300 N.C. App.—No. 5 Pages 502-609

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 13, 2026

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

THE COURT OF APPEALS

OF

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[1] Died 18 November 2025.

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COURT OF APPEALS

CASES REPORTED

FILED 17 SEPTEMBER 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Notice of appeal—nonjurisdictional defects—petition for certiorari allowed—In a criminal defendant's appeal from an order holding him in direct contempt, where his written notice of appeal failed to comply with Appellate Rule 4, including its requirements that the notice designate the court to which the appeal is taken and indicate whether notice has been served on the State, defendant's petition for a writ of certiorari was allowed because, despite the defects in defendant's notice of appeal (all of which were nonjurisdictional and therefore did not require automatic dismissal of the appeal), defendant's petition showed (1) merit or that error was probably committed below, and (2) the existence of extraordinary circumstances justifying certiorari review of his appeal. **State v. Brinkley, 513.**

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Right to counsel—request for substitute counsel—extent of inquiry—no abuse of discretion—In a prosecution for assault on a government official, the trial court did not abuse its discretion by denying defendant's request for substitute counsel where the court inquired into the request to the extent necessary to determine whether defendant would receive effective assistance of counsel. The trial court determined that defendant was able to communicate with his counsel at times, that defendant's counsel was competent and had extensive experience, and that defendant's refusal to work with his counsel was because he did not like the responses she gave him. Defendant also acknowledged that his request was primarily due to disagreeing over trial tactics, which was not a sufficient reason to grant his request. **State v. Chafen, 520.**

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CONTRIBUTION

Action against state agency—immunity—Emergency Management Act—emergency preparations—The decision and order of the Full Commission of the N.C. Industrial Commission granting recovery of contribution to plaintiff was reversed, where plaintiff's claim—that negligent acts by the N.C. Department of Transportation (NCDOT) with regard to snow removal training, supervision, and execution contributed to the traffic accident during a winter storm for which plaintiff settled two wrongful death claims—was barred by immunity under the Emergency Management Act (EMA). EMA immunity was not limited to NCDOT's activities during the actual declared state of emergency but extended to any part of the emergency preparedness cycle, which included the training of snowplow operators. **C.R. England, Inc. v. N.C. Dep't of Transp., 502.**

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Deed of trust reformation—motion for summary judgment—no pending discovery—ruling proper—In an action instituted by a loan servicer (plaintiff) to reform the legal description of real property in a deed of trust, the trial court properly granted summary judgment in favor of defendant property owners where, during the seven months between the filing of the complaint and defendants' motion for summary judgment, plaintiff never sought discovery by requesting any production or interrogatory. **Lycaste, LLC v. Newsome, 507.**

DRUGS

Trafficking by possession—methamphetamine and opium—total weight of mixture 28 grams or more—any portion a controlled substance—In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court properly denied defendant's motions to dismiss the trafficking charges and to limit the trafficking charges to either those for methamphetamine or those for opium, rejecting defendant's position that the trafficking statute (N.C.G.S. § 90-95) required evidence of 28 grams or more of each controlled substance. While noting the harsh results imposed by the statute, the appellate court emphasized that the pertinent (and identical) plain language of the statute's subsections regarding methamphetamine and opium—"any mixture containing such substance" and "if the quantity of such substance or mixture"—required only that a mixture with a total weight of 28 grams or more contain some portion of each controlled substance. **State v. Thomas, 588.**

Trafficking by possession—State's requested jury instruction—consistent with pattern jury instruction, statutory language, and case law—In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court properly gave the State's requested jury instructions. The appellate court rejected defendant's argument that the language "any mixture containing methamphetamine" and "any mixture containing opium" was confusing to the jury, noting that those phrases mirror the wording of the trafficking statute (N.C.G.S. § 90-95) and are consistent with the pertinent pattern jury instruction and case law; defendant's possession of 28 grams or more of a mixture containing some amount of methamphetamine and some amount of fentanyl supported his convictions on both trafficking charges. **State v. Thomas, 588.**

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JUDGMENTS

Verdict and judgment forms—naming opium rather than fentanyl—not fatally defective—In a prosecution on charges including trafficking by possession of methamphetamine and trafficking by possession of opium—arising from defendant's possession of a powder mixture containing both methamphetamine and fentanyl (an opiate)—the verdict and judgment forms were not fatally defective because they named one of the controlled substances possessed as opium rather than fentanyl. The indictments referenced fentanyl as a basis of the charges, a forensic analyst testified that the mixture contained fentanyl, and the trial court instructed the jury that fentanyl is opium; accordingly, the jury properly understood the evidence and based their verdicts on defendant's possession of fentanyl. **State v. Thomas, 588.**

LICENSING BOARDS

Disciplinary action—general contractor—expired license—effect of stipulations—The superior court did not err or act in an arbitrary or capricious manner when it upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for fraud or deceit (for failing to disclose pending Board investigations on its license renewal form) and for gross negligence, incompetence, and/or engaging in misconduct (for allowing its building license to lapse for several months). Although petitioners argued that their stipulation to three of the charges against them at the administrative hearing were not an admission to the intent and willfulness elements of the violations, they neither qualified their stipulations nor objected to the Board's counsel's characterization of the stipulations. **Story Homes Constr., LLC v. N.C. Licensing Bd. for Gen. Contractors, 598.**

Disciplinary action—general contractor—license renewal—failure to disclose pending complaints—The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. There was no merit to petitioners' argument that since the Board was on actual notice of the pending complaints that had been filed against petitioners, the Board committed an error of law by asserting that petitioners committed a violation by failing to disclose those complaints. Petitioners were required, pursuant to N.C.G.S. § 87-13, to answer questions on the license renewal form candidly and with full disclosure. **Story Homes Constr., LLC v. N.C. Licensing Bd. for Gen. Contractors, 598.**

Disciplinary action—general contractor—operating under expired license—proportionality of punishment—The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. Contrary to petitioners' assertion that the punishment imposed—six months' active suspension, twelve months' stayed suspension, a monetary fine of $15,000, and a requirement to take and pass the Level 1 Building Code Course—was not proportional to the violations, the Board's decision was appropriate given that multiple complaints about petitioners had been received and that petitioners had mischaracterized the pending complaints. **Story Homes Constr., LLC v. N.C. Licensing Bd. for Gen. Contractors, 598.**

Disciplinary action—general contractor—pre-hearing procedures—timing of subpoenas—The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. Despite petitioners' assertion on appeal, the timing of subpoenas issued by the Board (seven days before the hearing) was within allowable procedures; further, petitioners could have conducted discovery but chose not to do so. **Story Homes Constr., LLC v. N.C. Licensing Bd. for Gen. Contractors, 598.**

PROBATION AND PAROLE

Probation revocation—new criminal offense—communicating threats—no evidence of true threat—The trial court abused its discretion by revoking defendant's probation for committing a new criminal offense while on probation—communicating threats—where the evidence was insufficient to meet the subjective and objective components of a true threat as required to satisfy the First Amendment. Where defendant told a friend over the phone that he was "mad enough to kill somebody" but did not make that statement with regard to a specific person, neither that comment nor defendant's subsequent mention of the names of a judge and detective on the same phone call amounted to a serious expression that he intended to commit an act of violence, as opposed to mere hyperbole. Further, the evidence did not support a finding that defendant's friend understood the comments as likely to be acted upon, where the friend did not take any action until two days later, when he notified the detective about defendant's comments only after hearing that defendant had been hospitalized for self-harm. **State v. Creed, 539.**

SENTENCING

Trafficking controlled substances by possession—consecutive sentences—no double jeopardy violation—In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court did not violate defendant's right against double jeopardy when it sentenced him to consecutive sentences on the trafficking convictions. The element in each offense that defendant possessed at least the threshold amount of 28 grams was satisfied by "any mixture containing such substance" (N.C.G.S. § 90-95). Accordingly, defendant's possession of at least 28 grams of a mixture containing some amount of methamphetamine and some amount of fentanyl supported his convictions on both trafficking charges and, in turn, the consecutive sentences imposed thereupon. **State v. Thomas, 588.**

STATUTES OF LIMITATION AND REPOSE

Deed of trust reformation—delay from settlement negotiations—lack of bad faith—summary judgment proper—In an action instituted by a loan servicer (plaintiff) to reform the legal description of real property in a deed of trust, the trial court properly granted summary judgment in favor of defendant property owners where defendants did nothing to cause plaintiff (or its predecessors in interest) to believe that the applicable statute of limitation had been tolled, having instead negotiated good-faith settlement agreements on several occasions with the deed holders prior to plaintiff, only to have the deed of trust repeatedly change hands before the settlements could be finalized. **Lycaste, LLC v. Newsome, 507.**

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.

C.R. ENGLAND, INC., Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

No. COA24-1100

Filed 17 September 2025

Contribution—action against state agency—immunity—Emergency Management Act—emergency preparations

The decision and order of the Full Commission of the N.C. Industrial Commission granting recovery of contribution to plaintiff was reversed, where plaintiff's claim—that negligent acts by the N.C. Department of Transportation (NCDOT) with regard to snow removal training, supervision, and execution contributed to the traffic accident during a winter storm for which plaintiff settled two wrongful death claims—was barred by immunity under the Emergency Management Act (EMA). EMA immunity was not limited to NCDOT's activities during the actual declared state of emergency but extended to any part of the emergency preparedness cycle, which included the training of snowplow operators.

Appeal by defendant from decision and order entered for the Full Commission by Chairman Philip A. Baddour, III in the North Carolina Industrial Commission. Heard in the Court of Appeals 28 August 2025.

Young Moore & Henderson, P.A., by Angela F. Craddock and David M. Duke, for plaintiff-appellee.

Attorney General Jeff Jackson, by Special Deputy Attorney General David D. Larson, Jr., for defendant-appellant.

ARROWOOD, Judge.

North Carolina Department of Transportation ("NCDOT") appeals from a decision and order by the Full Commission of the North Carolina Industrial Commission awarding C.R. England ("plaintiff") recovery of contribution. For the following reasons, we reverse the decision and order.

I. Factual Background

On 13 February 2014, North Carolina was under a declared state of emergency due to Winter Storm Pax. That evening, Cardell Gayfield ("Mr. Gayfield") was operating a "Freightliner" bobtail tractor with no trailer on I-40W near the Wake County/Johnston County line. Mr. Gayfield was employed by plaintiff as a driver, and the Freightliner was registered to and owned by plaintiff. At that time, both lanes of I-40 east of the Wake County/Johnston County line were cleared from snow and ice. However, west of the Wake County/Johnston County line, only the left lane and shoulder had been cleared, leaving the right lane covered in snow and ice. As Mr. Gayfield crossed into Johnston County, he encountered the snow and ice, and his tractor lost traction. The tractor spun and landed perpendicular to the road.

After Mr. Gayfield's tractor lost traction, Nathaniel Williams similarly encountered the snow and ice and lost control of his vehicle. Meanwhile, Larry Kepley, who was driving in the left lane of I-40, saw the tractor and pulled over to provide assistance. Both Mr. Williams and Mr. Kepley were standing outside near the scene of the accident when they were struck and killed by another driver.

The estates of Mr. Williams and Mr. Kepley each brought a claim against plaintiff for wrongful death on 8 February 2015 and 13 February 2015, respectively. On 14 December 2015, plaintiff settled with Mr. Williams' estate for $1,050,000. On 8 June 2016, plaintiff settled with Mr. Kepley's estate for $600,000. Meanwhile, the statute of limitations for wrongful death claims arising from the accident on 13 February 2014 expired on 13 February 2016. *See* N.C.G.S. § 1-53(4) (limiting wrongful death claims to two years after the date of death). Plaintiff then filed a *Claim for Damages Under Tort Claims Act* with the North Carolina Industrial Commission on 30 November 2016, seeking contribution from NCDOT. Plaintiff alleged that "various named and unnamed employees of [NCDOT]" were negligent in the design and execution of lane adjustments on I-40W, by failing to warn approaching traffic of the dangerous conditions, and in the training, supervision, and execution of snow removal. Plaintiff claimed that NCDOT's negligence contributed to the traffic accident on 13 February and that the plaintiff was therefore entitled to recovery of contribution for the settlements with Mr. Williams' and Mr. Kepley's estates.

NCDOT filed a motion to dismiss on 3 January and 5 January 2017, claiming that plaintiff did not properly preserve its contribution claim through its settlement agreements. The motion was denied on 28 March 2017, and NCDOT appealed the denial to the Full Commission. On 19 April 2018, the Full Commission dismissed NCDOT's appeal as interlocutory and remanded the matter for further proceedings. After a full evidentiary hearing on the merits, Chief Deputy Commissioner Howell issued a 7 July 2023 order finding that plaintiff had not established

NCDOT's negligence and was thus not entitled to contribution. Plaintiff appealed to the Full Commission.

The Full Commission reversed on 23 July 2024. As a preliminary matter, the Full Commission determined that NCDOT did not properly preserve for review the issue of whether plaintiff's settlements preserved its contribution claim. The Full Commission also found that NCDOT was negligent in "fail[ing] to exercise reasonable care to implement reasonable training and dry run protocols for snowplow drivers necessary for adequate maintenance of the roadways during a winter storm event." Lastly, because the negligent training occurred prior to the declared state of emergency on 11 February, the Full Commission determined that Emergency Management Act ("EMA") immunity did not apply.

To support its finding of negligence, the Full Commission noted that while NCDOT's Safe Operating Procedures required operators inspecting snowplow routes to "note or mark" hazards, it did not require them to make documentation of or otherwise memorialize those hazards. The Full Commission found this procedure unreasonable as the snowplow routes are long, hard to visualize during a storm, and may not be cleared by the same operator who originally inspected the route, increasing the possibility that hazards will be overlooked or forgotten.

NCDOT filed notice of appeal to this Court on 20 August 2024.

II. Discussion

NCDOT raises three issues on appeal: 1) whether plaintiff's contribution claim is barred by EMA immunity; 2) whether the Full Commission had jurisdiction to decide whether plaintiff took the proper steps to preserve its contribution claim against NCDOT; and 3) whether plaintiff took the proper steps to preserve its contribution claim against NCDOT. For the following reasons, we reverse the Commission's order.

A. Standard of Review

Appeals from the Industrial Commission "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C.G.S. § 143-293 (2025). Therefore, the Court's inquiry on appeal is "limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Dawson v. N.C. Dep't of Env't and Nat. Res.*, 204 N.C. App. 524, 527 (2010). Conclusions of law are reviewed *de novo*. *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 120 (2012).

B. Emergency Management Act Immunity

Plaintiff contends that EMA immunity applies only to negligence committed "while carrying out emergency response functions during an actual or imminent emergency." Meanwhile, NCDOT argues that EMA immunity extends to activities related to emergency management outside the actual occurrence or imminence of an emergency. This issue is one of statutory interpretation and of first impression before this Court.

"[T]he intent of the legislature controls the interpretation of a statute." *C Investments 2, LLC v. Auger*, 383 N.C. 1, 8 (2022) (quoting *State v. Fletcher*, 370 N.C. 313, 327–28 (2017)). The Court shall "first look to the plain language [of a statute], as the actual words of the legislature are the clearest manifestation of its intent." *Cohane v. Home Missioners of America*, 387 N.C. 1, 7–8 (2025) (quoting *Fearrington v. City of Greenville*, 386 N.C. 38, 52 (2024)). "[W]ords and phrases are interpreted in their statutory context, and traditional rules of grammar apply. Where the statute's language is clear and unambiguous, courts must construe it using its plain meaning." *Id.* (citations omitted).

The EMA operates in conjunction with sovereign immunity and the Tort Claims Act ("TCA"). Generally, the doctrine of sovereign immunity grants the State immunity from suit absent a waiver. *Meyer v. Walls*, 347 N.C. 97, 104 (1997). The TCA provides such a waiver of immunity for negligence claims against the State and any of its departments. *Id.*; N.C.G.S. § 143-291(a) (2025). However, the EMA effectively retracts the TCA's waiver and reinstates immunity from negligence claims against the State where the State is engaged in emergency management. N.C.G.S. § 166A-19.60(a) (2025); *Williams v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 292 N.C. App. 542, 546 (2024). The EMA provides that "[n]either the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any [emergency-management] activity." *Williams*, 292 N.C. App. at 546 (quoting N.C.G.S. § 166A-19.60(a)). In turn, emergency management is defined as "measures . . . to minimize the adverse effect of any type emergency, which includes the never-ending preparedness cycle of planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery." N.C.G.S. § 166A-19.3(8) (2025).

For example, in *Williams*, this Court extended EMA immunity where a school bus collided with another vehicle and caused property damage while delivering food to students during the COVID-19 pandemic.

Williams, 292 N.C. App. at 546–47. There, at the time of the collision, the bus was on its route delivering food to students. *Id.* at 547. The Court reasoned that because the bus was being used for an emergency management purpose—minimizing the adverse effects of the COVID-19 emergency "by providing food to students who might otherwise go hungry"—at the time of the accident, EMA immunity applied. *Id.*

The plain language of the EMA contemplates pre-emergency preparations and provides immunity. N.C.G.S. § 166A-19.3(8) states that emergency management is a "*never-ending* preparedness cycle" which includes "planning." N.C.G.S. § 166A-19.3(8) (emphasis added). The broad definition of emergency management requires that EMA immunity encompass all stages of preparing for emergencies, including training personnel to respond to emergencies. Limiting EMA immunity only to actions made during an active or imminent emergency would impose an end to the cycle of emergency management, contrary to the statute. Thus, whether EMA immunity applies is not simply a question of timing but rather of relation to emergency "planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery." *See* N.C.G.S. § 166A-19.3(8).

The negligence alleged in this case occurred in preparation of an emergency and falls under the EMA. NCDOT's training and adoption of snowplow operating procedures is done in preparation for winter weather events. Indeed, the act of clearing roads of snow and ice is meant to "minimize the adverse effects" of a winter storm by making the roads safer to use. Accordingly, the training of snowplow operators is "an important function of safety" and a crucial step in planning for emergencies. As such, though these preparations took place before the occurrence of winter storm Pax, they are part of the emergency preparedness cycle and protected by EMA immunity. Therefore, we find that plaintiff's contribution claim against NCDOT is barred by EMA immunity.

C. <u>Preservation of Contribution Claim</u>

NCDOT also argues that the Full Commission had jurisdiction to consider whether plaintiff had properly preserved its contribution claim. Moreover, NCDOT contends that plaintiff did not preserve its contribution claim because the wrongful death settlements did not extinguish NCDOT's liability for the deaths of Mr. Williams and Mr. Kepley. However, because we find that plaintiff's contribution claim is barred by EMA immunity, we do not reach these issues.

III. Conclusion

For the foregoing reasons, we reverse the Full Commission's decision and order granting recovery of contribution to C.R. England and remand to the Commission for entry of an Order dismissing plaintiff's claims for contribution.

REVERSED.

Judges COLLINS and FREEMAN concur.

LYCASTE, LLC, SUBSTITUTED FOR OH TACOMA 1 SUBI,
A SERIES OF OH TACOMA 1 TRUST, PLAINTIFF
v.
DEMARCUS NEWSOME AND WIFE, KEVIETTE HOLLOMAN NEWSOME;
AND UNKNOWN HEIRS OF ZINNIE NEWSOME, DEFENDANTS

No. COA25-123

Filed 17 September 2025

1. **Discovery—deed of trust reformation—motion for summary judgment—no pending discovery—ruling proper**

   In an action instituted by a loan servicer (plaintiff) to reform the legal description of real property in a deed of trust, the trial court properly granted summary judgment in favor of defendant property owners where, during the seven months between the filing of the complaint and defendants' motion for summary judgment, plaintiff never sought discovery by requesting any production or interrogatory.

2. **Statutes of Limitation and Repose—deed of trust reformation—delay from settlement negotiations—lack of bad faith—summary judgment proper**

   In an action instituted by a loan servicer (plaintiff) to reform the legal description of real property in a deed of trust, the trial court properly granted summary judgment in favor of defendant property owners where defendants did nothing to cause plaintiff (or its predecessors in interest) to believe that the applicable statute of limitation had been tolled, having instead negotiated good-faith settlement agreements on several occasions with the deed holders prior to plaintiff, only to have the deed of trust repeatedly change hands before the settlements could be finalized.

Appeal by Plaintiff from order entered 20 September 2024 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 13 August 2025.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey, Michael J. Crook, and Alexandria G. Hill, for Plaintiff-Appellant.

Jones & Carter, P.A., by W. Hugh Jones, Jr., for Defendants-Appellees.

COLLINS, Judge.

This appeal arises out of an action instituted by a loan servicer to reform the legal description of real property in a deed of trust. Plaintiff[1] appeals from an order granting Defendants' motion for summary judgment. Plaintiff argues that the trial court erred by hearing the motion "before any discovery had been conducted" and by granting the motion on the ground that Plaintiff's claim is barred by the applicable statute of limitations. For the following reasons, we affirm.

I. Background

Between 1967 and 1983, Samuel and Zinnie Newsome, husband and wife, acquired three separate tracts of land. On or about 25 July 1984, they acquired a fourth tract ("1984 tract") that extended the boundaries of one of the previously-acquired tracts. Collectively, all four tracts of land ("Property") are located at 517 Hall Siding Road in Ahoskie, North Carolina.

Samuel and Zinnie obtained a loan on 20 July 2005 from American General Financial Services, Inc. in the principal amount of $148,000. In the deed of trust, the legal description of the real property listed only the 1984 tract as the real property to be encumbered by the loan and therefore did not encumber the entire Property.

Upon his death in 2006, Samuel's interest in the Property vested in Zinnie. Upon her death in 2017, Zinnie's interest in the Property vested in her surviving relatives, including Defendant Demarcus Newsome. In 2020, Zinnie's surviving relatives conveyed the Property to Defendants

1. Lycaste, LLC has been substituted for OH Tacoma 1 Subi, a Series of OH Tacoma Trust, as Plaintiff because the deed of trust that is the subject of the underlying action was sold by OH Tacoma to Lycaste after the filing of this appeal. OH Tacoma filed a motion to substitute Lycaste as a party, which we allowed.

Demarcus Newsome and his wife, Keviette Holloman Newsome (collectively, with the Unknown Heirs of Zinnie Newsome, "Defendants").

The loan changed hands approximately eight times between 2005, when it was originally executed, and 2022, when the deed of trust was assigned to OH Tacoma. On 8 September 2016, Defendants' counsel informed Bayview Loan Servicing, LLC, who held the loan from February 2016 until September 2018, that "[Zinnie] Newsome resides at 517 Hall Siding Road, Ahoskie, NC. She has been told that [the] [P]roperty is on the Deed of Trust. It is not." Bayview then filed a complaint on 15 August 2018 seeking to reform the legal description in the deed of trust to include the entire Property, not just the 1984 tract.

In September 2018, Bayview assigned the deed of trust to BOF CORP IVB. Bayview was no longer a party in interest, and it voluntarily dismissed its action without prejudice on 10 October 2018. The deed of trust has changed hands four times since the voluntary dismissal.

During both the pendency of Bayview's action and after the action was dismissed, the parties in interest engaged in settlement negotiations. OH Tacoma contends that the parties negotiated final settlement documents, such as an instrument to cure and a loan modification agreement, but the documents were never executed. According to OH Tacoma, settlement discussions continued until they ceased in December 2023, "thereby necessitating the filing of this action."

Defendants contend that an agreement was twice reached, but on each occasion, the deed of trust was sold before the settlement documents were finalized. In 2017, Defendants reached a settlement with Bayview; however, before the settlement was finalized, the loan was transferred to 1900 Capital Trust II. A settlement was then reached with Capital Trust in September 2020, and counsel for Capital Trust was to prepare and send executed settlement documents to Defendants. The settlement, however, was never finalized.

Capital Trust transferred the deed of trust to Revolve Capital Group, LLC in September 2021. In January 2022, Revolve assigned the deed of trust to Atlantica, LLC, and in June 2022, Atlantica assigned the deed of trust to OH Tacoma. In September 2022, counsel for Atlantica notified Zinnie that the loan was in default and that Zinnie owed more than \$81,000. According to Defendants, "in December of 2023 [OH Tacoma] failed to honor the settlement twice reached."

OH Tacoma commenced this action for reformation of the deed of trust and declaratory judgment on 10 February 2024, seeking, among other things, a declaration that OH Tacoma has a valid lien on the Property. Defendants filed their answer on 10 May 2024 and a motion for summary judgment on 31 May 2024. A hearing on Defendants' motion for summary judgment was held on 3 September 2024, and the trial court entered an order on 20 September 2024 granting Defendants' motion. OH Tacoma filed its notice of appeal on 15 October 2024.

On 23 December 2024, while its appeal with this Court was pending, OH Tacoma "conveyed, assigned, and transferred 'all right, title, and interest together with all moneys due or to become due and all rights accrued or to accrue under that certain Deed of Trust' " to Lycaste. OH Tacoma filed a motion on 7 February 2025 to substitute Lycaste as the plaintiff-appellant to this appeal; we allowed the motion.

II. Discussion

Plaintiff argues that the trial court erred by granting Defendants' motion for summary judgment. We disagree.

This Court reviews a trial court's grant of summary judgment de novo. *Erthal v. May*, 223 N.C. App. 373, 377 (2012). Summary judgment should 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 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). "[W]e 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) (citation omitted).

A. Lack of Discovery

[1] Plaintiff first argues that the trial court erred by hearing and ruling on Defendants' motion for summary judgment "before the parties had an opportunity to conduct discovery."

It can be error for a trial court to rule on a motion for summary judgment when discovery procedures "are still pending and the party seeking discovery has not been dilatory in doing so." *Poage v. Cox*, 265 N.C. App. 229, 238 (2019) (citation omitted). "However, a trial court is not barred in every case from granting summary judgment before discovery is completed." *Id.* (brackets and citation omitted).

In *Ussery v. Taylor*, plaintiff served written requests for discovery on defendant one day after filing his complaint. 156 N.C. App. 684, 684-85 (2003). Approximately one month later, before responding to those discovery requests, defendant filed a motion for summary judgment. *Id.* at 685. The trial court heard defendant's motion while plaintiff was still awaiting discovery responses and with depositions scheduled to take place at a later date. *Id.* This Court reversed the trial court's grant of summary judgment because "plaintiff did not have adequate time to develop his case before the trial court entertained defendants' motion for summary judgment." *Id.* at 686; *see Burge v. Integon Gen. Ins. Co.*, 104 N.C. App. 628, 631 (1991) (reversing a trial court's grant of summary judgment in favor of defendant because plaintiff's discovery was still outstanding at the time summary judgment was granted).

The circumstances in *Ussery* are readily distinguishable from the circumstances in this case. Here, approximately seven months elapsed between the time OH Tacoma filed its complaint and the summary judgment hearing. During this time, OH Tacoma did not request discovery. OH Tacoma, now Lycaste, concedes in its brief that at the time of the summary judgment hearing, "Not one request for production or interrogatory had been served. No depositions had been taken (or even noticed)." Accordingly, unlike in *Ussery*, OH Tacoma had "adequate time to develop [its] case before the trial court entertained [D]efendants' motion for summary judgment." *Ussery*, 156 N.C. App. at 686.

The trial court did not err by granting Defendants' motion for summary judgment.

B. Statute of Limitations

[2] Plaintiff next argues that the trial court erred by granting Defendants' motion for summary judgment on the basis that Plaintiff's claim is barred by the applicable statute of limitations.

In motions for summary judgment, "[t]he burden is on the moving party to show the absence of any genuine issue of fact and [their] entitlement to judgment as a matter of law." *In re Will of Smith*, 158 N.C. App. 722, 724 (2003) (citation omitted). Summary judgment is appropriate where "the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210 (2007) (footnote and citation omitted).

Statutes of limitations are "inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." *Blue Cross & Blue Shield v. Odell Assocs.*, 61 N.C. App. 350, 356 (1983) (citation omitted). "When the affirmative defense of the statute of limitations has been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Scott & Jones, Inc.*

v. Carlton Ins. Agency, Inc., 196 N.C. App. 290, 293 (2009) (citation omitted). Whether a claim is barred by the statute of limitations is generally "a mixed question of law and fact." *Rowell v. N.C. Equip. Co.*, 146 N.C. App. 431, 434 (2001) (quotation marks and citation omitted). "However, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes a matter of law, and summary judgment is appropriate." *Id.* (citation omitted).

A statute of limitations defense will not be applied when the plaintiff's delay in filing suit "has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987) (citation omitted). However, mere settlement discussions are not enough to displace the application of an applicable statute of limitations. *Turning Point Indus. v. Global Furniture, Inc.*, 183 N.C. App. 119, 125 (2007). "[P]laintiff must show that defendant falsely represented to him that the statute would be extended . . . or that defendant would not assert the statute as a defense. Plaintiff would also have to show that he reasonably relied on this representation in failing to file suit" within the applicable time period. *Id.* (citation omitted).

Here, the trial court found that Plaintiff's claim is barred by the statute of limitations and that "Defendants did nothing to cause the Plaintiff's predecessors in interest to believe the Statute of Limitations had been tolled." We agree. Plaintiff put forth no evidence that Defendants affirmatively misled or induced Plaintiff not to file its claim before the running of the applicable statute of limitations. *See Taylor v. Coats*, 180 N.C. App. 210, 212-13 (2006) (explaining that if the moving party satisfies its burden "by proving that the non-moving party cannot overcome an affirmative defense to bar the claim[,] . . . the burden shifts to the non-moving party to establish an issue that should be given to a jury.") (citations omitted).

The evidence instead shows that the parties in interest, in good faith, agreed to settlements on several occasions; however, before the settlements could be finalized, the deed of trust would again change hands. Plaintiff has failed to present any evidence of bad faith on the part of Defendants; there is no evidence that Defendants "misled, lulled, or kept [P]laintiff from filing its complaint earlier. No evidence shows [D]efendant[s] [] misled [P]laintiff or induced [P]laintiff not to institute suit." *Turning Point Indus.*, 183 N.C. App. at 126. Accordingly, the trial court did not err by granting Defendants' motion for summary judgment on the grounds that Plaintiff's claim is barred by the statute of limitations.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting Defendants' motion for summary judgment.

AFFIRMED.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CURTIS BRINKLEY, DEFENDANT

No. COA24-681

Filed 17 September 2025

1. Appeal and Error—notice of appeal—nonjurisdictional defects —petition for certiorari allowed

In a criminal defendant's appeal from an order holding him in direct contempt, where his written notice of appeal failed to comply with Appellate Rule 4, including its requirements that the notice designate the court to which the appeal is taken and indicate whether notice has been served on the State, defendant's petition for a writ of certiorari was allowed because, despite the defects in defendant's notice of appeal (all of which were nonjurisdictional and therefore did not require automatic dismissal of the appeal), defendant's petition showed (1) merit or that error was probably committed below, and (2) the existence of extraordinary circumstances justifying certiorari review of his appeal.

2. Contempt—criminal—indirect—failure to report to jail— summary contempt proceeding—inappropriate

After defendant failed to report to jail to serve his sentence for a voluntary manslaughter conviction, the trial court's order holding him in direct criminal contempt was reversed and the matter was remanded for further proceedings because: (1) defendant's conduct neither occurred in proximity to a judicial official or courtroom nor disrupted any court proceeding, and therefore defendant's conduct constituted indirect contempt; and (2) since defendant's conduct did not constitute direct criminal contempt, the court erred by conducting a summary contempt proceeding pursuant to N.C.G.S. § 5A-14.

Appeal by Defendant from order entered 16 January 2024 by Judge R. Andrew Womble in Pasquotank County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General G. Mark Teague, for the State.

Sarah Holladay, for defendant-appellant.

STADING, Judge.

Curtis Brinkley ("Defendant") appeals from the trial court's order holding him in direct criminal contempt. For the reasons below, we vacate and remand for further proceedings not inconsistent with this opinion.

I. Background

On 11 April 2023, Defendant entered an *Alford* plea to the charge of voluntary manslaughter.[1] That same day, the trial court sentenced Defendant to 58 to 82 months in prison. Despite being sentenced in April, the trial court ordered that Defendant's term of imprisonment would begin on 12 June 2023. The trial court further ordered that if Defendant failed to report to the Albemarle District Jail ("the jail") on that date, "he shall be held under a $50,000 cash/US currency bond."

Defendant failed to report to the jail on 12 June 2023. Consequently, the trial court issued an order for his arrest the next day. Defendant was arrested much later, on 3 January 2024.

On 16 January 2024, the trial court conducted a summary contempt proceeding concerning Defendant's failure to report to the jail. Defendant was not represented by counsel during this hearing. When asked why he failed to report pursuant to the court's order, Defendant stated he "had other things going on[.]" At the conclusion of the hearing, the trial court held Defendant in direct criminal contempt and sentenced him to an additional thirty days of imprisonment:

> THE COURT: All right. I'm going to find that [Defendant] is in direct criminal contempt of [the sentencing judge's] order by failing to report without due cause. I'm going to

1. *North Carolina v. Alford* permits a trial court to accept a guilty plea whereby the defendant consents to sentencing by the trial court but does not admit his guilt. 400 U.S. 25, 91 S. Ct. 160 (1970).

> order that he serve an active sentence of 30 days for that direct criminal contempt. And I'm going to order that [the] 30 days run consecutively with his 58 to 82, and I'm ordering that he serve it right now. He is in your custody, Mr. Sheriff. Good luck to you.

On 26 January 2024, Defendant filed a *pro se* written notice of appeal concerning the trial court's direct criminal contempt order. That notice stated: "I Curtis Brinkley w[ould] like to appeal the 30 days I was giv[en] in court on the 16th." Defendant was appointed counsel for his appeal on 12 February 2024. Thereafter, by and through counsel, Defendant petitioned our Court for writ of certiorari ("PWC") on 29 August 2024.

II. Jurisdiction

[1] We must determine whether this Court has jurisdiction to consider Defendant's appeal in light of his PWC. Defendant filed this PWC because his written notice of appeal failed to comply with the requirements set out by the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 4. For the reasons below, we grant Defendant's PWC. N.C. R. App. P. 21(a)(1); N.C. Gen. Stat. § 7A-32 (2023).

It is well-settled that "[w]ithout a proper notice of appeal, this Court does not have the jurisdiction to hear a case." *State v. Mauck*, 204 N.C. App. 583, 586, 694 S.E.2d 481, 483 (2010); *State v. Morris*, 41 N.C. App. 164, 166, 254 S.E.2d 241, 242 (1979). "Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial . . . . Otherwise, notice of appeal must be in writing and filed with the clerk of court." *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (citations omitted). If a defendant files a written notice of appeal, he must do so "within fourteen days after entry of the judgment or order . . . ." N.C. R. App. P. 4(a)(2). In addition, the written notice must: be served on all adverse parties within fourteen days; specify the party taking the appeal; designate the judgment or order being appealed; designate the court to which the appeal is taken; and be signed by counsel of record for the party taking the appeal. *Id.* 4(a)(2), (b).

Notwithstanding the requirements of Rule 4, "this Court possesses the authority to grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court 'when the right to prosecute an appeal has been lost by failure to take timely action[.]' " *State v. Salter*, 264 N.C. App. 724, 729, 826 S.E.2d 803, 807 (2019) (quoting N.C. R. App. P. 21(a)(1)). "Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate.

First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). And "[s]econd, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Cryan*, 384 N.C. at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811 (1982)). A showing of extraordinary circumstances is necessary because, "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Cryan*, 384 N.C. at 572–73, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). Although "[t]here is no fixed list of 'extraordinary circumstances' that warrant certiorari review, . . . this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (citation omitted). Extraordinary circumstances may also manifest where resolution of the matter is "in the interest of 'judicial economy.' " *Id.* (citation omitted). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (citing *Ricks*, 378 N.C. at 740, 862 S.E.2d at 838).

Here, Defendant concedes—and we agree—that his written notice of appeal failed to comply with N.C. R. App. P. 4. For example, Defendant's written notice failed to designate the court to which he was taking his appeal and failed to indicate whether the notice had been served on the State. Yet, "this Court has noted that failure to serve the State and identify the court to which the appeal is taken 'are not the sorts of defects requiring dismissal of an appeal on a jurisdictional basis.' " *State v. Hammond*, 288 N.C. App. 58, 62, 884 S.E.2d 767, 770 (2023) (quoting *State v. Baungartner*, 273 N.C. App. 580, 583, 850 S.E.2d 549, 551 (2020)). Despite his noncompliance with Rule 4, Defendant's PWC satisfies the standard set out in *Cryan*. 384 N.C. at 572–73, 887 S.E.2d at 851. Accordingly, we grant Defendant's PWC and proceed with our review on the merits.

III. Analysis

[2] Defendant asserts the trial court committed error by finding him in direct criminal contempt because the alleged conduct did not occur in proximity to a judicial official or courtroom and did not disrupt any court proceeding. He also contends that he cannot be held in indirect criminal contempt because the proceedings below failed to comply with statutory requirements.

A. Standard of Review

"In general, our standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Robinson*, 281 N.C. App. 614, 619, 868 S.E.2d 703, 708 (2022) (citations and quotation marks omitted). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (citation omitted and emphasis added). "We review a trial court's compliance with the contempt statutes *de novo*, considering the matter anew and freely substituting our judgment for the lower court's judgment." *Robinson*, 281 N.C. App. at 620, 868 S.E.2d at 708; *State v. Perkinson*, 271 N.C. App. 557, 559, 844 S.E.2d 336, 337 (2020) ("Whether a trial court violated N.C. Gen. Stat. § 5A-14 is an issue of law reviewed *de novo* as a violation of a statutory mandate.").

B. Direct and Indirect Criminal Contempt

Defendant first contends that the trial court committed error by holding him in direct criminal contempt for his failure to report to the jail. Defendant maintains this act is not direct criminal contempt because it occurred outside the presence of the courtroom, its officials, or any proceeding. *See* N.C. Gen. Stat. § 5A-13(a)(1)–(3) (2023). In addition, Defendant submits that because his failure to report is not direct criminal contempt, the trial court erred by "conducting a summary contempt proceeding . . . ." *See id.* §§ 5A-13(b), 5A-14 (2023).

N.C. Gen. Stat. § 5A-11(a)(1)–(10) (2023) provides twelve grounds that constitute criminal contempt. *In re Korfmann*, 247 N.C. App. 703, 707, 786 S.E.2d 768, 770 (2016) ("[Section] 5A-11 provides a list of conduct that constitutes criminal contempt."). Relevant here, a defendant's "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution" constitutes criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3); *State v. Simon*, 185 N.C. App. 247, 251, 648 S.E.2d 853, 856 (2007).

In addition, section 5A-13 provides that there are two types of criminal contempt—direct and indirect. *See* N.C. Gen. Stat. § 5A-13 ("Direct and indirect criminal contempt; proceedings required."). An act constitutes direct criminal contempt if it: "(1) Is committed within the sight or hearing of a presiding judicial official; and (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) Is likely to interrupt or interfere with matters then before the court." *Id.* § 5A-13(a)(1)–(3). "Any criminal contempt other than direct criminal contempt is indirect criminal contempt . . . ." *Id.* § 5A-13(b). "Indirect contempt ([section] 5A-13(b)) is that which arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice." *Atassi v. Atassi*, 122 N.C. App. 356, 361, 470 S.E.2d 59, 62 (1996).

When a defendant's act constitutes direct criminal contempt, "[t]he presiding judicial official may punish summarily . . . according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S. 5A-15." N.C. Gen. Stat. § 5A-13(a); *e.g.*, *State v. Land*, 273 N.C. App. 384, 393, 848 S.E.2d 564, 570 (2020). To summarily impose punishment for direct criminal contempt, the presiding judicial official must adhere to the following procedures:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14(a)–(b).

But if a defendant's act constitutes indirect criminal contempt, the judicial official must proceed "in accordance with the procedure required by G.S. 5A-15." *Id.* § 5A-13(b). "Indirect criminal contempt must be enforced through plenary proceedings. Plenary proceedings for contempt require the trial court to first issue a show cause order and subsequently hold a show cause hearing." *State v. Gonzalez*, 278 N.C. App. 302, 305, 862 S.E.2d 427, 430 (2021) (internal citation omitted). "[A] show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice." *State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008). The critical question here is whether Defendant's failure to report as ordered "constitute[s] direct or indirect criminal contempt." *Cox v. Cox*, 92 N.C. App. 702, 706, 376 S.E.2d 13, 16 (1989).

The trial court—without issuing a show cause order—summarily held Defendant in direct criminal contempt because he "fail[ed] to report as ordered . . . for his active sentence." We note that Defendant's willful failure to comply with the trial court's prior order constitutes an act of criminal contempt. *See Simon*, 185 N.C. App. at 251, 648 S.E.2d at 856 (quoting N.C. Gen. Stat. § 5A-11(a)(3)) ("[C]riminal contempt includes '[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.' "). Here, Defendant's failure to report occurred outside the presence of the court. N.C. Gen. Stat. § 5A-13(a)(2); *e.g.*, *Ingle v. Ingle*, 18 N.C. App. 455, 457, 197 S.E.2d 61, 62 (1973) ("Failure to comply with a prior court order would amount to an act committed outside the presence of the court, at a distance from it, which tends to degrade the court or interrupts, prevents or impedes the administration of justice and would be classified an indirect contempt."). Additionally, Defendant's failure to comply did not occur during "any matters then before the court" and did not occur "within the sight or hearing of a presiding judicial official." N.C. Gen. Stat. § 5A-13(a)(1), (3).

As the State concedes, Defendant's failure to report to the jail is not direct criminal contempt as set out in N.C. Gen. Stat. § 5A-13(a)(1)–(3). Defendant's act is more appropriately characterized as indirect criminal contempt. *See id.* § 5A-13(b) ("Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15."); *see also Cox*, 92 N.C. App. at 707, 376 S.E.2d at 17 ("Our reading . . . leads us to the conclusion that defendant Cox's failure to appear at the show cause hearing must be classified as indirect criminal contempt."). Since Defendant's act constitutes indirect criminal contempt, the trial court erred by conducting summary proceedings under N.C. Gen. Stat. § 5A-14. *See Cox*, 92 N.C. App. at 707, 376 S.E.2d at 17 (holding that the defendant "was entitled to a hearing pursuant to G.S. secs. 5A-13(b) and 5A-15" and that "the judgment against him should have been supported by facts established beyond a reasonable doubt" under G.S. 5A-15(f)).

Accordingly, we vacate the trial court's order and remand for further proceedings under sections 5A-13(b) and 5A-15. *See Cox*, 92 N.C. App. at 707, 376 S.E.2d at 17 (vacating and remanding pursuant to N.C. Gen. Stat. §§ 5A-13(b) and 5A-15 after the trial court summarily punished the defendant for direct criminal contempt because his conduct was more appropriately classified as indirect criminal contempt).

C. Conversion to Indirect Criminal Contempt

Defendant next asks us to determine whether his conviction for direct criminal contempt can be converted to a judgment for indirect criminal contempt on appeal. Defendant maintains that his conviction cannot be converted given that the trial court failed to adhere to the procedures for indirect criminal contempt as set out in N.C. Gen. Stat. § 5A-15 ("Plenary proceedings for contempt"). We decline further review in light of our resolution of the matter above.

IV. Conclusion

For the reasons above, we hold that the trial court erroneously held Defendant in direct criminal contempt. Consequently, we vacate the trial court's order and remand for proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
VINCENT LAURICA CHAFEN, Defendant

No. COA24-1030

Filed 17 September 2025

1. Constitutional Law—due process—competency to stand trial—sua sponte hearing not required—insufficient evidence of incompetency

In a prosecution for assault on a government official, the trial court was not required to sua sponte inquire into defendant's competency to stand trial where, although defendant informed the court of his homelessness, refused to be represented by his court-appointed attorney, refused to attend his trial or participate in his defense, and volunteered information at sentencing that could be used to add a prior record level point, there was no substantial evidence indicating that defendant was incompetent such that proceeding to trial would violate his statutory protections or constitutional due process rights. Specifically, defendant gave a rational explanation for why he arrived late to court, he explained that he was homeless because the charges prevented him from securing employment, he stated that he was able-bodied and that his mind was "sound," he was able to interact with his attorney at times, he understood the nature of the charges against him, and his acknowledgement that he didn't want to listen to his counsel appeared to result from not getting along with her.

2. Constitutional Law—right to be present at criminal trial—waiver—failure to return to courtroom

In a prosecution for assault on a government official, the trial court did not err by concluding that defendant voluntarily waived his right to be present at trial, where defendant did not assert a statutory right to a competency hearing, there was no substantial evidence to cast doubt on defendant's competency to stand trial, defendant voluntarily left the courtroom after trial began, and he refused to return to the courtroom despite being given multiple opportunities to do so.

3. Constitutional Law—right to counsel—request for substitute counsel—extent of inquiry—no abuse of discretion

In a prosecution for assault on a government official, the trial court did not abuse its discretion by denying defendant's request for substitute counsel where the court inquired into the request to the extent necessary to determine whether defendant would receive effective assistance of counsel. The trial court determined that defendant was able to communicate with his counsel at times, that defendant's counsel was competent and had extensive experience, and that defendant's refusal to work with his counsel was because he did not like the responses she gave him. Defendant also acknowledged that his request was primarily due to disagreeing over trial tactics, which was not a sufficient reason to grant his request.

Appeal by Defendant from judgment entered 22 March 2024 by Judge Clifton H. Smith in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

STADING, Judge.

Vincent Laurica Chafen ("Defendant") appeals from final judgment entered upon a jury verdict convicting him of assault on a government official. Defendant maintains the trial court should have sua sponte ordered a competency hearing, erroneously determined he waived the right to be present at trial, and erroneously failed to appoint substitute counsel. For the reasons below, we discern no error.

I. Background

On 12 May 2023, the Charlotte-Mecklenburg Police Department ("CMPD") obtained an arrest warrant for Defendant, charging him with: (1) assault on a government official or employee; (2) resisting a public officer; (3) second-degree trespass; and (4) misuse of the 911 system. Defendant's district court trial commenced on 6 December 2023, where he was convicted of assault on a government official and resisting a public officer. The district court consolidated the offenses and sentenced Defendant to seventy-five days of imprisonment, suspended for twelve months of supervised probation. Following entry of judgment, Defendant appealed to the superior court division.

Defendant's superior court trial commenced on 19 March 2024. At the outset, the State voluntarily dismissed the charges for resisting a public officer, misuse of the 911 system, and second-degree trespass. The State solely proceeded against Defendant for assault on a government official or employee. After the jury was empaneled but before the State called its first witness, Defendant expressed frustration with his court-appointed attorney ("court-appointed attorney" or "defense counsel") and moved the trial court for substitute counsel:

> DEFENDANT: I would like to ask that I get another attorney. I don't want to go to trial today. . . . I don't want to go to trial with her. I don't want her representing me, no.
>
> THE COURT: Well, at this point, the trial has begun.
>
> DEFENDANT: Well . . . I'm going to file for insufficient counsel. . . . I do not want her to represent me.
>
> THE COURT: All right. Well --
>
> DEFENDANT: I don't think that would be in my best interest.

In response, the trial court noted several observations it had made, including the fact that Defendant refused to participate with his court-appointed attorney, notwithstanding the attorney's efforts:

> THE COURT: I have noticed at various times this morning when your counsel has attempted to speak with you, you have turned and faced the opposite direction - -
>
> DEFENDANT: Yes.
>
> THE COURT: -- so as to not . . . engage in conversation with the attorney that has been appointed to represent you. And that all those times that I've noticed, you have not wanted to participate with your attorney, despite her efforts to participate and ask you questions. Certainly you have that option to represent yourself if you desire to do so.
>
> DEFENDANT: Absolutely not.
>
> THE COURT: Is there --
>
> DEFENDANT: What I would . . . like to say, Your Honor, is this, and I think that's being disingenuous. The times that I . . . offer my opinion to her to ask her something, she . . . was just like she just, "What? What do you want?" And I choose not to say that to her when she asked me a couple of times. She asked me twice some questions and . . . I was like, just go along with her. A couple of times I did answer her when . . . she asked for my opinion about a juror, and I said yes, I would like to (indiscernible) -- I'm cool with it. But it's a couple of times I didn't respond to her at all because I don't like the way she respond to me when I ask a question. And that's why I say I do not want her representing me. I don't think it's in my best interest.

The trial court ultimately concluded, "there is good cause . . . to continue this case with the current representation of [Defendant]," highlighting the fact that his court-appointed attorney had more than forty years of experience. In response, Defendant refused to participate in his trial any further and was taken into custody under a secured bond:

> DEFENDANT: I suggested some things that I wanted her to do for me, she refused to do those things, and, like I said, . . . I'm not going forward. I believe y'all can have a trial and I (indiscernible) y'all to handle it. I'm homeless, I'm a homeless guy. I'm not letting her represent me. I'm not going to do it. . . . I'm leaving. So do with it what you will. I'm leaving.
>
> THE COURT: All right. So – what kind of bond is he[ ] currently under?

> DEFENDANT: I don't care. I'm homeless, man. I've been sleeping on a bench for five months.
>
> . . . .
>
> [THE STATE]: Give me one moment, Your Honor. I believe . . . it was $2,500 secured.
>
> THE COURT: At this time, I will revoke his bond and I would issue a new bond at $10,000 secured. And we'll be in recess until 2:00 o'clock.

The trial court then recessed for lunch.

Following the lunch recess, the trial court requested Defendant's presence several times to no avail. Deputy Hagan with the Mecklenburg County Sheriff's Office told Defendant, "[t]he judge is ordering you to come into the courtroom[,]" to which Defendant stated, "No." In light of Defendant's refusal to return or participate, the trial court requested that defense counsel speak with Defendant. The trial court asked defense counsel to ensure that Defendant understood "he has a right to waive his presence during the trial," and that the trial court "will let him go back to his cell if he does not want to participate in trial." But Defendant refused to speak with his court-appointed attorney at this time. Sergeant Jake Knight with the Mecklenburg County Sheriff's Office also attempted to convey the trial court's message, but Sergeant Knight relayed, "he's not coming out of the cell and he said he's not coming in here." Given Defendant's refusals, the trial court concluded he voluntarily waived his right to be present at trial, and the State proceeded with its first witness.

The evidence at Defendant's superior court trial tended to show that officers with CMPD arrested him at Novant-Presbyterian Hospital on 12 May 2023 after he was banned from the premises and refused to leave. Throughout the course of the night and early morning, authorities responded to three different 911 calls originating from the hospital. Law enforcement received the first call around 11:09 p.m. from Defendant, who was in the waiting room at the hospital seeking treatment. Defendant told the 911 operator, "he didn't want to be at the hospital"; he "wanted to go to another hospital"; and "they weren't taking care of him."

Captain L.D. Randolph Goodman, a paramedic crew chief and assistant operations supervisor with the Mecklenburg Emergency Medical Services Agency, responded to the disturbance. Captain Goodman testified that Defendant was angry, yelling, cursing, and being uncooperative. Captain Goodman told Defendant: "[A]n ambulance would not be transporting him to another facility, that he's at a facility being seen." Christian Murillo, a patrol officer with CMPD, also responded to the disturbance. Officer Murillo similarly testified "that they were not going to transport [Defendant] to another hospital due to him already being at Novant Presbyterian." After speaking with Defendant, Captain Goodman left the scene.

Around 12:49 a.m., law enforcement responded to the second 911 call from the hospital's location—this time, "in reference to an accident" in front of the hospital. Several CMPD officers responded to the call, including Officer Murillo, Officer Elijah Morrison, and Officer Robert Rendon. Officer Morrison testified that Defendant claimed to have been "hit by a car." As a result, Defendant "was taken [back] to the hospital for evaluation by a medic[.]" Yet, upon examining the scene, Officer Rendon concluded that nobody had actually been struck by a vehicle.

About an hour-and-a-half later, around 3:00 a.m., CMPD responded to the third 911 call from the hospital's location—Officers Murillo, Morrison, and Rendon responded to the disturbance. This time, the hospital requested assistance with removing Defendant from the premises because he refused to leave. Upon arrival, Officer Morrison observed Defendant on a stretcher "right in front of the [emergency room] doors," complaining that "his leg hurt and . . . he wasn't seen by a doctor." However, Officer Morrison saw a discharge order in Defendant's possession. And when discussing with nearby medical personnel, Officer Morrison learned Defendant's "leg wasn't broken." He also learned that one of the security employees from the hospital banned Defendant from the premises. Upon learning Defendant had been banned, Officer Murillo testified: "I gave him the opportunity to stand up and leave. He refused to leave so I then placed him under arrest for second-degree trespassing."

Defendant did not willingly submit to the arrest. Instead, Officer Murillo carried Defendant into the back of his patrol vehicle with the assistance of other officers. Officer Murillo noted that when he and other officers attempted to place Defendant in the patrol vehicle, Defendant "kept locking out his body . . . and legs." And when the officers attempted to lift Defendant's legs, he "locked [them] out . . . [and] refused to bend them." After several attempts, Officer Murillo successfully bent Defendant's leg at the knee. But upon doing so, Defendant "kicked out and struck [Officer Murillo] in the head twice."

Following deliberations, the jury returned a guilty verdict for assault on a government official. The trial court sentenced Defendant to 120 days imprisonment, and Defendant timely entered his notice of appeal.

II. Jurisdiction

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

III. Analysis

Defendant contends the trial court violated his constitutional right to due process by failing to sua sponte order a competency hearing since "substantial evidence existed creating a bona fide doubt as to [his] competency to stand trial." He also asserts the trial court committed error by concluding that he waived the right to be present at trial and by failing to conduct a sufficient inquiry into his request for substitute counsel.

A. Competency Hearing

[1] Defendant maintains there was substantial evidence establishing a bona fide doubt as to his competency to stand trial because he informed the trial court that he was homeless, and there is "a correlation . . . between homelessness and mental illness"; arrived late to court and stated "he did not care what happened to him"; refused to be represented by or speak to his court-appointed trial attorney; refused to attend his trial or participate in his defense; demonstrated "irrational and bizarre behavior . . . on the night in question"[1]; and acted irrationally at sentencing. Defendant did not raise the question of competency at trial. Instead, he asserts the trial court should have sua sponte initiated a competency hearing. We disagree.

"The standard of review for alleged violations of constitutional rights is de novo." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (emphasis omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted) (emphasis omitted).

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1. "Regardless of the circumstances that constitute substantial evidence of a defendant's incompetence, the relevant period of time for judging a defendant's competence to stand trial is 'at the time of trial.' " *State v. Hollars*, 376 N.C. 432, 442, 852 S.E.2d 135, 142 (2020) (citation omitted).

"One of the fundamental pillars of our criminal justice system is that a defendant must be competent to stand trial." *State v. Jones*, 296 N.C. App. 512, 516, 909 S.E.2d 373, 376 (2024). "The Due Process Clause of the Constitution of the United States shields criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to do so while they remain incompetent." *Hollars*, 376 N.C. at 441, 852 S.E.2d at 141–42; *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (citations and quotation marks omitted) ("[U]nder the Due Process Clause of the United States Constitution, [a] criminal defendant may not be tried unless he is competent."); *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 1376 (1996) (citations omitted) ("[T]he criminal trial of an incompetent defendant violates due process.").

To that end, N.C. Gen. Stat. § 15A-1001(a) (2023) contains "a statutory competency requirement." *Jones*, 296 N.C. App. at 516, 909 S.E.2d at 376. Subsection 15A-1001(a) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a). "The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." *Id.* § 15A-1002(a). "When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." *Id.* § 15A-1002(b)(1).

Generally, a defendant waives his right to a competency hearing under N.C. Gen. Stat. § 15A-1002(b) if he fails to raise a question as to his capacity at trial. *See, e.g.*, *Jones*, 296 N.C. App. at 516, 909 S.E.2d at 376 (citation omitted) ("[T]he statutory right to a competency hearing is waived by the failure to assert that right at trial."); *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citation omitted) ("In applying these statutory provisions, this Court has recognized that the trial court is only required to 'hold a hearing to determine the defendant's capacity *if* the question is raised.' "); *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 585 (2001) (determining that the "defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002(b) by his failure to assert that right").

However, even if a defendant fails to raise a question about his capacity, "[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citations and quotation marks omitted); *King*, 353 N.C. at 467, 546 S.E.2d at 585; *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977); *State v. Allen*, 377 N.C. 169, 181, 856 S.E.2d 494, 503 (2021); *State v. Heptinstall*, 309 N.C. 231, 236, 306 S.E.2d 109, 112 (1983). "In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citations and quotation marks omitted).

Generally, "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Minyard*, 289 N.C. App. 436, 442, 890 S.E.2d 182, 187 (2023) (citation omitted). "Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering 'a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial.' " *Hollars*, 376 N.C. at 442, 852 S.E.2d at 142 (quoting *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975)).[2] "Regardless of the circumstances that constitute substantial evidence of a defendant's incompetence, the relevant period of time for judging a defendant's competence to stand trial is 'at the time of trial.' " *Hollars*, 376 N.C. at 442, 852 S.E.2d at 142 (citation omitted). "Moreover, even when the defendant is deemed competent to stand trial at the commencement of the proceedings circumstances may arise during trial suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Allen*, 377 N.C. at 181, 856 S.E.2d at 504 (citations and quotation marks omitted). But, the mere presence of "evidence tending to show that the defendant has exhibited certain signs of mental disorder in the past or has engaged in what might be deemed unusual behavior during trial does not necessarily require the trial court to inquire into the defendant's competence to proceed on its own motion." *Id.* at 182, 856 S.E.2d at 504.

2. "[T]he issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case." *State v. Sides*, 376 N.C. 449, 466, 852 S.E.2d 170, 181 (2020).

Contrary to Defendant's urging, there is insufficient evidence in this case to have warranted the initiation of a competency hearing by the trial court. Our review leads us to conclude that Defendant was able "to consult with his lawyer with a reasonable degree of rational understanding and ha[d] a rational as well as factual understanding of the proceedings against him." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citations and quotation marks omitted).

Although Defendant arrived late to court, he immediately apologized and provided an explanation: that he lacked the "means or money" to transport himself to court since he was homeless at the time. The fact that Defendant was homeless—without more—is insufficient to warrant an inquiry into his competency by the trial court. *Cf. Hollars*, 376 N.C. at 442, 852 S.E.2d at 142. Defendant concedes as much in his brief, noting the following: "While this information, standing alone, was not enough to require a hearing in this case, it is relevant in conjunction with other evidence in the record suggesting incompetence."

Defendant also argues there was a bona fide doubt he was competent to stand trial since "he did not care what happened to him and would gladly accept whatever punishment he received." However, Defendant's statement was made in the following context:

> DEFENDANT: I'm leaving. So do with it what you will. I'm leaving.
>
> THE COURT: All right. So . . . what kind of bond is he[ ] currently under?
>
> DEFENDANT: I don't care. I'm homeless, man. I've been sleeping on a bench for five months.
>
> [DEFENDANT'S ATTORNEY]: I think it's unsecured but I don't know . . . .
>
> [STATE'S ATTORNEY]: Give me one moment, Your Honor. I believe . . . it was $2,500 secured.

After Defendant was taken into custody, Sergeant Knight relayed to the trial court:

> It's his wish that he not have to speak to his counsel anymore. He doesn't want anything to do with her. He . . . said she was condescending and disrespectful and that he was a homeless, 49-year-old man and all he wanted to do was get a . . . bed.

> . . . .
>
> He also said that whatever sentencing and/or ruling that came down, he said he's fine with it one way or another.

Defendant's argument is contextually misplaced. In any event, "[t]he mere existence of evidence tending to show that the defendant has . . . engaged in what might be deemed unusual behavior during trial does not necessarily require the trial court to inquire into the defendant's competence to proceed on [its] own motion." *Allen*, 377 N.C. at 182, 856 S.E.2d at 504.

Defendant next asserts a bona fide doubt existed as to his competency because, at sentencing, he informed the trial court about a previous mental health evaluation:

> THE COURT: Anything else you would like to say at this time, [Defendant]?
>
> DEFENDANT: Yeah. I got some stuff in my property, but y'all . . . already know my situation. So it's not something that's not really documented. I went to Novant Health or whatever the hospital is. I went through the whole process myself to get a screening and evaluation. I went . . . to someplace called Holly Hillis. And I got paperwork and everything that document that. So we're wasting time here.

Immediately thereafter, Defendant noted he was "able-bodied" and that his mind was "sound." Defendant also expressed he was homeless since the charges prevented him from securing stable employment. Further, Defendant added he desired to "take care of these . . . cases [so he] c[ould] get on with [his] life." Even though Defendant discussed his psychological history at sentencing, nothing he said suggested he was suffering from a condition that would render him incompetent to stand trial; he merely discussed a previous time where he received a mental health evaluation. *See Badgett*, 361 N.C. at 261, 644 S.E.2d at 222 ("We observe that defendant called three experts to testify about his psychological history, yet none of them suggested that he suffered from a condition that would render him incompetent to stand trial. Though the record confirms that defendant was treated for anger management and depression prior to trial, this is insufficient to establish a lack of competency."); *see also King*, 353 N.C. at 467, 546 S.E.2d at 585 (holding that evidence of the defendant receiving treatment for depression and suicidal tendencies several months before trial did not constitute substantial evidence that the defendant lacked the requisite capacity to stand trial); *see also Allen*, 377 N.C. at 182, 856 S.E.2d at 504 ("[T]he fact that a defendant has received mental health treatment in the past . . . does not, without more, suffice to require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion."). These statements therefore do not constitute substantial evidence indicating concerns of incompetency. *See Hollars*, 376 N.C. at 442, 852 S.E.2d at 142.

Defendant also maintains there existed a bona fide doubt as to his competency because at sentencing, he "volunteer[ed] information in support of a prior record level point." In calculating Defendant's prior record level, the district attorney presented a sentencing worksheet that contained several previous felony convictions he received, including one from 1992. The district attorney noted that defense counsel specifically took issue with the 1992 conviction since Defendant was sixteen years old at the time of the offense. Defendant interjected, conceding: "Yeah, I was tried as an adult, but I was 16." The trial court then responded, "Well you certainly have a right to remain silent. Anything you say may be used against you, just to remind you of that." Although volunteering information that could enhance one's conviction is certainly out of the ordinary, unusual behavior—standing alone—does not "require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion." *Allen*, 377 N.C. at 182, 856 S.E.2d at 504. This interaction thus does not constitute substantial evidence creating a bona fide doubt as to Defendant's competency to stand trial.

Finally, viewing the entire transaction in context, Defendant's refusal to participate in his trial or with his court-appointed attorney does not constitute substantial evidence requiring the trial court to institute a competency hearing on its own accord; Defendant's refusals were merely a product of frustration with his court-appointed attorney for personal reasons. Indeed, Defendant requested substitute counsel in light of the fact that his court-appointed attorney "seem[ed] . . . upset" when he asked any form of question. He also expressed a desire for substitute counsel because his court-appointed attorney "refused to do" certain things he asked. Yet during a colloquy with the trial court, Defendant admitted that he "turned and faced the opposite direction" several times when his court-appointed attorney tried to speak with him. He also conceded that he refused to speak with his court-appointed attorney despite the fact that the attorney had attempted to ask questions: "But it's a couple of times I didn't respond to her at all because I don't like the way she respond to me when I ask a question. And that's why I say I do not want her representing me." Thus, it appears that Defendant's refusal to cooperate was due to the fact that he did not get along with his court-appointed attorney as opposed to a lack of competence.

In any event, our Supreme Court's decision in *State v. Badgett* provides further guidance. 361 N.C. 234, 644 S.E.2d 206 (2007). In that case, the defendant asserted the trial court should have ordered a competency hearing on its own accord since he:

> (1) wrote numerous letters to the trial court and the district attorney expressing his desire for a speedy trial resulting in a death sentence; (2) read a statement to the jury during the penalty phase in which he impliedly asked for a death sentence; and (3) had an emotional outburst coupled with verbal attacks on the assistant district attorney who delivered the state's closing argument during the sentencing proceeding.

Id. at 259–60, 644 S.E.2d at 221. The Court disagreed, concluding "that the evidence referenced by defendant did not constitute 'substantial evidence' requiring the trial court to institute a competency hearing, and that this evidence was outweighed by substantial evidence indicating that [the] defendant was competent to stand trial." *Id.* at 260, 644 S.E.2d at 221. The Court determined that the defendant "was able to interact appropriately with his attorneys during the trial"; conferred with his attorneys "on issues of law applicable to his case"; "followed their advice by declining to testify"; "responded directly and appropriately to questioning . . . throughout the trial"; "demonstrated a strong understanding of the proceedings against him"; "consistently addressed the trial court with appropriate deference and intelligent responses"; and "calmly and rationally explained" why he was upset. *Id.* at 260–61, 644 S.E.2d at 221–22.

Here, as in *Badgett*, the evidence referenced by Defendant does not constitute substantial evidence and is "outweighed by substantial evidence indicating [he] was competent to stand trial." *Id.* at 260, 644 S.E.2d at 221. When Defendant moved for substitute counsel, he demonstrated appropriate deference, delivered intelligent responses, and responded directly to the trial court's questions. In turn, the trial court noted several observations it had made, including the fact that Defendant refused to participate with his court-appointed attorney notwithstanding the attorney's efforts. Defendant acknowledged that he had in fact refused to speak with his attorney several times, but only because he did not "like the way she respond[ed] to [him] when [he] ask[ed] a question." Otherwise, Defendant admitted that he was able to interact with his attorney and participate in his trial, including telling his court-appointed attorney his opinion about certain prospective jurors. The trial court also notified Defendant he had the right to represent himself, he had the right to control certain aspects of representation including whether to plead guilty or not, and that his court-appointed lawyer had the ability to control matters pertaining to "trial strategy." In response, Defendant declined proceeding pro se; instead, articulating a desire "to get the paperwork to file for insufficient counsel." At all times, Defendant maintained, "I do not want [my court-appointed attorney] representing me. I don't think it's in my best interest."

The evidence detailed above showcases that Defendant: was capable of interacting with his court-appointed attorney at times; conferred with his court-appointed attorney on legal issues, including jury selection; sometimes accepted his court-appointed attorney's advice; understood the nature of the proceedings against him; understood his rights as they relate to appointed and substitute counsel; and "calmly and rationally explained" why he was upset with his court-appointed attorney when the trial court disagreed. *Id.* at 260–61, 644 S.E.2d at 221–22; *see also Jones*, 296 N.C. App. at 518, 909 S.E.2d at 377–78. Thus, even though Defendant's emotional outburst and refusal to participate in his trial may be "unusual," *Allen*, 377 N.C. at 182, 856 S.E.2d at 504, "the evidence referenced by defendant did not constitute 'substantial evidence' requiring the trial court to institute a competency hearing, and . . . this evidence was outweighed by substantial evidence indicating that [he] was competent to stand trial." *Badgett*, 361 N.C. at 260, 644 S.E.2d at 221. For all of these reasons, we hold there is insufficient evidence establishing a bona fide doubt as to Defendant's competency to stand trial, and as such, the trial court did not commit error by failing to sua sponte inquire into Defendant's competence. Defendant's assignment of error is overruled.

B. Right to be Present

[2] Defendant next asserts the trial court committed error by concluding he voluntarily waived the right to be present before determining whether he was competent to stand trial. We disagree.

"We review the trial court's conclusion that Defendant voluntarily waived [the] constitutional right to be present *de novo*." *State v. Sides*, 267 N.C. App. 653, 660, 834 S.E.2d 146, 151 (2019), *rev'd and remanded on other grounds*, 376 N.C. 449, 852 S.E.2d 170 (2020). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Hicks*, 243 N.C. App. 628, 641, 777 S.E.2d 341, 350 (2015) (citation omitted).

"The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution 'guarantees an accused the right to be present in person at every stage of his trial.' " *State v. Workman*, 344 N.C. 482, 497, 476 S.E.2d 301, 309 (1996) (quoting *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1996)); *State v. Jefferson*, 288 N.C. App. 257, 261–62, 886 S.E.2d 180, 183 (2023) ("The right of the defendant to be present at criminal proceedings is protected by both the federal and state constitutions."). "This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Wright*, 212 N.C. App. 640, 644, 711 S.E.2d 797, 800 (2011) (citation omitted).

"[A]lthough a criminal defendant possesses a constitutional right to be present at all stages of her trial, the United States Supreme Court has . . . recognized the potential for a defendant in a non-capital case to waive that right." *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 177 (2020); *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right. And in capital trials the right cannot be waived by the prisoner."). To that end:

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Sides, 376 N.C. at 458, 852 S.E.2d at 177 (citation omitted). Thus, "[a] defendant may waive the general right to be present at his trial through his voluntary and unexplained absence from court." *Jefferson*, 288 N.C. App. at 262, 886 S.E.2d at 183 (citation omitted).

"[I]n order to waive the right to be present, however, the defendant 'must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.' " *Sides*, 376 N.C. at 458, 852 S.E.2d at 177 (citation omitted). Phrased another way, "in order to waive the right to be present, there must be 'an intentional relinquishment or abandonment' of that right." *Id.* at 458–59, 852 S.E.2d at 177 (citation omitted). Where "there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial through her own conduct." *Id.*

Here, the trial court concluded that Defendant voluntarily waived his right to be present after he left the courtroom and refused to return. Defendant asserts the trial court erroneously reached this conclusion because it failed to first determine whether he was competent to stand trial. But since we have already held there was insufficient evidence warranting the initiation of a sua sponte competency hearing by the trial court, and that Defendant waived his statutory right to a competency hearing under N.C. Gen. Stat. § 15A-1002(b) by failing to assert it at trial, Defendant's argument is meritless. *Jones*, 296 N.C. App. at 516, 909 S.E.2d at 376.

In any event, we hold the trial court did not commit error by concluding that Defendant voluntarily waived the right to be present. After Defendant's trial had begun "in his presence" and the trial court denied his request for substitute counsel, he voluntarily chose to not participate any further and to leave the courtroom. *Sides*, 376 N.C. at 458, 852 S.E.2d at 177. In the courtroom, Defendant stated to the trial court: "I'm not going forward. I believe y'all can have a trial and . . . handle it . . . . I'm not going to do it. . . . I'm leaving. So do with it what you will. I'm leaving." Notwithstanding, the trial court made several efforts to bring Defendant back to the courtroom. We also note the efforts of Deputy Hagan, Sergeant Knight, and his court-appointed attorney. The trial court entered an order noting it "previously verbally ordered [Defendant] to come into the courtroom through a deputy," and gave written notice to Defendant that he "is ordered to come into this courtroom so that these matters may be discussed with him and allow him meaningful participation in his trial." Defendant was thus "aware of the processes taking place, of his right and of his obligation to be present, and . . . ha[d] no sound reason for remaining away.' " *Sides*, 376 N.C. at 458, 852 S.E.2d at 177 (citation omitted). Accordingly, the trial court did not err in concluding that Defendant intentionally abandoned his right to be present at trial. Defendant's assignment of error is overruled.

C. Substitute Counsel

[3] Defendant last contends the trial court violated his constitutional right to counsel by failing to conduct a sufficient inquiry into his request for substitute counsel. More specifically, he maintains the trial court failed to determine "whether the nature or degree of the conflict between [him] and his defense counsel was such that substitute counsel should [have been] appointed." Alternatively, Defendant maintains the trial court abused its discretion by denying his request for substitute counsel since there was "a complete and irreconcilable breakdown in communication[.]" We disagree.

"Unless a Sixth Amendment violation is shown, whether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the district court." *State v. Sweezy*, 291 N.C. 366, 371–72, 230 S.E.2d 524, 529 (1976) (citation omitted); *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981); *State v. Covington*, 205 N.C. App. 254, 256, 696 S.E.2d 183, 185 (2010). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"An indigent defendant's right to appointed counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to the United States Constitution." *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013); *State v. Strickland*, 283 N.C. App. 295, 302, 872 S.E.2d 594, 601 (2022). The right to appointed counsel, "however, does not 'include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services.' " *Strickland*, 283 N.C. App. at 302, 872 S.E.2d at 601 (citation omitted); *State v. Thacker*, 301 N.C. 348, 351–52, 271 S.E.2d 252, 255 (1980) (internal citation omitted) ("While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, an indigent defendant does not have the right to have counsel *of his choice* appointed to represent him.").

"A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. "In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 529 (citations omitted); *State v. Glenn*, 221 N.C. App. 143, 149, 726 S.E.2d 185, 189 (2012) (citation omitted) ("Substitute counsel is required and must be appointed when defendant shows good cause, such as a conflict of interest or a complete breakdown in communications."). "In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense." *State v. Robinson*, 290 N.C. 56, 65, 224 S.E.2d 174, 179 (1976) (citation omitted).

If it appears to "the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper." *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *State v. Poole*, 305 N.C. 308, 311–12, 289 S.E.2d 335, 338 (1982). A "trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel." *Id.* "If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right." *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 529.

Contrary to Defendant's urging, the trial court inquired into Defendant's request "to the extent necessary" to determine whether he would receive effective assistance of counsel. *Poole*, 305 N.C. at 311–12, 289 S.E.2d at 338. Indeed, in investigating the complaint, the trial court first asked Defendant whether he had "turned and faced the opposite direction" while defense counsel tried to communicate with him. Defendant acknowledged this observation as true, noting that he did not respond to defense counsel several times because he did not "like the way [defense counsel] respond[ed]." Yet at other times, Defendant admitted he was capable of communicating with defense counsel about prospective jurors: "A couple of times I did answer her when . . . she asked for my opinion about a juror." At this juncture, the trial court learned that "the nature of the conflict between defendant and counsel [was] not such as would render counsel . . . ineffective to represent" him. *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. It also "had ample information before it to conclude that [D]efendant had no real basis for wanting his counsel withdrawn." *Poole*, 305 N.C. at 317, 289 S.E.2d at 341. Moreover, Defendant's complaints were "general and vague, and the emphasis of his objections shifted during the hearing." *State v. Gray*, 292 N.C. 270, 281, 233 S.E.2d 905, 913 (1977).

Thereafter, the trial court inquired into defense counsel's competency by asking how long she had been practicing law and in what field. *See Thacker*, 301 N.C. at 353, 271 S.E.2d at 256. Once it became apparent to the trial court that defense counsel was competent and the assistance of defense counsel was not "ineffective," it was "not required to delve any further into the alleged conflict." *Poole*, 305 N.C. at 311–12, 289 S.E.2d at 338. The trial court thus conducted the requisite inquiry and did not violate Defendant's Sixth Amendment right. *Cf. Sweezy*, 291 N.C. at 372, 230 S.E.2d at 529 ("If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, . . . the defendant may then properly claim denial of his Sixth Amendment right."); *Covington*, 205 N.C. App. at 257, 696 S.E.2d at 185 ("Denying a defendant's request for substitute counsel based upon his current counsel's communication and trial strategy does not automatically amount to a violation of the defendant's constitutional rights."). Although Defendant "may have been peeved with his attorney for personal reasons," the trial court "had no reason to doubt that attorney's effectiveness and capability as an advocate or to suspect the relationship between [D]efendant and his counsel to have deteriorated so as to prejudice the presentation of his defense." *Gray*, 292 N.C. at 282, 233 S.E.2d at 913.

Moreover, the trial court did not abuse its discretion by denying Defendant's request for substitute counsel. *See Covington*, 205 N.C. App. at 258, 696 S.E.2d at 186 ("Because defendant's constitutional rights were not violated, the trial court's decision whether to allow substitute counsel was discretionary, and . . . it did not abuse its discretion by denying defendant's request."). Defendant initially framed his request under the guise of disapproval with how defense counsel responded to his questions: "But it's a couple of times I didn't respond to her at all because I don't like the way she respond to me when I ask a question. And that's why I say I do not want her representing me." But Defendant later revealed his request for substitute counsel primarily stemmed from a disagreement over defense counsel's trial tactics:

> I suggested some things that I wanted her to do for me, she refused to do those things, and, like I said, . . . I'm not going forward. I believe y'all can have a trial and I (indiscernible) y'all to handle it. . . . I'm not letting her represent me. I'm not going to do it. . . . I'm leaving. So do with it what you will. I'm leaving.

Precedent dictates that "[a] mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney." *Robinson*, 290 N.C. at 66, 224 S.E.2d at 179; *Thacker*, 301 N.C. at 353, 271 S.E.2d at 255; *Glenn*, 221 N.C. App. at 149, 726 S.E.2d at 189; *State v. Prevatte*, 356 N.C. 178, 216, 570 S.E.2d 440, 461 (2002). The trial court thus acted within the bounds of its discretion upon denying Defendant's motion for substitute counsel. Defendant's final assignment of error is overruled.

IV. Conclusion

Our review leads us to conclude that the trial court did not commit error by failing to sua sponte conduct a competency hearing or by concluding that Defendant voluntarily waived his constitutional right to be present. Additionally, the trial court conducted the requisite inquiry when addressing Defendant's motion for substitute counsel and did not abuse its discretion in denying the motion.

NO ERROR.

Judges GRIFFIN and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
TRAVIS RAY CREED

No. COA25-184

Filed 17 September 2025

Probation and Parole—probation revocation—new criminal offense—communicating threats—no evidence of true threat

The trial court abused its discretion by revoking defendant's probation for committing a new criminal offense while on probation—communicating threats—where the evidence was insufficient to meet the subjective and objective components of a true threat as required to satisfy the First Amendment. Where defendant told a friend over the phone that he was "mad enough to kill somebody" but did not make that statement with regard to a specific person, neither that comment nor defendant's subsequent mention of the names of a judge and detective on the same phone call amounted to a serious expression that he intended to commit an act of violence, as opposed to mere hyperbole. Further, the evidence did not support a finding that defendant's friend understood the comments as likely to be acted upon, where the friend did not take any action until two days later, when he notified the detective about defendant's comments only after hearing that defendant had been hospitalized for self-harm.

Appeal by Defendant from judgment entered 21 August 2024 by Judge Martin B. McGee in Surry County Superior Court. Heard in the Court of Appeals 6 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Hillary F. Patterson, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Travis Ray Creed appeals the trial court's judgment revoking his probation. Defendant argues that the trial court erred by revoking his probation because the State did not present sufficient evidence that he "communicated a threat" under N.C. Gen. Stat. § 14-277.1, which incorporates the requirement that the State present sufficient evidence of a "true threat." Accordingly, Defendant argues, the State failed to show that he willfully violated the valid condition of his probation that he "commit no criminal offense." We agree with Defendant and reverse the trial court's judgment.

I. Background

Defendant pled guilty on 10 January 2024 to possession of a firearm by a felon and misdemeanor possession of marijuana. The trial court sentenced Defendant to a term of 12-24 months' imprisonment, suspended for 36 months of supervised probation.

Defendant's probation officer filed probation violation reports in March and July of 2024 alleging various violations, including that Defendant had willfully violated:

> General Statute 15A-1343(b)(1) "Commit no criminal offense in any jurisdiction" in that
>
> The Defendant has made credible threats concerning Judge Puckett a superior court judge, and Detective Johnson of the Surry County Sheriffs Office. These threats

> being substantiated by a credible witness to the district attorneys office in Surry County. These threats having occurred on or about 6-30-2024, while the Defendant is on supervised probation in Surry County, NC. (original in all capital letters).

The matter came on for hearing in August 2024. The State proceeded only on the alleged threat made against Detective Brandon Johnson ("Detective Johnson" or "Brandon"). At the hearing, the State presented testimony from three witnesses: Justin Potts, Defendant's friend; Detective Johnson; and Erik Pfundt, Defendant's probation officer.

The evidence presented at the hearing tended to show the following: On 30 June 2024, Defendant called Potts on the phone "all stressed out" and said he was "mad enough to kill somebody." Potts was concerned and went to see Defendant in person.

In person, Defendant mentioned "Judge Puckett and Brandon Johnson." Potts knew Brandon and thought highly of him. It was evident to Potts that Defendant had "a lot of animosity towards Brandon." Potts testified that Defendant "didn't say he was going to kill either one of them" but "he just had a lot of animosity towards Brandon[.]" Potts further testified that Defendant "was just stressed and scared, you know, about him really going to jail" and that when "people get scared[,] [t]hey don't think right, you know, during things." At that point, "that was pretty much it of that. And then, I didn't say anything. Didn't do anything, you know."

Two days later, Potts learned from a family member that Defendant had been committed to the hospital for trying to kill himself. Potts testified that the family member "called and said [Defendant] was -- acted like, you know, acted like he'd lost his mind, you know. And he kind of acted like that then to me, you know? But, you know, I couldn't say anything then." Potts contacted Detective Johnson and told him what Defendant had said to Potts two days earlier. Potts also called the district attorney's office.

Detective Johnson testified that Potts told him that Defendant "had made statements about wanting to kill me and kill Judge Puckett." When asked whether he knew Defendant, Detective Johnson stated, "Never met him. Never dealt with him. Never arrested him. Never been part of any investigation. . . ." Detective Johnson was nevertheless concerned with what Defendant had said and reported it to the district attorney's office. The next day, once warrants were issued for Defendant's arrest, Detective Johnson went looking for Defendant.

Pfundt testified about the various probation violation reports and allegations he had filed, including the allegation that Defendant had violated the condition of his probation that he "commit no criminal offense in any jurisdiction." Pfundt also testified that Defendant had made disturbing comments about ending his life which led to Defendant's involuntary commitment.

The trial court found that Defendant had committed several willful violations of his probation, including that Defendant had violated the condition of probation that he "commit no criminal offense in any jurisdiction" as set forth in the violation report. The trial court revoked Defendant's probation and activated his sentence. Defendant appealed.

II. Discussion

Defendant argues that the trial court erred by revoking his probation because the State did not present sufficient evidence that he "communicated a threat" under N.C. Gen. Stat. § 14-277.1, which incorporates the requirement that the State present sufficient evidence of a "true threat." Accordingly, Defendant argues, the State failed to show that he willfully violated the valid condition of his probation that he "commit no criminal offense."

"[T]he alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *State v. Duncan*, 270 N.C. 241, 245 (1967) (citations omitted). Instead, the State bears the burden of presenting sufficient evidence "to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. Murchison*, 367 N.C. 461, 464 (2014) (citation omitted). "[T]he decision of the trial court is reviewed for abuse of discretion." *Id.* (citation omitted).

When First Amendment issues are raised, however, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Taylor*, 379 N.C. 589, 608 (2021) (quotation marks and citation omitted). "This obligation supplements rather than supplants the analysis that we typically utilize when reviewing a trial court's decision" but "does not empower an appellate court to ignore a trial court's factual determinations." *Id.*

It is a Class 1 misdemeanor to communicate a threat. N.C. Gen. Stat. § 14-277.1(b) (2025). A person communicates a threat when

> (1) He willfully threatens to physically injure the person . . . ;

> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

Id. § 14-277.1(a) (2025).

"[A] statute criminalizing speech 'must be interpreted with the commands of the First Amendment clearly in mind.' " *Taylor*, 379 N.C. at 600 (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)). And "an anti-threat statute requires the [State] to prove a 'true threat.' " *In re Z.P.*, 280 N.C. App. 442, 445 (2021) (citing *Watts*, 394 U.S. at 708). Accordingly, under the First Amendment, N.C. Gen. Stat. § 14-277.1 requires the State to prove a true threat. *See State v. Guice*, 286 N.C. App. 106, 110-11 (2022).

"[A] true threat [is] an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group." *Taylor*, 379 N.C. at 605. "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.' " *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). "The 'true' in that term distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late')." *Id.* (quoting *Watts*, 394 U.S. at 708). "[T]o determine whether a defendant's particular statements contain a true threat, a court must consider (1) the context in which the statement was made, (2) the nature of the language the defendant deployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive." *Taylor*, 379 N.C. at 600-01 (citing *Watts*, 394 U.S. at 708).

The first element of section 14-277.1(a)–the person "willfully threatens to physically injure the person"–"includes the subjective component of [a] true threat[]." *Guice*, 286 N.C. App. at 111; N.C. Gen. Stat. § 14-277.1(a)(1). The third element–"[t]he threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out"–includes the objective component of a true threat. *See United States v. Bagdasarian*, 652 F.3d 1113, 1119 (9th Cir. 2011) (the objective test asks "whether a reasonable person who heard the statement would have interpreted it as a threat") (citation omitted); N.C. Gen. Stat. § 14-277.1(a)(3).

Here, the evidence presented at the revocation hearing failed to adequately demonstrate the subjective and objective components of a true threat, and therefore was insufficient to support either the first or third elements of section 14-277.1(a).

When Defendant spoke to Potts on the phone, Defendant made the general statement that he was "mad enough to kill somebody" but did not threaten a specific person. When questioning Potts about what Defendant said to him when they met in person, the State asked, "What names did he mention after he said he was stressed enough to hurt somebody?" Potts responded, "Judge Puckett and Brandon Johnson." The State further questioned Potts, "When [Defendant] told you he was mad enough to kill somebody, what was the first thing out of his mouth afterwards?" Potts responded, "He was just talking about Brandon and Puckett, but he didn't come out and say that he was[.]" Potts testified that Defendant "didn't say he was going to kill either one of them" but "he just had a lot of animosity towards Brandon[.]" Potts further testified that Defendant "was just stressed and scared, you know, about him really going to jail" and that when "people get scared[,] [t]hey don't think right, you know, during things."

Even assuming the evidence allows a reasonable inference that Defendant's statements were specifically directed toward Detective Johnson, the evidence is not sufficient to support a finding that Defendant's statements were "serious expression[s]" conveying that he meant to "commit an act of unlawful violence," as opposed to mere hyperbole. *Virginia*, 638 U.S. at 359.

The evidence is also not sufficient to support a finding that Potts understood Defendant's statements, in the context of their conversation, as a "serious expression" of an intent to kill or injure Detective Johnson. *Id.* Instead, the evidence shows that Potts understood Defendant's statements as indications that he had "a lot of animosity towards Brandon" and was "just stressed and scared" about going to jail. Potts explained that after his conversation with Defendant, he did nothing: "[T]hat was pretty much it of that. And then, I didn't say anything. Didn't do anything, you know."

It wasn't until two days later, when Potts learned that Defendant had been hospitalized for trying to kill himself, that Potts contacted Detective Johnson. When the State asked Potts, "[W]ere you afraid enough for Brandon -- did you think that [Defendant] was going to act on that threat that he was stressed enough to hurt somebody?" Potts responded, "Well, I don't – he was locked up at the time at the hospital, I mean[.]" Although the State argued at the revocation hearing, and argues in its brief, that Potts thought the threat was credible enough to "communicate it immediately to [Detective] Johnson[,]" this is simply not an accurate characterization of the evidence. In light of Defendant's hospitalization for attempted suicide and his behavior surrounding that event, it was certainly advisable for Potts to alert Detective Johnson to Defendant's animosity towards him. But Defendant's speech was not criminal.

Indeed, the trial court did not find that Defendant violated N.C. Gen. Stat. § 14-277.1(a) by communicating a true threat; the trial court found that Defendant made "credible threats" that were "substantiated by a credible witness." This standard does not satisfy the First Amendment. The evidence here was not sufficient to "reasonably satisfy the judge in the exercise of his sound discretion," *Murchison*, 367 N.C. at 464 (citation omitted), that Defendant's communication constituted a true threat outside of the protection of the First Amendment such that Defendant communicated a threat within the meaning of N.C. Gen. Stat. § 14-277.1(a). Accordingly, the trial court abused its discretion in concluding that Defendant willfully violated the valid condition of his probation that he "commit no criminal offense." We thus reverse the trial court's judgment.

REVERSED.

Judges HAMPSON and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
JOSEPH STEPHEN JETT, Defendant

No. COA23-624

Filed 17 September 2025

1. Appeal and Error—Rule 2—unpreserved argument—inconsistent verdicts in criminal case—no merit shown

In an appeal from criminal convictions arising from a break-in during which two firearms were taken from a modular home, the Court of Appeals declined to address defendant's argument that the jury's guilty verdict for possession of a firearm by a felon was inconsistent with the verdicts of not guilty for felony larceny and felony possession of stolen goods. Firstly, defendant failed to raise this argument before the trial court and, therefore, it was not preserved for appellate review. Secondly, the appellate court declined to invoke Appellate Rule 2 to review the unpreserved argument because it lacked merit. Specifically, defendant assumed that the jury must have simultaneously found that he possessed one of the missing firearms for purposes of one charge but did not possess that same firearm for purposes of the other two charges; however, all three charged offenses had distinct elements with possession being only one element that the jury had to consider when determining defendant's guilt of each offense. Thus, the verdicts were neither mutually exclusive nor legally contradictory.

2. Evidence—lay witness opinion—law enforcement officer—DNA match—describing investigative process—invited error—plain error analysis

In a criminal prosecution for charges arising from a break-in, where a forensic scientist testified as an expert witness that defendant's DNA profile "could not be excluded as a contributor" to a DNA sample taken from a cigarette butt found at the crime scene, the trial court did not commit plain error by allowing a law enforcement officer to testify about receiving a crime lab report showing a DNA "match" between the cigarette butt and a buccal swab taken from defendant. The officer's testimony was not offered to establish an exact match between the DNA samples; rather, the officer was merely describing his investigative process and recounting facts that lead him to identify defendant as a suspect. Moreover, because defense counsel elicited part of the challenged testimony while cross-examining the officer, defendant at least partially invited the alleged error and therefore waived appellate review—including plain error review—of that issue. At any rate, defendant could not satisfy the prejudice prong of plain error review where similar evidence was admitted at other points of the trial.

3. Damages and Remedies—restitution—home break-in—sufficiency of evidence supporting amount

In a criminal prosecution for charges arising from a break-in, during which the modular home that had been broken into was partially damaged in the process, the amount of restitution ordered by the trial court was supported by sufficient competent evidence consisting of receipts for the replacement of the back door to the home, as well as testimony from the homeowner regarding the total cost of installing a new door, seal, trim, and lock. Importantly, the homeowner's testimony describing damages and necessary repairs caused by defendant's actions was sufficient to show that the restitution amount was based on something more than guess or conjecture.

4. Attorney Fees—awarded in criminal case—no civil judgment entered—unreviewable on appeal

In an appeal from criminal convictions arising from a break-in, the Court of Appeals lacked jurisdiction to review defendant's argument challenging the award of attorney fees to his court-appointed counsel where the trial court never entered a civil judgment for costs or attorneys fees in accordance with Civil Procedure Rule 58, rendering the attorney fee award ineffective.

Appeal by defendant from judgments entered 13 January 2023 by Judge J. Carlton Cole in Chowan County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Alesia Mikhaulauna Balshakova, for the State-appellee.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

GORE, Judge.

Defendant Joseph Stephen Jett was indicted for possession of a firearm by a felon, felony breaking and/or entering, felony larceny after breaking and/or entering, felony possession of stolen goods/property, and attaining the status of an habitual felon. All charges arose from conduct on 28 June 2017.

The matter came on for trial at the 11 January 2023 session of Chowan County superior court. The jury found defendant guilty of possession of a firearm by a felon, felony breaking and/or entering, and attaining habitual felon status. He was acquitted of the remaining charges.

The trial court entered two judgments. In 19CRS50234, defendant was sentenced to 110 to 144 months' imprisonment. In 19CRS50233, he was sentenced to 97 to 129 months' imprisonment, to run consecutively. Defendant received 44 days' credit for pretrial confinement. He gave oral notice of appeal in open court the same day.

Defendant presents four issues on appeal: (i) whether the guilty verdict for possession of a firearm by felon is inconsistent with the not guilty verdicts for felony larceny and felony possession of stolen goods; (ii) whether the trial court plainly erred by admitting a law enforcement officer's testimony regarding DNA evidence; (iii) whether the restitution order of $1,118 is supported by competent evidence; and (iv) whether the trial court erred by ordering payment of attorney's fees without first providing defendant notice and opportunity to be heard.

Upon review, we discern no error in the trial court's judgment.

I.

On 28 June 2017, Jeffery Roberts[1] locked the door to his modular home before leaving for a doctor's appointment. When he returned, he found the back door hanging by a single hinge and standing open. Inside, the home was in disarray, with cabinets open and belongings scattered about. Roberts soon discovered that two firearms were missing: a pump-action Harrington & Richardson shotgun and a shortened, chrome-plated shotgun with a black lacquer stock. No other property was taken.

Roberts contacted law enforcement, and officers arrived at his home. While they examined the scene, Roberts went to his Florida room and noticed a "brown-filter" cigarette butt freshly burned into his carpet. He informed officers it was not his, explaining that he smoked only "white-filter" cigarettes and kept ashtrays throughout the house.

1. A pseudonym.

Roberts further stated that no one had smoked in his home for at least a week before the break-in.

Deputy Jeff Edwards of the Chowan County Sheriff's Office was the second officer to arrive after Roberts reported the break-in. Edwards spoke with Roberts' neighbor, Vincent Harris,[2] regarding a possible suspect description. Harris stated that while working in his shop behind his house with the garage door open, he looked toward Roberts's home and briefly observed a person standing at the back door. He described the individual as a white male of average build, wearing summer clothing and possibly a baseball cap. Harris stated he was not concerned at the time because he assumed the person might have been visiting Roberts.

Deputy Edwards examined the back door and observed damage consistent with the use of a prying tool, though no such tool was found at the scene. He obtained detailed descriptions of the two missing firearms: an operable Harrington & Richardson shotgun with a listed serial number, and a second shotgun described as decorative. Edwards also observed a cigarette butt on the floor near the sliding glass door at the rear of the home, which he collected and submitted to the North Carolina State Crime Lab for forensic testing. Based on his investigation, Edwards concluded that defendant had broken into Roberts's home.

At the time the cigarette butt was submitted, Sarah Ellis was employed as a Forensic Scientist III in the forensic biology section of the North Carolina State Crime Lab. She performed two analyses on the cigarette butt. The first yielded a DNA profile, which she determined was consistent with a mixture of two contributors, including at least one male. Ellis later received a buccal swab containing defendant's DNA and compared it to the profile obtained from the cigarette butt. She concluded that defendant's DNA profile could not be excluded as a contributor to the mixture.

Chief Deputy John McArthur became involved in the investigation on 2 April 2019, after the North Carolina State Crime Lab notified the Chowan County Sheriff's Office of a DNA "hit" on evidence previously submitted. He testified that the lab reported the DNA profile from the cigarette butt was consistent with defendant's DNA profile contained in the system. Based on this information, McArthur obtained probable cause and arrested defendant.

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2. A pseudonym.

At trial, Roberts testified that he did not know defendant. He recalled that four or five years before the break-in, he permitted defendant's mother and several of her children to stay at his home for a few days because they were experiencing difficulties. After three or four days, Roberts contacted the sheriff's department to have them removed. He was unable to recognize or identify defendant in the courtroom.

Defendant told Chief Deputy McArthur that in 2009 or 2010, he, his mother, brother, and two sisters stayed at Roberts's house after being forced to leave their father's home. Defendant also stated that on 28 June 2017, the date of the break-in, he was incarcerated. McArthur confirmed, however, that defendant was not in prison at that time. McArthur further testified that Harris's description of the individual seen at Roberts's door was consistent with defendant's appearance.

Roberts provided police with the serial number of the first shotgun, which was later recovered at Chauncey's Pawnshop in Elizabeth City. The second shotgun, a relic from the 1960s dating to Roberts's employment with the Portsmouth Police Department, was never recovered. Chief Deputy McArthur testified that, based on his investigation, defendant did not personally pawn the Harrington & Richardson shotgun but was connected to the individual who did.

Lisa Smith, Assistant Clerk of superior court for Chowan County, testified that defendant's record included the following convictions: felony breaking and/or entering on 28 February 2011; felony possession with intent to sell and deliver a Schedule I controlled substance and maintaining a vehicle or dwelling for controlled substances on 17 June 2015; and felony larceny on 7 June 2016.

Roberts testified that he suffered financial loss as a result of the break-in. Unable to afford replacement, he attempted to repair the damaged carpet himself. The State introduced receipts showing $266.89 for replacement of Roberts's door, though Roberts estimated the total cost of installing a new door, seal, trim, and lock at approximately $1,200 to $1,400.

With respect to the value of the second, unrecovered decorative shotgun, Roberts testified:

> Sentimental value and everything like that, it's unbelievable. I mean, I got a lot of labor and stuff into it getting it chrome-plated and black-lacquered stock and that type of stuff, 2 or $3,000 probably it would bring at a swap meet or something like that.

At the close of the State's evidence, defendant moved to dismiss. He presented no evidence and renewed the motion, which the trial court denied. The court instructed the jury on five substantive offenses: felonious breaking and entering, felonious larceny, possession of stolen property, felonious larceny of a firearm, and possession of a firearm by a felon.

The jury found defendant guilty of felonious breaking and entering and possession of a firearm by a felon, and not guilty of felonious larceny and possession of stolen goods. In a subsequent phase, the jury determined that defendant had attained habitual felon status. At sentencing, the State requested restitution in the amount of $1,118.

II.

A.

[1] We first consider whether the trial court erred by accepting allegedly inconsistent verdicts. Defendant argues that the guilty verdict for possession of a firearm by a felon is mutually exclusive with the not guilty verdicts for felony larceny and felony possession of stolen goods. He contends the jury necessarily found he possessed a Harrington & Richardson single-shot shotgun for purposes of the possession charge, while simultaneously finding he did not possess the same firearm for purposes of larceny and possession of stolen goods.

Defendant did not preserve this issue for appellate review, and his argument is without merit.

Defendant concedes he did not raise any alleged inconsistency in the verdicts at trial and did not object to the trial court's entry of judgment on the guilty verdict. He has therefore failed to preserve this issue for appellate review. *See* N.C. R. App. P. 10(a)(1). Defendant nevertheless asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits. "Rule 2 specifically gives either court of the appellate division the discretion to suspend or vary the requirements or provisions of any of the rules in order to prevent manifest injustice to a party, or to expedite decision in the public interest." *State v. Hart*, 361 N.C. 309, 315 (2007) (cleaned up) (quoting N.C. R. App. P. 2).

The State contends this issue should be reviewed for plain error. We disagree. "Plain error analysis applies to evidentiary matters and jury instructions[,]" *State v. Garcell*, 363 N.C. 10, 35 (2009), and may be raised on appeal "when the judicial action questioned is specifically and distinctly contended to amount to plain error[,]" N.C. R. App. P. 10(a)(4).

Defendant neither alleges plain error nor presents this issue as involving evidence or jury instructions. *Id.*

Thus, we must determine whether this Court should invoke Rule 2 to reach the merits of defendant's argument on appeal. As our Supreme Court has repeatedly stated:

> Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*. This assessment—whether a particular case is one of the rare instances appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected. In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.

State v. Campbell, 369 N.C. 599, 603 (2017) (cleaned up).

Defendant relies on *State v. Hames*, 170 N.C. App. 312, 321 (2005), where this Court invoked Rule 2 to review legally contradictory verdicts because the defendant's arguments were "persuasive" under the circumstances of that case. Here, defendant contends he "was sentenced to a minimum of nine years imprisonment on the basis of what appears to be legally contradictory and mutually exclusive verdicts, warranting invocation of Rule 2 to prevent manifest injustice."

However, defendant cannot rely on precedent alone to justify Rule 2 review. *Campbell*, 369 N.C. at 603. Nor has he shown that this case presents the type of rare or exceptional circumstances that would warrant suspension of our appellate rules. *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135 (2009). "In the absence of any argument specific to the facts of this case, . . . [defendant] is no different from countless other defendants whose . . . arguments were barred on direct appeal because they were not preserved for appellate review." *State v. Bishop*, 255 N.C. App. 767, 769–70 (2017).

In considering whether to invoke Rule 2, we have independently reviewed defendant's argument and conclude it lacks merit. *See State v. Draughon*, 281 N.C. App. 573, 586 (2022) (addressing the merits of a claim of "legally inconsistent and mutually exclusive verdicts" to determine whether Rule 2 review was warranted).

"In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory." *State v. Mumford*, 364 N.C. 394, 398 (2010) (citation omitted). "Verdicts are inconsistent when they reflect some logical flaw or compromise in the jury's reasoning." *State v. Watson*, 277 N.C. App. 314, 324 (2021). "[W]hen there is sufficient evidence to support a verdict, mere inconsistency will not invalidate the verdict." *Mumford*, 364 N.C. at 398 (citation and quotation marks omitted). On the other hand, verdicts are *legally* contradictory (i.e., mutually exclusive) and subject to reversal, "when a verdict purports to establish that the defendant is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* at 400 (cleaned up).

The jury found defendant guilty of possession of a firearm by a felon, felonious breaking or entering, and attaining habitual felon status. It found him not guilty of felony larceny and felony possession of stolen goods. Defendant contends these verdicts "were legally contradictory and mutually exclusive" because, in his view, he "was simultaneously found to have possessed and also to not have possessed the exact same H&R shotgun." In support, he cites *State v. Hames*, 170 N.C. App. 312 (2005); *State v. Yang*, 174 N.C. App. 755 (2005); and *State v. Hall*, 104 N.C. App. 375 (1991). These cases, however, are distinguishable, and defendant's reliance on them is misplaced.

First, *Hames*, *Yang*, and *Hall* each involved claims of logically inconsistent guilty verdicts. *See Hames*, 170 N.C. App. at 322–23; *Yang*, 174 N.C. App. at 761–62; *Hall*, 104 N.C. App. at 386. Here, by contrast, defendant challenges the consistency of one guilty verdict with two not guilty verdicts.

Second, defendant suggests the jury was required to reach uniform verdicts on all charges because each offense turned on the element of possession. But possession was only one element the jury had to consider in determining guilt of possession of a firearm by a felon, felony larceny, or felony possession of stolen goods. It is well established that "[i]f two statutes are violated even by a single act and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *State v. Brake*, 279 N.C. App. 416, 422 (2021) (quotation marks omitted) (quoting *State* *v. Birckhead*, 256 N.C. 494, 500 (1962)). Thus, the verdicts here "are not mutually exclusive because guilt of one criminal act does not exclude guilt of the other." *Brake*, 279 N.C. App. at 425. Each of the charged offenses has distinct elements, and "jury verdicts may be influenced by many factors." *Id.* at 424 (citing *Mumford*, 364 N.C. at 399).

Finally, it is unclear what evidence supports defendant's theory that the jury's verdicts were logically contradictory based solely on a single element. A jury's "verdict may have been the result of compromise, or of a mistake on the part of the jury, . . . [b]ut verdicts cannot be upset by speculation or inquiry into such matters." *Mumford*, 364 N.C. at 399. Moreover, "if the inconsistent verdicts are determined to be merely inconsistent, rather than mutually exclusive, then the verdicts will stand so long as the State has presented substantial evidence as to each element of the charges." *State v. Blackmon*, 208 N.C. App. 397, 403 (2010) (citing *Mumford*, 364 N.C. at 398).

In sum, defendant did not preserve his claim of inconsistent verdicts for appellate review. Having independently considered the argument, we conclude it lacks merit. We therefore decline to invoke Rule 2, and discern no error.

B.

[2] Defendant next contends the trial court plainly erred by permitting Chief Deputy John McArthur to give improper lay opinion testimony that "the DNA on the cigarette butt matched the DNA belonging to [defendant]," whereas the State's qualified forensic expert, Sarah Ellis, testified only that defendant "could not be excluded as a contributor to the mixture." Defendant argues Ellis, as the State's qualified expert, had already presented the relevant scientific evidence, and McArthur was in no better position than the jury to interpret it.

Upon review, we conclude defendant mischaracterizes McArthur's testimony and, in part, invited the error of which he now complains. Moreover, even assuming *arguendo* that portions of McArthur's testimony were erroneously admitted, defendant has not shown prejudice. We therefore discern no plain error.

Defendant concedes he did not object to Chief Deputy McArthur's testimony at trial. On appeal, he contends the admission of McArthur's lay opinion testimony constitutes plain error. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citing *State v. Odom*, 307 N.C. 655, 660 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). Because plain error review is applied "cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up).

"It is the province of the jury to decide what inferences and conclusions are warranted by the testimony." *State v. Peterson*, 225 N.C. 540, 543 (1945), *overruled on other grounds by State v. Hill*, 236 N.C. 704 (1953). Lay witness testimony is generally inadmissible "because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494 (1980). Under our Rules of Evidence:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2023). "The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *Fulton*, 299 N.C. at 494 (quotation marks and citation omitted). Relatedly, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 (2023).

The State's forensic biology expert, Sarah Ellis, testified that she conducted several analyses of the cigarette butt recovered from the victim's residence. The first test produced a DNA profile, which she described as "consistent with a mixture of two contributors." After receiving a buccal swab from defendant, Ellis compared defendant's DNA with the profile obtained from the cigarette butt. In her expert opinion, "the DNA profile obtained from [defendant] could not be excluded as a contributor to the mixture." When asked to clarify whether she observed similarities between defendant's DNA profile and the cigarette butt profile, Ellis reiterated that she could not exclude defendant as a contributor.

Chief Deputy McArthur testified immediately following the State's forensic expert, and the State elicited the following testimony on direct examination, without objection by defense counsel:

[PROSECUTOR]: Were you involved in the breaking and entering investigation regarding [the victim's] house?

[MCARTHUR]: I was. Not initially at the time of the report, but I got it some time later.

[PROSECUTOR]: And . . . [w]hen did you first get involved?

[MCARTHUR]: I first got involved on [2 April 2019]. The sheriff's office received notification from the State Bureau of Investigation Crime Lab about a CODIS hit, a DNA hit, on a piece of — on an item of evidence that we submitted to their lab. That item of evidence was tested for DNA, and they were able to determine an individual that possessed that DNA.

[PROSECUTOR]: And that item that you said you submitted, what was that item?

[MCARTHUR]: That was the cigarette butt.

[PROSECUTOR]: Is that the cigarette butt we were talking about yesterday from [the victim's] house?

[MCARTHUR]: The cigarette butt that had been recovered from his carpet by the Florida room door.

[PROSECUTOR]: And who, if anyone, did the State Crime Lab indicate would have a similar DNA?

[MCARTHUR]: Joseph Stephen Jett [(defendant)].

[PROSECUTOR]: So once you received that information from the State Crime Lab, what did you do?

[MCARTHUR]: Per their protocol, there has to be — so they had a DNA sample to compare to the DNA that was on the cigarette butt, but for checks and balances, basically, they require every new case to submit a buccal swab from the suspect that we — that is indicated based on the DNA hit, so that is what I did. I went and I located the whereabouts of [defendant], and I went to where he was, and I tried to get his buccal swab DNA.

[PROSECUTOR]: Were you able to meet with the defendant?

[MCARTHUR]: I was able to meet with the defendant, yes.

[PROSECUTOR]: And when you met with the defendant, did you advise him of his rights?

[MCARTHUR]: Yes, ma'am. . . . I read [defendant] his rights and had him sign his Miranda waiver so I knew he understood what those rights were.

[PROSECUTOR]: And by signing that waiver, he acknowledged his rights. Did he also agree to speak with you?

[MCARTHUR]: Yes, ma'am.

. . .

[PROSECUTOR]: When you asked specifically about the cigarette, what did the defendant say?

[MCARTHUR]: [He] [s]aid that there was no way that his DNA could be on the cigarette butt that we recovered, and I said, well, why would he feel that way? If the DNA is there, it's there. And he said, well, he wouldn't be that dumb to leave something like that behind.

. . .

[PROSECUTOR]: You stated that you went to meet with the defendant to ultimately get a buccal swab. Were you able to get that buccal swab?

[MCARTHUR]: Yes, ma'am.

[PROSECUTOR]: And what did you do with that buccal swab once you obtained it?

[MCARTHUR]: I packaged it in a[n] . . . evidence bag, and I submitted that to the State Bureau of Investigation Crime Lab for them to compare to the standard and the DNA swab — I'm sorry — the DNA that they were able to recover off the cigarette butt.

. . .

[PROSECUTOR]: And you stated you sent the buccal swab off to the State Crime Lab, correct?

[MCARTHUR]: Yes, ma'am.

[PROSECUTOR]: Did you receive results back where the State Crime Lab compared the buccal swab to the DNA from the cigarette?

> [MCARTHUR]: I did.
>
> [PROSECUTOR]: And just so we don't have to go into that detail again, was that all explained by Ms. Ellis yesterday?
>
> [MCARTHUR]: Yes.
>
> . . .
>
> [PROSECUTOR]: Chief Deputy, did you continue your investigation after you received those items back from the State Crime Lab?
>
> [MCARTHUR]: Yes, I did.
>
> [PROSECUTOR]: And what, if anything, did you do next?
>
> [MCARTHUR]: Once I received those items back and the report from the crime lab saying that the swabbing that I did matched the DNA that was on the cigarette butt that was found at [the victim's] house, I, in that moment, had probable cause to believe that [defendant] was the one that broke into that house and that he stole the items within, and then therefore he was in possession of the firearm as a convicted felon, and I presented that information to the District Attorney's Office and charges were brought.

Defendant asserts "the State offered Deputy Chief McArthur to provide his own lay opinion regarding the link between the DNA profiles."

> However, it is apparent from the context of [Chief Deputy McArthur's] testimony on direct examination that he was simply explaining the steps he took in furtherance of his ongoing investigation. His statements . . . served merely to provide context and explain his rationale for continuing to subject [d]efendant to additional scrutiny.
>
> Such testimony does not run afoul of Rule 701. Indeed, we have expressly held that testimony elicited to assist the jury in understanding a law enforcement officer's investigative process is admissible under Rule 701.

State v. Daughtridge, 248 N.C. App. 707, 716 (2016) (cleaned up). Defendant correctly observes that the jury was entitled to determine whether an "inability to exclude" carried the same weight as a direct DNA match. *See State v. White*, 154 N.C. App. 598, 605 (2002) ("The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer].").

However, Chief Deputy McArthur did not purport to assess the accuracy of Ellis's expert opinion. Nor was his testimony offered to establish an exact match between defendant's DNA profile and the profile obtained from the cigarette butt. Viewed in context, McArthur described his investigative process and recounted facts that led him to (1) identify defendant as a suspect and (2) obtain a buccal swab from defendant.

Additionally, we note that defendant is challenging some testimony his own trial counsel elicited from Chief Deputy McArthur on cross-examination:

> [DEFENSE COUNSEL]: Chief Deputy McArthur, you mentioned at some point in 2018, that you received a CODIS hit and that — tell me again what that alerted you of, the CODIS hit?
>
> . . .
>
> [MCARTHUR]: The CODIS hit alerted me that the state lab had an item of our evidence that they had been able to determine whose DNA was on that cigarette butt.
>
> . . .
>
> [MCARTHUR]: My understanding of the CODIS hit was that an item of evidence that we had submitted after this breaking and entering, the item being the cigarette butt, had been sent to the state lab. They had tested that item of evidence, that cigarette butt for DNA. They had located DNA on the cigarette butt and compared it to DNA standards, I think is the word, but the DNA profiles, that's a better way, the DNA profiles that were already in their system. When they did that comparison of the DNA that they found on the cigarette butt and the DNA that was already in their system, they determined that the DNA on the cigarette butt matched the DNA belonging to Joseph Stephen Jett.
>
> [DEFENSE COUNSEL]: Okay. And once you received that, was it also your understanding that there was a mixture DNA profile, correct?
>
> [MCARTHUR]: That's what the report notified me of, yes.
>
> [DEFENSE COUNSEL]: And at that particular point in time, because we know we had the analyst come yesterday, did you understand what the mixture DNA was?

[PROSECUTOR]: Objection, Judge. This is outside the scope of this witness'[s] testimony being that the lab analyst yesterday would be able to testify regarding any type of what mixture means, et cetera. This witness is an investigator not to interpret DNA.

[DEFENSE COUNSEL]: Judge, I'm only asking if he knows what is in the report, the words in the report to which he made a conclusion meant.

THE COURT: Objection overruled. Let him testify if he knows.

[DEFENSE COUNSEL]: Yes. If he does, Judge. If he doesn't, that's fine.

[MCARTHUR]: I'm attempting to locate that copy of the report from the lab so I can make sure that —

[DEFENSE COUNSEL]: Take your time, sir.

[MCARTHUR]: — I'm seeing what you're seeing. Thank you. Okay. Can you ask me that again to make sure I answer your question.

[DEFENSE COUNSEL]: No problem. So where it says notification of CODIS hit, do you see where that's bolded?

. . .

[DEFENSE COUNSEL]: So what I'm showing to you is laboratory report notification of CODIS hit.

[MCARTHUR]: That report looks very similar to what I'm looking at, but it's not the exact form. I —

[PROSECUTOR]: Objection, Judge. This report is not in evidence yet, and if this witness is testifying to the contents of the report, then it's not admissible at this moment.

THE COURT: If it's not in evidence, objection sustained.

[PROSECUTOR]: Thank you, Judge.

. . .

[DEFENSE COUNSEL]: You previously testified about a CODIS hit, correct?

[MCARTHUR]: Yes.

[DEFENSE COUNSEL]: Okay. Was your understanding of the CODIS hit that there was a mixture of DNA on it?

[PROSECUTOR]: Objection, Judge. Same objection.

THE COURT: Objection sustained.

We need not decide whether the State's objection to defense counsel's line of questioning precipitated the alleged error. Defendant at least partially invited the error he now asserts, and "[a] defendant is not prejudiced by . . . error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2023). A defendant who invites error waives appellate review of that error—including plain error—and statements elicited by the defense on cross-examination, even if erroneous, constitute invited error. *State v. Crane*, 269 N.C. App. 341, 343 (2020). In any event, assuming *arguendo* the admission of McArthur's testimony was erroneous, defendant has not shown prejudice because substantially similar evidence was admitted elsewhere. *State v. Delau*, 381 N.C. 226, 237 (2022). "[I]f certain evidence is admitted without objection, the admission of subsequent evidence of similar character cannot be objectionable." *Id.*

Even assuming the trial court erred in admitting the challenged testimony, "it cannot be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *Odom*, 307 N.C. at 660. Defendant therefore has not met his burden of showing that admission of Chief Deputy McArthur's testimony constituted plain error.

C.

[3] In his third argument, defendant challenges the trial court's restitution order of $1,118, contending it was not supported by sufficient evidence. He notes the only receipts introduced by the State reflected costs of $266.89 and argues the restitution award should be limited to that amount. We disagree.

"Whether the amount of restitution recommended by the trial court is supported by competent evidence adduced at trial or sentencing is reviewed by an appellate court *de novo*." *State v. Hillard*, 258 N.C. App. 94, 97 (2018) (citing *State v. Wilson*, 340 N.C. 720, 726–27 (1995)). "While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *State v. Shelton*, 167 N.C. App. 225, 233 (2004) (citation omitted).

North Carolina law provides that "[t]he amount of restitution must be limited to that supported by the record . . . ." N.C.G.S. § 15A-1340.36(a)

(2023). Consistent with this mandate, "[a] trial court's judgment ordering restitution must be supported by evidence adduced at trial or at sentencing." *Mumford*, 364 N.C at 403. In determining the amount, the court must consider, in cases involving loss or destruction of property, "[t]he value of the property on the date of the damage, loss, or destruction." N.C.G.S. § 15A-1340.35(a)(2)(b)(1)–(2) (2023). The award "does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal." *Hillard*, 258 N.C. App. at 97 (citations omitted).

Our review of the record reveals *specific* evidence supporting the restitution award. The State introduced receipts showing $266.89 for replacement of Roberts's door, and Roberts testified that the total cost of installing a new door, seal, trim, and lock was between $1,200 and $1,400. The restitution amount of $1,118 did not include costs related to carpet repair or the unrecovered decorative shotgun. These facts are analogous to *State v. Hardy*, 242 N.C. App. 146, 160 (2015), where this Court held that a victim's testimony describing damages and necessary repairs caused by the defendant's actions was sufficient to show that restitution was "based on something more than a guess or conjecture . . . ."

We also note the trial court did not require the State to corroborate Roberts's testimony with additional documentation, nor was it required to do so. *See* N.C.G.S. § 15A-1340.35(b) (2023) (emphasis added) ("The court *may require* that the victim or the victim's estate provide admissible evidence that documents the costs claimed by the victim . . . ." Likewise, in *State v. Stephenson*, 267 N.C. App. 475, 483 (2019), this Court observed that although the State introduced a truck repair estimate, it "could have relied solely on . . . [the victim's] testimony to support the restitution amount." Thus, consistent with § 15A-1340.35(b) and *Stephenson*, the trial court had discretion to require additional evidence but was also permitted to rely solely on specific witness testimony to determine the proper restitution amount. Accordingly, the restitution order was supported by competent evidence.

D.

[4] In his final argument, defendant contends the trial court erred by awarding his court-appointed attorney a fee "for an unknown number of hours and an unknown monetary amount without first giving [defendant] notice and opportunity to be heard." Upon review, we conclude this Court lacks jurisdiction to address the merits of this issue.

"We have previously determined that judgments entered against a defendant for attorney fees and appointment fees constitute civil judgments, which require a defendant to comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure when appealing from those judgments." *State v. Patterson*, 269 N.C. App. 640, 642 (2020) (citation omitted). Rule 58 of our North Carolina Rules of Civil Procedure applies to all civil judgments entered in superior court, and states "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." § 1A-1, Rule 58 (2023). Here, defendant did not file written notice of appeal from a civil judgment awarding attorney's fees because no such judgment exists.

The transcript indicates the following colloquy occurred during the sentencing phase between the trial court, defendant's counsel, and defendant:

> THE COURT: Costs and attorney's fees to be a civil judgment. Do you have your hours?
>
> [DEFENSE COUNSEL]: I will submit them, Judge.
>
> THE COURT: Will there be anything further from the State?
>
> [PROSECUTOR]: Nothing further from the State, Judge.
>
> THE COURT: [Defense counsel] . . . , do you care to be heard?
>
> [DEFENSE COUNSEL]: Just two things, Judge. Notice of appeal and notice to withdraw.
>
> THE COURT: [Defendant] . . . , do you have any questions about this sentence?
>
> THE DEFENDANT: No, sir.

The Judgments and Commitments in 19CRS50234 and 19CRS50233 state that the trial court "further recommends" court costs "be a civil judgment." The court, however, did not enter a final civil judgment for costs or attorney's fees in accordance with Rule 58 of the Rules of Civil Procedure. Where a judgment or order is not entered in compliance with Rule 58, it is not effective. *Onslow Cnty. v. Moore*, 129 N.C. App. 376, 388–89 (1998). Both this Court and our Supreme Court have held that, absent entry of a judgment or order, an appellate court lacks jurisdiction to review the matter. *State v. Jacobs*, 361 N.C. 565, 566 (2007) (concluding that because "there is no civil judgment in the record ordering defendant to pay attorney fees, th[is] Court . . . had no subject matter jurisdiction on this issue").

In sum, we lack jurisdiction to review a non-existent civil judgment for attorney's fees. *See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147–48 (1972) (explaining that without entry of a final judgment or order, the judgment or order has no effect and is not reviewable on appeal). We therefore dismiss this issue without prejudice.

III.

Defendant did not preserve his challenge to allegedly inconsistent verdicts, and we decline to invoke Rule 2 to reach the merits. His claim of plain error regarding the admission of Chief Deputy McArthur's testimony is without merit. The restitution order was supported by competent evidence, and we lack jurisdiction to review defendant's challenge to attorney's fees in the absence of a civil judgment.

NO ERROR.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
BRIAN LEE THOMAS, Defendant

No. COA24-770

Filed 17 September 2025

Criminal Law—defenses—defense of habitation—jury instruction—assault with a deadly weapon with intent to kill inflicting serious injury—new trial

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury—brought after defendant shot a neighbor in a dispute over an access easement to defendant's residence—the trial court plainly erred in giving a jury instruction regarding the defense of habitation that failed to explain that the presumption that defendant was in "reasonable fear of imminent death or serious bodily harm to himself or others" (as provided in N.C.G.S. § 14-51.2(b)) could be rebutted only by evidence of the specific circumstances listed in N.C.G.S. § 14-51(c). While the instruction given tracked the language of N.C.P.I. Crim. 308.80 (stating that the presumption applied "absent evidence to the contrary"), that pattern jury instruction had not been updated to conform with precedent and permitted the jury to find defendant's use of force "excessive"—thus denying him the benefit of the defense—even if the jury also found defendant was a lawful occupant of a home who used defensive force against a person who was unlawfully and forcefully entering or attempting to enter the home.

Appeal by defendant from judgment entered 23 February 2024 by Judge Alyson A. Grine in Superior Court, Surry County. Heard in the Court of Appeals 22 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Sage A. Boyd, for the State.

Phoebe W. Dee for defendant-appellant.

STROUD, Judge.

Brian Lee Thomas, Defendant, appeals from judgment entered following a jury's verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues the trial court plainly erred in giving the jury deficient instructions as to both self-defense and the defense of habitation. As to the defense of habitation instruction, the jury instructions failed to explain the presumption Defendant was in "reasonable fear of imminent death or serious bodily harm to himself or others" under North Carolina General Statute Section 14-51.2(b) could be rebutted only by the circumstances listed in North Carolina General Statute Section 14-51(c). Also, the jury instructions did not clearly limit the application of the jury instruction on use of excessive force to the common law defenses of self-defense and lawful defense of a family member, while the State explicitly argued that the limitation as to excessive force did apply to defense of habitation just as it would for the common law defenses. This error rose to the level of plain error as the jury instructions as given had a probable impact on the jury's findings on the applicability of defense of habitation. We vacate Defendant's conviction and remand for a new trial.

I. Factual and Procedural Background

The evidence at trial tended to show on 9 April 2020, Surry County Sheriff's Office received a call reporting a "shooting . . . between neighbors[ ]" at 907 Oak Grove Church Road in Mount Airy, North Carolina.

The neighbors were Defendant and Burt Wallace. Defendant's property and home, owned by his mother-in-law, was landlocked and only accessible through a dirt driveway easement granted by another neighbor, Harlan Stone. At some point in time, before the shooting on 9 April 2020, Wallace bought a small section of land from Stone including the gravel road easement used by Defendant and his family to access their property. After Wallace's purchase of this parcel, Defendant and Wallace began having disputes about Defendant's use of the gravel driveway and the actual location of the easement.

In November of 2019, "after a couple of disagreements about the easement[,]" Wallace "erected a barrier" at the base of the gravel driveway. According to Defendant, this barrier prevented him and his family from driving their vehicles up to their house. Defendant and members of his family had to park their vehicles on the side of the road, using "4-wheelers" to access their home. Defendant also had a gate at the top of the gravel driveway that served as a barrier to his property.

Because the issue presented in this case arises from the jury instructions about self-defense and defense of habitation, we are required to consider the evidence in the light most favorable to Defendant. *See State v. Coley*, 375 N.C. 156, 162, 846 S.E.2d 455, 459 (2020). We recognize the State's evidence regarding the shooting disputes many of Defendant's claims, but due to the issue on appeal, we will summarize the evidence presented at trial based upon Defendant's evidence. Defendant testified there were many instances when Wallace was "drunk" and would "cuss [at] anybody that walked down the [gravel] driveway[,]" telling them to "get the f[ ] off [his] property." Defendant testified he knew Wallace carried a gun on his person "the whole time I've lived there," "[p]retty much every day" and Defendant "never unblocked the barricade" himself because he "was too scared of what [Wallace] might do." Twice, during the time from November 2019 to April 2020, Defendant's stepmother needed to be transported by ambulance, and on one of these incidents, the ambulance was "not able to get up the driveway at all" because "they were being threatened if they moved anything in the easement to get up the driveway." Defendant called the sheriff's office "[m]ultiple" times, "probably 20, 30 times" regarding the disputes over the driveway.

Defendant also testified that on 20 February 2020 he filed a complaint against Wallace and his wife at that time, Danielle, seeking a protective order under North Carolina General Statute Section 50C. On 20 February 2020, the District Court of Surry County entered a temporary no-contact *ex parte* order for "Stalking or Nonconsensual Sexual Conduct" against Wallace. The District Court found the *ex parte* order should be entered based on "[e]scalating behaviors. Criminal charges pending from incident in December, 2019." The specific unlawful conduct of Wallace noted by the order was that "[Wallace] has blocked [the] driveway and threatened [Defendant] on [19 February 2020]."[1] Defendant filed this complaint after Wallace's dogs "attacked" Defendant's "8-year-old daughter's service dog[.]" After this incident, Defendant had to leave to go to work, but when he returned home that evening about 6:30 or 7:00 p.m., "[Wallace] and his son [were] sitting in the foldup chairs as if they were waiting for [Defendant]."

As Defendant tried to pull his truck into the driveway, Wallace tried to open the truck's door. "[Wallace] was cussing, telling [Defendant] to get out, calling [Defendant] very negative things." Once Defendant got past the gate, "[Wallace] was standing at [the] gate yelling at [Defendant], telling [him] to get out and settle this like a man." Defendant testified Wallace "kept calling [him] a p—y." Wallace then began to walk away, and at first Defendant thought he was leaving, but he was "actually calling his son up there for something. And he c[a]me back as his son was approaching and held onto the gate and stepped in, and told [Defendant] to get out of [his] truck. That he was going to f—ing kill [Defendant]." Defendant's wife was on the porch during the time Wallace was threatening Defendant, and Defendant "called the [s]heriff's [office.]" The sheriff's office responded, and "they had people talking to [Wallace], trying to calm him down." The return hearing on the *ex parte* 50C order was initially set for 29 February 2020, but Defendant testified that they "never even got to go to court over it."

Defendant also testified about an incident on 7 April 2020, when Danielle was "blowing rocks all over the cars when [Defendant and his family] were trying to get out with [their] kids." Again, Defendant or his father called the sheriff's office because they "had the 50C in order."

On the evening of 9 April 2020, Defendant arrived home after doing some grocery shopping and going "out to eat." Wallace and Danielle were outside doing some yard work. After bringing the groceries inside, Defendant began driving up and down the driveway easement on a 4-wheeler he was working on because he was planning to sell it. Defendant's wife, father, and stepmother were also outside during this time, initially positioned at the top of the driveway near their house. Defendant testified that Wallace came out of the garage and started

1. A similar 50C order was entered against Danielle finding that "[Danielle] threatened to hurt [Defendant's] family."

"videotaping [him] riding back and forth right there in the easement." Defendant told Danielle "there was a 50C in place, and it was [their] easement." Defendant kept riding the 4-wheeler, thinking "they were just going to videotape and, you know, maybe cuss or go back home." He didn't think it was "going to be like a big deal."

The last time Defendant rode through the gate and onto the easement, Wallace "reached out for [him]" and Defendant thought "this is getting a little bit more serious." Defendant testified he stopped the 4-wheeler and got off because he didn't "want, you know, any more trouble." At this time, Danielle was "closer to [Defendant's] stepmom and wife, closer to [Defendant's] property," and she was "yelling, saying stuff" to Defendant's family. Nothing physical had happened yet, but Defendant and his family had their cell phones out since the sheriff's office had told them "most of the time" nothing could be done because they couldn't prove anything happened. The sheriff's office told them "that anytime . . . [they] were going to do anything in the easement, that [they] needed to videotape [it], period." At the time of this incident, Defendant's wife, Defendant's stepmother, and Wallace were all videotaping.

Danielle then started the "physical confrontation" when she "attack[ed] [Defendant's] wife and step-mom." His stepmother's wrist was "broken in two spots" during this assault. At trial, Defendant presented evidence of his stepmother's x-rays and orthopedic medical treatment of the wrist fracture. This confrontation happened about six or seven feet from where Defendant was. Defendant's father tried to break up the fight between Danielle and Defendant's stepmother. Wallace "was coming back up the driveway." Defendant testified Wallace dropped his cell phone "and c[a]me at [him], telling [him] to pull [his] gun, pull [his] gun. [Wallace] reached back in his pocket. [Defendant] thought he was reaching for a gun." Defendant "begged [Wallace] to stop three times. He didn't."

Defendant testified that he "was so scared at the moment because [his] kids, all three of them, [were] standing right behind me . . . [Defendant] pulled the trigger twice." At that time, he "figured [Wallace] was going to pull a gun and shoot [him] and possibly could get [his] kids that [were] standing behind [him]." Defendant testified Wallace was on Defendant's property when he shot him. Wallace took some steps backward before he fell to the ground. Defendant or his wife immediately called 911. Defendant testified at the time he shot Wallace, he believed that Wallace was armed. He later learned that Wallace was unarmed. Both shots stuck Wallace: one bullet entered his neck and exited through his shoulder, and the other went through his arm and "lodged" itself in his back.

At trial, Wallace's testimony confirmed that he and Danielle were out in the yard while Defendant was driving the 4-wheeler up and down the driveway and that he was videorecording this before the shooting, although he claimed Defendant had threatened him and he was trying to assist Danielle. He testified he could see that Defendant was armed with a "pistol on his hip[,]" and he believed Defendant was driving up and down the driveway as an attempt to "aggravate" him. Wallace walked "[r]ight up the left side of [the] driveway[,]" pulled out his cellphone, and began videorecording Defendant. Defendant continued riding his 4-wheeler up and down the driveway. Wallace testified there were times when the "4-wheeler c[a]me close to striking" him. Danielle moved "closer to [Defendant's] property" and began exchanging "unpleasant" words with Defendant's wife and stepmother. This exchange of "unpleasant" words eventually turned into a physical fight. Wallace testified Defendant's wife and stepmother were "on top of" Danielle, and that he began running up the driveway towards the altercation to "pull them off of her." At this point, Defendant had "returned [the] 4-wheeler to [his] property" and was standing "right inside of [Defendant's property] gate." Wallace confirmed he began running up the driveway towards the altercation and towards Defendant's property. Wallace testified he could not remember everything Defendant said to him as he was running up the driveway, but did remember Defendant saying he was "going to shoot" him.

The first Surry County Sheriff's deputy arrived shortly after the shooting and Defendant handed over his firearm. Defendant went to the sheriff's office that night for an interview and gave a statement. Defendant returned to the sheriff's office again on 22 April 2020 to take part in another interview. Following the second interview, the Surry County Grand Jury indicted Defendant on 18 May 2020 for assault with a deadly weapon with the intent to kill inflicting serious injury. Defendant's case came for trial during the 19 February 2024 Superior Court, Surry County criminal session.

During a preliminary charge conference on 22 February 2024, the trial court and attorneys discussed proposed jury instructions. The State requested the definition of intent to be included, and Defendant requested an instruction on the lesser-included charge of assault with a deadly weapon inflicting serious injury. The trial court and the attorneys also acknowledged the need for further discussions relating to the defensive force instructions.

During the final charge conference, after the close of all evidence, the State agreed as to Defendant's requested instruction for defense of self and defense of a family member, but objected to Defendant's request to include a defense of habitation instruction. After some discussion, the trial court agreed with Defendant's argument the evidence of Wallace's forceful entry into the curtilage of the home would support a defense of habitation instruction. The jury was instructed on defense of self, defense of a family member, and defense of habitation.

After deliberation, the jury returned a verdict of guilty as to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced Defendant as a prior record level I offender to a presumptive range of 58-82 months imprisonment. Defendant gave oral notice of appeal following sentencing on 23 February 2024.

II. Analysis

Defendant presents four arguments on appeal. First, he argues the trial court committed plain error in providing the defense of habitation instruction because it "failed to provide [him] with the immunity to which he was entitled[ ]" under North Carolina General Statute Section 14-51.2(c) (2023). Second, he argues the trial court plainly erred "by providing a self-defense instruction tracking the common law language rather than the statutory language of [North Carolina General Statute Section] 14-51.3." Third, Defendant argues in the alternative that he received ineffective assistance of counsel when his attorney "stipulated to the admission of a recorded interview wherein [Defendant] made statements that were both irrelevant . . . and extremely damaging to his defense." Finally, he argues "[c]umulative [e]rror" deprived him of a fair trial. Defendant's arguments regarding the jury instructions are dispositive so we will not address his additional arguments.

A. Standard of Review

At trial, Defendant did not object to the proposed instructions relating to self-defense and defense of habitation. Without an objection at trial, this Court reviews only for plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). Defendant has clearly and distinctly argued plain error on appeal.

The State contends we should not consider Defendant's arguments regarding the jury instructions even for plain error because any error in the jury instructions is invited error. The trial court granted all Defendant's requests for instructions on self-defense, defense of habitation, and defense of a family member. The State objected to the instruction on defense of habitation, and Defendant had failed to give the State notice specifically of the defense of habitation, but the trial court gave this instruction over the State's objection. The State also notes the trial court granted Defendant's requests for specific changes to the wording of some instructions and ultimately, the trial court gave the instructions as requested and revised by Defendant.

Where the defendant has requested the jury instructions and consented to the instructions as given, "[t]he defendant will not be heard to complain on appeal[.]" *State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996) (quotation marks omitted) ("Although [the] defendant labels th[e] assignment of error as 'plain error,' it is actually invited error because, as the transcript reveals, [the] defendant consented to the manner in which the trial court gave the instructions to the jury. The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant. If there was error in the charge, it was invited error and we shall not review it." (citations and quotation marks omitted)).

Defendant responds we should not consider the error in the instructions as invited error because at the time of the trial, neither counsel nor the trial court had the benefit of our Supreme Court's recent case addressing jury instructions on defense of habitation, *State v. Phillips*, 386 N.C. 513, 905 S.E.2d 23 (2024). The opinion in *Phillips* was filed on 23 August 2024, about six months after Defendant's trial. In *Phillips*, our Supreme Court provided an extensive review of "the castle doctrine's evolution in North Carolina[,]" *id.* at 517, 905 S.E.2d at 27 (capitalization altered), and the "operation of Section 14-51.2[,]" *id.* at 521, 905 S.E.2d at 30 (capitalization altered). Our Supreme Court noted that

> the castle doctrine statute, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," is a clear and concise statutory enactment that has yet to be fully interpreted by this Court. Because this case squarely raises questions of the statute's meaning, we take this opportunity to clarify the scope of the castle doctrine in North Carolina.

Id. (citation omitted).

Because counsel and the trial court did not have the benefit of our Supreme Court's first detailed guidance on jury instructions on defense of habitation at the time of the trial,[2] we will not treat this issue as invited error. And although *Phillips* did not address the separate instruction on self-defense specifically, Defendant's arguments here are all based upon the application of North Carolina General Statute Section 14-51.2 in the factual context of this case. As noted by Justice Barringer's concurring opinion in *State v. Copley*, at the time of Defendant's trial, "the various self-defense provisions" in the pattern jury instructions "continue[d] to leave jurors confused on what they may or may not consider in self-defense and castle doctrine circumstances." 386 N.C. 111, 126-27, 900 S.E.2d 904, 915 (2024) (Barringer, J., concurring). We will therefore consider Defendant's arguments of plain error in the jury instructions.

Our Supreme Court recently

> reiterated the standard for plain error review, clarifying that for a defendant to succeed, three things must be shown:
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> > 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.

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2. We also note that Justice Barringer noted concern regarding these particular pattern jury instructions in *State v. Copley*, 386 N.C. 111, 126-27, 900 S.E.2d 904, 915 (2024) (Barringer, J., concurring) ("I write this concurrence to 'call out for clarity' in the pattern jury instructions associated with the various self-defense provisions that are now in place. *State v. Hicks*, 385 N.C. 52, 66-67, 891 S.E.2d 235 (2023) (Dietz, J., concurring). Roughly one year ago, this Court was faced with issues of the interplay between the castle doctrine and N.C.G.S. § 14-51.4. *See Hicks*, 385 N.C. 52, 891 S.E.2d 235. It appears that the state of the pattern jury instructions is still not improved as of today.

It is greatly concerning that our State's pattern jury instructions continue to leave jurors confused on what they may or may not consider in self-defense and castle doctrine circumstances. Further development of a strong underpinning to our State's castle doctrine jurisprudence requires clear jury instructions. Instructions that provide jurors with a clear decision tree are critical for a jury to be able to accurately determine whether the presumptions provided by [Section] 14-51.2 have been rebutted. A jury must intentionally and methodically determine whether that presumption has been rebutted.").

State v. Gillard, 386 N.C. 797, 820, 909 S.E.2d 226, 250-51 (2024) (citation and quotation marks omitted).

B. Defense of Habitation

Defendant argues

> [b]ecause the jury instructions allowed the jury to determine that the presumption that [Defendant] was in reasonable fear of death or serious bodily injury could be rebutted on bases other than those enumerated in [North Carolina General Statute Section] 14-51.2(c), the instruction, as given, failed to provide [Defendant] with the immunity to which he was entitled.

The jury was instructed on defense of habitation based on Pattern Jury Instruction for Criminal Cases No. 308.80, specifically as follows:

> If the defendant assaulted the victim to prevent a forcible entry into the defendant's place of residence, or to terminate the intruder's unlawful entry, the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's place of residence.
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> The defendant was justified in using deadly force if:
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> (1) such force was being used to prevent a forcible entry or terminate the intruder's unlawful entry into the defendant's place of residence;
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> (2) the defendant reasonably believed that the intruder would kill or inflict serious bodily harm to the defendant or others in the place of residence; and
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> (3) the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry or terminate the intruder's unlawful entry into the defendant's place of residence.
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> A lawful occupant within a place of residence does not have a duty to retreat from an intruder in these circumstances. Furthermore, a person who unlawfully and by force enters or attempts to enter a person's place of residence is presumed to be doing so with the intent to commit an unlawful act involving force or violence. In addition,

> *absent evidence to the contrary*, the lawful occupant of a place of residence is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
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> > (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a place of residence; and
> >
> > (2) The person who used defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(Emphasis added.)

Defendant argues "[t]he jury was instructed that if it agreed . . . the castle doctrine applied to [Defendant]'s use of defensive force," then there was an automatic presumption Defendant "was in 'reasonable fear of imminent death or serious bodily harm to himself' or others" under North Carolina General Statute Section 14-51.2(b). *See* N.C. Gen. Stat. § 14-51.2(b) (2023). However, Defendant contends the jury was further instructed this "presumption could be rebutted by the State's evidence[,]" but the instructions provided "no limits . . . on the manner in which the presumption could be rebutted or the evidence the jury could properly consider while making this determination." Although the presumption is rebuttable, in *Phillips*, the Supreme Court held that this presumption can "*only* be rebutted" by the criteria provided in Section 14-51.2(c). *Phillips*, 386 NC at 525, 905 S.E.2d at 31 (emphasis added).

In *Phillips*, the Supreme Court held the jury instructions were in error because they would have allowed the jury to consider the defendant's use of force to be "excessive," even if the jury also found that the defendant was a lawful occupant of the home who used defensive force against a person who "was in the process of unlawfully and forcefully entering" the home. *Id.* at 516, 905 S.E.2d at 27. According to *Phillips*, the presumption can be rebutted o*nly* by the circumstances listed in North Carolina General Statute Section 14-51(c):

> The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

> (1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.
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> (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.
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> (3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.
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> (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
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> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

N.C. Gen. Stat. § 14-51(c) (2023).

The State does not contend that any of these listed circumstances exist in this case. There is no dispute that Defendant was a "lawful occupant" of his own property. Therefore, applying this statute to the evidence presented in this case, if the jury determined that Wallace was "in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered" the curtilage of Defendant's home, and Defendant "knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred" under Section

14-51.2(b), then Defendant "is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another." N.C. Gen. Stat. § 14-51.2(b).

Defendant notes that the verdict sheet "did not require the jury to indicate what their findings of fact were regarding whether (1) [Defendant] was in the curtilage of his home, (2) whether Wallace was in the process of entering or (3) had entered the curtilage of [Defendant]'s home." The jury instructions also failed to make the distinction in the applicable law for self-defense depending on what the jury believed about the exact circumstances of the shooting. These facts are determinative because the jury was instructed on both common law self-defense (and lawful defense of a family member) as well as defense of habitation. Based on the evidence here, the defenses available to Defendant would depend on the jury's determination as to these disputed facts. If the jury determined Wallace had unlawfully or forcefully entered the curtilage of Defendant's home, and Defendant was aware of this entry, then the jury would be required to consider the presumption afforded by the defense of habitation instruction. But Defendant still had a potential defense, even if the jury determined Wallace had *not* unlawfully or forcefully entered the curtilage of Defendant's property, since the jury could still consider the potential defenses of self-defense and defense of a family member. Of course, the bar is higher for Defendant on those defenses, as there is no statutory presumption Defendant had a "reasonable fear of imminent death or serious bodily harm to himself or herself or another," and common-law self-defense is limited by the requirement that Defendant not use "excessive force." *Id.*; *see also Phillips*, 386 N.C. at 520, 905 S.E.2d at 29.

Although the trial court did not give an instruction as to "excessive force" within the "defense of habitation" instruction as in *Phillips*, the instruction was given twice without clarifying that it would not apply in the context of the defense of habitation instruction. The trial court gave the instruction on excessive force twice, with the instruction on self-defense and with the instruction on lawful defense of a family member. Immediately before the instruction on the defense of habitation as quoted above, the instruction on excessive force[3] stated:

3. The trial court gave the instruction regarding use of excessive force based on N.C.P.I. –Criminal 308.45 (self-defense) and N.C.P.I. – Criminal 308.50 (defense of family member) twice, with the instructions on self-defense and lawful defense of a family member. The instruction on excessive force was essentially the same as the instruction in *Phillips*. *See* 386 N.C. at 515-16, 905 S.E.2d at 26.

> A defendant does not have the right to use excessive force. The [D]efendant had the right to use only such force as reasonably appeared necessary to the [D]efendant under the circumstances to protect a family member from death or great bodily harm. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the [D]efendant and the family member as compared to the victim, the fierceness of the assault, if any, upon the family member, whether the victim had a weapon in the victim's possession, and the course of conduct of the parties. You, the jury, determine the reasonableness of the [D]efendant's belief from the circumstances appearing to the [D]efendant at that time.

In reviewing the jury instructions, we must consider them in context and in their entirety to determine if they are in error:

> We review the jury instructions in their entirety to determine if the jury may have been misled or misinformed about the applicable law:
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>> The charge of the court must be read *as a whole*, *in the same connected way that the judge is supposed to have intended it and the jury to have considered it.* It will be construed contextually, and isolated portions will not be held prejudicial when the charge as whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Wilson, 297 N.C. App. 535, 538-39, 910 S.E.2d 407, 410 (2024) (emphasis added) (citation and quotation marks omitted). Here, reviewing the jury instructions "in the same connected way that the judge" gave them and the jury would have considered them in their entirety, the instructions are misleading. *Id.* (citation and quotation marks omitted). Even though the instructions regarding use of excessive force are correct in the context of the instructions on self-defense and defense of a family member, the instructions did not clarify that the instructions on "excessive force" would *not* apply in the jury's consideration of the defense of habitation.

Defendant also argues that this error in the instructions was "greatly compounded by the prosecutor's repeated calls for the jury to dismiss

[Defendant]'s defense if the jury concluded that his force was excessive." The State argued to the jury that for Defendant to be entitled to use any type of self-defense, whether defense of self, defense of others, or defense of habitation, the jury had to conclude that Defendant reasonably believed "this assault was necessary to protect him from imminent death or great bodily harm." In closing, the State argued "[a] defendant is never entitled to use excessive force. The law allows only such force as reasonably appeared necessary to protect from death or great bodily harm." Under the jury instructions as given, the State's argument was logical, but the instructions had conflated the requirements for common-law defense of self or defense of a family member – which may occur anywhere – and the statutory defense of habitation – which may occur only in or related to the forceful entry of the Defendant's "home, motor vehicle, or workplace" in the circumstances stated in Section 14-51.2. N.C. Gen. Stat. § 14-51.2(b).

Our State's statutes and precedents have long recognized an individual's right to protect and defend themselves, their family, and their home and curtilage. "The principle that *one does not have to retreat* regardless of the nature of the assault upon him *when he is in his own home* and acting *in defense of himself, his family and his habitation* is firmly embedded in our law." *State v. McCombs*, 297 N.C. 151, 156, 253 S.E.2d 906, 910 (1979) (emphasis added) (citations omitted).

Our Supreme Court recently noted the critical importance of the jury instructions in a case addressing a similar assertion of self-defense and defense of habitation in *State v. Coley*:

> The jury charge is one of the most critical parts of a criminal trial. It is the duty of the trial court to instruct on all substantial features of a case raised by the evidence. This Court has consistently held that where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant. In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we take the evidence as true and consider it in the light most favorable to the defendant. Once a showing is made that the defendant has presented such competent evidence, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence. A

> defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.

375 N.C. at 159, 846 S.E.2d at 457-58 (emphasis original) (citations, brackets, and quotation marks omitted).

The State notes that language of the jury instructions tracks the North Carolina School of Government's Pattern Jury Instruction for Defense of Habitation, *see* N.C.P.I. Crim. 308.80, but unfortunately, the version of the pattern instruction used in this case – the same version noted as "confus[ing]" by Justice Barringer in the concurring opinion in *Copley*, *see* 386 N.C. at 126-27, 900 S.E.2d at 915 (Barringer, J., concurring) – did not have the benefit of updates based on either *Copley* or *Phillips*. In fact, the State's primary argument is the instructions followed N.C.P.I. Crim. 308.80. Although pattern jury instructions are normally the "preferred method of jury instruction[,]" *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994) (citation omitted), they have "neither the force nor effect of the law" and they "may be erroneous and need alteration to conform with the law." *State v. Ferebee*, 137 N.C. App. 710, 714-15, 529 S.E.2d 686, 689 (2000) ("Although the given charge tracked applicable pattern jury instructions, pattern instructions, which have neither the force nor effect of the law, may be erroneous and need alteration to conform with the law." (citations omitted)). The pattern jury instructions at issue in this case are in "need of alternation to conform with the law" based upon our Supreme Court's guidance. *Id.*

The State's secondary argument is the trial court erred because the jury instruction on defense of habitation should not have been given at all, noting that the instruction was given over the State's objection. But the State's argument is based upon a view of the evidence in the light most favorable to the State, not the proper standard, which is to view the evidence in the light most favorable to the Defendant. *See Coley*, 375 N.C. at 162, 846 S.E.2d at 459 ("Viewing the evidence at trial in the light most favorable to [the] defendant in order to determine whether the evidence was competent and sufficient to support the jury instructions on self-defense and the defense of habitation, we conclude that [the] defendant was entitled to both instructions."). The State is correct there was conflicting evidence regarding whether Wallace had actually entered Defendant's property and how far onto Defendant's property Wallace had progressed, if he had entered at all, at the time he was shot. The evidence in the light most favorable to the State would indicate that Wallace was not even on Defendant's property when he was shot and he was moving in that direction only to assist Danielle, who was engaged in a fight with Defendant's wife and stepmother. But for purposes of instructions on a defense, including defense of habitation, the trial court must view the evidence in the light most favorable to the defendant. *See id.* The evidence in the light most favorable to Defendant required the trial court to give the instruction on the statutory defense of habitation. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that [the] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence." (citations omitted)). Thus, the only question for us on appeal is whether the instruction as given constituted plain error.

Defendant argues including language of "absent evidence to the contrary[,]" without also including the statutory bases in which the presumption could be rebutted, this instruction "erroneous[ly] . . . allowed the jury to consider any evidence it deemed appropriate to the determination of whether the presumption had been rebutted." In the context of this case and based on the instructions given, the jury could believe that "evidence to the contrary" would be evidence that Defendant used excessive force, but this is not a proper consideration under the defense of habitation.

In *Phillips*, our Supreme Court explained how the castle doctrine operates, the presumption North Carolina General Statute Section 14-51.2 provides, and the limited instances in which the presumption can be rebutted:

> The statute operates as follows. First, any person who "unlawfully and by force enters or attempts to enter" a home is "presumed to be doing so with the intent to commit an unlawful act involving force or violence," and this presumption is non-rebuttable. Second, a lawful occupant of a home who knows or has reason to believe such unlawful entry or attempted entry occurred or is occurring, and who uses force against the intruder that is intended or likely to cause death or serious bodily injury, is "presumed to have held a reasonable fear of imminent death or serious bodily harm" and has no duty to retreat from the intruder. Finally, if a lawful occupant of a home uses deadly force as permitted by this statute, he or she is "immune from civil or criminal liability for the use of such force," subject only to a narrow exception not relevant here.
>
> However, the statutory presumption of a lawful occupant's reasonable fear of death or serious bodily harm is

> "rebuttable and does not apply in any of the circumstances" listed in [North Carolina General Statute Section 14-51.2] subsection (c). The plain language of subsection (c), and the legislature's clear intent to significantly broaden castle doctrine protections by repealing section 14-51.1 and enacting section 14-51.2, compels the conclusion that the presumption of reasonable fear may be rebutted *only by the circumstances set forth in subsection (c)*.

386 N.C. at 524, 905 S.E.2d at 31 (emphasis added) (citations, ellipses, and original emphasis omitted). Under North Carolina General Statute Section 14-51.2, the presumption of "reasonable fear of imminent death or serious bodily harm" may only be rebutted by evidence of any of the five circumstances outlined in North Carolina General Statute Section 14-51(c). *See* N.C. Gen. Stat. § 14-51.2(c).

Defendant relies on *Phillips* in arguing because the jury was not presented with the statutorily outlined circumstances for rebutting the presumption, and allowed to "consider any evidence it deemed appropriate" in "determin[ing] . . . whether the presumption had been rebutted[,]" Defendant was erroneously denied protections afforded under the castle doctrine. In *Phillips*, our Supreme Court explained "if the presumption could be rebutted by other circumstances[ ]" not outlined by Section 14-51.2(c), "such as the victim's relative size or strength," then the presumption and statutorily granted protections "would serve no purpose." 386 N.C. at 524, 905 S.E.2d at 31 ("There is no meaningful difference between a jury considering whether a victim's inferior strength rebutted the presumption of the defendant's reasonable fear under the castle doctrine statute and a jury considering whether a victim's inferior strength undercut the defendant's attempt to demonstrate his or her reasonable fear under the general self-defense statute."). Similar to the case at bar, the trial court's jury instruction in *Phillips* also included the language of "[a]bsent evidence to the contrary[.]" *Id.* at 516, 905 S.E.2d at 26 (brackets omitted).

Although the instruction on excessive force in *Phillips* was included within the instruction on defense of habitation and here it was technically included within the instructions on self-defense and defense of family, it was given immediately before the instruction on defense of habitation and the instructions here do not clearly limit the application of the instruction on "excessive force" to a particular defense. Particularly where the jury was instructed that it may consider "evidence to the contrary" without any limitation within the instruction of defense of habitation, and the State's repeated argument that "excessive force" *should* be considered for all the defenses, there is no practical difference between the instruction in *Phillips* and in this case. Specifically, the jury in *Phillips* was instructed that

> the defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances you find to have existed from the evidence including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; and whether the victim possessed a weapon.

Id. at 516, 905 S.E.2d at 27. The trial court's instruction in *Phillips* was "contrary to law[ ]" because it added the qualifier that "even if the castle doctrine applied, 'the defendant d[id] not have the right to use excessive force' and that 'the defendant had the right to use only such force as reasonably appeared necessary to protect the defendant from death or great bodily harm.' " *Id.* at 526, 905 S.E.2d at 32 (brackets and ellipses omitted). Our Supreme Court determined and concluded this instruction was erroneous as it did not comply with the "clear and unambiguous" language of North Carolina General Statute Section 14-51.2. *Id.* at 526-27, 905 S.E.2d at 32-33 (citation and quotation marks omitted).

Here, excessive force was addressed within the trial court's instructions on self-defense and defense of a family member, not *technically* within the paragraph including the defense of habitation instruction, but that subtle difference would not be discernable to the members of the jury listening to the instructions. The jury was not lawfully and fully instructed the requirements of the defenses of self-defense, defense of family, and defense of habitation were different in regard to how "excessive force" is considered, and the State argued that there was no difference. Therefore, Defendant has demonstrated that the trial court's instructions as to defense of habitation were in error.

C. Plain Error

Since we have determined that the trial court's jury instructions on defense of habitation were erroneous, we must next consider whether Defendant has established this error rises to the level of plain error. Our Supreme Court has recently clarified the application of the plain error rule where there has been an error as to admission of evidence or in the jury instructions but the defendant did not preserve his arguments by objection at trial:

> This preservation rule serves crucial functions in our justice system. First, and most obviously, it promotes the efficiency of a justice system with limited resources. When a party alerts the trial court of a potential error, the court can correct it. For example, with an evidentiary objection, the trial court can refuse to admit the evidence or offer a limiting instruction to the jury. If the error is not identified until after the trial, the only option is to set aside the judgment and order a new trial. This is an incredibly costly alternative.
>
> Second, this preservation rule reduces the risk of "gamesmanship" in the appellate process. As noted above, when there is a reversible evidentiary or instructional error in a criminal trial, the remedy on appeal is to vacate the judgment and remand for a new trial. A preservation requirement prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work.
>
> Despite the important functions of this preservation rule, its application can be harsh. There will be times when the lack of preservation means the trial court committed a reversible error but the aggrieved party cannot raise that error on appeal.

State v. Reber, 386 N.C. 153, 157, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

We first note Defendant did "alert[ ] the trial court" by requesting an instruction on defense of habitation, while the State argued this instruction should not be given. *Id.* The transcript shows that the trial court carefully considered how to instruct on this issue, and the proper instruction, in light of the confusion arising from the interaction of the common law with Section 14-51.2, was by no means obvious at that time. Defendant notes that

> the interpretation of our defense of habitation statutes is evolving. In 2019, John Rubin, long recognized as the School of Government academic with the soundest grasp of North Carolina's self defense rules, wrote
>
> I must admit that I did not fully appreciate the significance of the [2011] statutes when they appeared. I saw them as revising, supplementing and clarifying the common law.

> Now that we have almost twenty reported appellate decisions that have grappled with the statutes (as well as some unpublished opinions), I can see I had it wrong.

During several discussions with counsel throughout the trial regarding the jury instructions, the trial court carefully considered some of the publications of Mr. Rubin and the School of Government as to how to instruct the jury on this issue. And after the trial, our Supreme Court provided a clear analysis of these issues in *State v. Phillips*, but the trial court did not have the benefit of that guidance at the time of the trial. This is not a situation where the parties have engaged in gamesmanship or assented to an erroneous instruction where the law was already clear. Concerns of efficiency and judicial economy cannot overcome clear legal error in this type of situation.

For the same reasons, this case does not present the appearance of "gamesmanship" in the appellate process. *See id.* An evidentiary error, as considered in *Reber*, is a bit different from an instruction error such as the one in this case. As noted above, this instruction on defense of habitation was given in the context of evolving and unclear law which was later clarified by *State v. Phillips*. *Reber* then states the standard for plain error review:

> Plain error exists for the rare cases where the harshness of this preservation rule vastly outweighs its benefits. When we first recognized the rule in *Odom*, we emphasized that it was available only in extraordinary cases. We explained that it should be applied cautiously and only in the exceptional case, that it is reserved for grave error which amounts to a denial of a fundamental right of the accused, and that it focuses on error that has resulted in a miscarriage of justice or the denial of a fair trial.

Id. at 158, 900 S.E.2d at 786 (citations and quotation marks omitted).

Defendant contends the trial court was

> participating in the ongoing process, evolving in our trial courts, of learning how best to instruct our juries on the nuances of the application of statutory self-defense in North Carolina. Ultimately, justice requires everyone tried for the same crime be treated in the same way and have the same law apply.

(Quotation marks omitted.) Defendant argues he should not be "penalized because his case was tried before our trial courts understood the importance of supplementing the defensive force instructions with an explanation of the limited grounds upon which this presumption can be rebutted."

Our Supreme Court explained the fundamental importance of this jury instruction as well as the need for clarification of the law in *Phillips*:

> An individual has a fundamental right to defend his or her home from unlawful intrusion. This principle of personal liberty is grounded in natural law and English common law. Commonly known as the castle doctrine, the legislature codified and expanded the fundamental right of defense of habitation in Chapter 14 of the North Carolina General Statutes. Thus, the common law may aid our understanding, but statutes set the boundaries of the law in this area. This case presents us with the opportunity to clarify the castle doctrine as established by the legislature.

Phillips, 386 N.C. at 514, 905 S.E.2d at 25 (citations omitted).

Under the facts of this case, we conclude the error in the jury instructions did have a probable effect on the outcome of the trial and the error resulted in "the denial of a 'fair trial.' " *Reber*, 386 N.C. at 158, 900 S.E.2d at 786 (citation omitted). Defendant argues the error in the instruction on defense of habitation was a "fundamental error" because jury instructions are fundamental to a fair trial. Our Supreme Court has recognized that where there is "highly conflicting evidence" along with an "instructional error," this error may have "tilted the scales" to cause the jury to reach its guilty verdict. *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (quotation marks omitted). Here, there was conflicting evidence as to whether Wallace had forcibly entered Defendant's property and the jury was not properly instructed on a statutory presumption which might have given Defendant immunity "from civil or criminal liability for the use of such force." N.C. Gen. Stat. § 14-51.2(e).

Defendant argues the erroneous instruction "had a probable impact" on the outcome of the trial. He contends:

> [b]ecause the verdict forms didn't require the jury to make specific findings of fact, for instance whether [Defendant] was located in the curtilage of his home or whether Wallace was in the process of forcefully entering the curtilage of [Defendant]'s home, it is possible that at least some of the jurors believed that [Defendant] was entitled to the castle doctrine protections but also believed that the

> State's evidence was sufficient to rebut the presumption that he was in reasonable fear of death or grave injury. In other words, since the jury instructions allowed the jury to find the State had rebutted that presumption on impermissible grounds, it allowed them to convict on a theory contrary to law. These were the central issues at trial and the jury being incorrectly instructed on how to apply the castle doctrine is likely to have impacted the verdict.

Again, the State relies mainly on its argument it had objected to Defendant's request to have the defense of habitation instructed to the jury. The State argued to the trial court that the pattern jury instruction "reads if the assault occurred in [D]efendant's home, place or residence, workplace or motor vehicle, use the defense of habitation instruction 308.80. This did not occur within the home. It occurred on [the] property. But that's entirely different." The State argues "the only evidence to support that Wallace had stepped onto . . . Defendant's property c[a]me[ ] from . . . Defendant, who stated Wallace was one foot in the gate [of Defendant's property] when he shot Wallace." According to the State, because Defendant was not entitled to the defense of habitation instruction, "Defendant cannot show the requisite prejudice to establish plain error."

We have already rejected the State's argument regarding the need for the defense of habitation instruction. We view the evidence in the light most favorable to Defendant for purposes of the instructions on self-defense, including defense of habitation. The State also argues the instructions would not have changed the result because the evidence shows "Wallace was headed one of two places either he was headed toward his ex-wife who was located outside of Defendant's gate (on the easement) to break up the scuffle or he was headed toward Defendant. There is no evidence that Wallace headed toward Defendant's place of residence." But again, the State's argument presumes the jury instructions were correct and views the evidence in the light most favorable to the State to contend that Defendant has failed to demonstrate a fundamental error or a probable effect on the outcome of the trial.

The State makes assumptions about the facts the jury may not have made and based upon incorrect instructions. As Defendant notes, "[w]e don't know if the jury determined that Wallace was in the process of 'unlawfully and forcibly' entering the curtilage of [Defendant]'s home[,]" but "[w]e do know" the evidence does not support any of the circumstances rebutting the presumption listed in Section 14-51.2(c) applied to this case. *See* N.C. Gen. Stat. § 14.51.2(c). The State also repeatedly argued Defendant's use of "excessive force" would deprive him of self-defense immunity under any scenario. Since the jury instructions did not address the limited means of rebuttal, Defendant contends that

> we must [pre]sume that members of the jury concluded that [Defendant] was in the curtilage of his home and that Wallace was either in the process or had completed entry into [Defendant's] curtilage. Assuming that the jurors could have so found, we must further conclude that they believed the State had presented evidence that rebutted [Defendant]'s presumption of "reasonable fear of imminent death or serious bodily harm to himself" or others, as was argued for vigorously by the State in closing.

We therefore conclude the trial court erred by failing to address the specific instances stated in Section 14-51.2(c) which may rebut the presumption created by Section 14-51.2(b) and by failing to clearly limit the application of the instruction on "excessive force" solely to the defenses of common law self-defense and defense of family members, in accord with *Phillips*. This error rises to the level of plain error for the reasons addressed above. We vacate Defendant's conviction and remand for a new trial with proper instructions on self-defense, defense of a family member, and defense of habitation in compliance with Section 14-51.2 and *State v. Phillips*. *See id.*

Defendant has raised other issues on appeal, but as those issues may not recur in the trial on remand, we have not addressed those issues.

III. Conclusion

Based on plain error in the jury instructions, Defendant was prejudicially denied his right to self-defense of habitation. For the reasons discussed above, we vacate Defendant's conviction and remand for a new trial.

NEW TRIAL.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CARLTON DEPRECE THOMAS, DEFENDANT.

No. COA24-940

Filed 17 September 2025

1. Drugs—trafficking by possession—methamphetamine and opium—total weight of mixture 28 grams or more—any portion a controlled substance

In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court properly denied defendant's motions to dismiss the trafficking charges and to limit the trafficking charges to either those for methamphetamine or those for opium, rejecting defendant's position that the trafficking statute (N.C.G.S. § 90-95) required evidence of 28 grams or more of each controlled substance. While noting the harsh results imposed by the statute, the appellate court emphasized that the pertinent (and identical) plain language of the statute's subsections regarding methamphetamine and opium—"any mixture containing such substance" and "if the quantity of such substance or mixture"—required only that a mixture with a total weight of 28 grams or more contain some portion of each controlled substance.

2. Drugs—trafficking by possession—State's requested jury instruction—consistent with pattern jury instruction, statutory language, and case law

In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court properly gave the State's requested jury instructions. The appellate court rejected defendant's argument that the language "any mixture containing methamphetamine" and "any mixture containing opium" was confusing to the jury, noting that those phrases mirror the wording of the trafficking statute (N.C.G.S. § 90-95) and are consistent with the pertinent pattern jury instruction and case law; defendant's possession of 28 grams or more of a mixture containing some amount of methamphetamine and some amount of fentanyl supported his convictions on both trafficking charges.

3. Sentencing—trafficking controlled substances by possession—consecutive sentences—no double jeopardy violation

In a prosecution on charges including trafficking by possession of 28 grams or more of methamphetamine and trafficking by possession of 28 grams or more of opium—where a forensic analyst testified that a powder mixture (with a total weight over 28 grams) found in defendant's vehicle contained both methamphetamine and fentanyl (an opiate)—the trial court did not violate defendant's right against double jeopardy when it sentenced him to consecutive sentences on the trafficking convictions. The element in each offense that defendant possessed at least the threshold amount of 28 grams was satisfied by "any mixture containing such substance" (N.C.G.S. § 90-95). Accordingly, defendant's possession of at least 28 grams of a mixture containing some amount of methamphetamine and some amount of fentanyl supported his convictions on both trafficking charges and, in turn, the consecutive sentences imposed thereupon.

4. Judgments—verdict and judgment forms—naming opium rather than fentanyl—not fatally defective

In a prosecution on charges including trafficking by possession of methamphetamine and trafficking by possession of opium—arising from defendant's possession of a powder mixture containing both methamphetamine and fentanyl (an opiate)—the verdict and judgment forms were not fatally defective because they named one of the controlled substances possessed as opium rather than fentanyl. The indictments referenced fentanyl as a basis of the charges, a forensic analyst testified that the mixture contained fentanyl, and the trial court instructed the jury that fentanyl is opium; accordingly, the jury properly understood the evidence and based their verdicts on defendant's possession of fentanyl.

Appeal by Defendant from judgments entered 11 April 2024 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 27 August 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General M. Denise Stanford, for the State.

Dunn, Pittman, Skinner & Ashton, PLLC, by Rudolph A. Ashton, III, for Defendant.

GRIFFIN, Judge.

Defendant Carlton Deprece Thomas appeals from the trial court's judgments entered upon jury verdicts finding him guilty of multiple felonies. Defendant contends the trial court erred by denying his motions to dismiss and to limit the trafficking charges, by allowing the State's requested jury instructions, by sentencing him to consecutive sentences for both trafficking offenses, and by allowing fatally defective verdict and judgment forms in 23-CRS-1542. We disagree and hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

On 11 April 2024, a jury found Defendant guilty of numerous crimes related to a high speed chase and the possession of controlled substances. Evidence presented at trial tended to show the following:

On 10 January 2023, two North Carolina highway patrolmen were parked on the side of I-85 near the border of Mecklenburg County and Gaston County when Defendant passed them going 105 miles per hour in an orange Honda Civic. They immediately activated their lights and began pursuing Defendant. Defendant did not stop and led them on an approximately ten-mile, high-speed chase. After an additional patrolman deployed a tire deflation device, Defendant began throwing bags filled with a white powdery substance out of his vehicle. Highway patrol conducted a pit-maneuver on Defendant's vehicle, removed him from his vehicle, and arrested him.

Law enforcement noticed three areas on the road where the white powder landed but only recovered one intact bag still holding the substance. Inside of Defendant's vehicle, law enforcement found two large sandwich bags containing the white powdery substance. Law enforcement also found, in the ditch next to Defendant's car, a Yeti cooler containing multiple smaller baggies with the white powder inside of them and a digital scale.

Following his arrest and the search of the vehicle and surrounding areas, Defendant was indicted by a grand jury on sixteen different counts related to the chase. Defendant's matter came on for trial in Gaston County Superior Court on 8 April 2024. At trial, a forensic analyst working for the North Carolina State Crime Lab testified her analysis of the white substance contained in the large bag recovered from Defendant's car showed the mixture contained methamphetamine, fentanyl, and ANPP—a precursor to fentanyl.

At the close of the State's evidence, Defendant moved to dismiss the charges against him. The trial court denied his motion in part. Defendant later renewed his motion to dismiss following the close of evidence and also moved to limit the trafficking charges to either those for methamphetamine or for opium.[1] The trial court denied those motions as well.

The jury returned a verdict finding Defendant guilty of trafficking opium by possession of twenty-eight grams or more, trafficking opium by transportation of twenty-eight grams or more, trafficking methamphetamine by possession of twenty-eight grams or more but less than 200 grams, trafficking methamphetamine by transportation of twenty-eight grams or more but less than 200 grams, felony fleeing to elude arrest, driving while his license was revoked, speeding, and reckless driving.

Defendant timely appeals.

II. Analysis

Defendant argues the trial court erred by denying his motion to dismiss and motion to limit the trafficking charges against him. Defendant also argues the trial court erred in its instructions to the jury, erred during sentencing, and that there were fatal defects in the verdict and judgment forms. We disagree.

A. Motion to Dismiss

[1] Defendant argues the trial court erred by denying his motions to dismiss and to limit the trafficking charges to either methamphetamine or opium because only one bag of white powder was tested. Specifically, the bag held 36.37 grams of a mixture comprised of both methamphetamine and fentanyl which, Defendant contends, was insufficient to support convictions for both trafficking charges as it is mathematically impossible for the bag to have contained twenty-eight grams of each

1. We note here Defendant was convicted of two sets of charges. For both methamphetamine and for opium/opiates, Defendant was convicted for trafficking by possession and for trafficking by transportation. Because Defendant only disputes whether substantial evidence of the requisite weight of each substance was presented, we elect to use language only addressing the convictions for trafficking by possession, although our holding applies to both sets of convictions with equal weight. Because it is not at issue, we similarly elect to refer to the opium/opiate convictions as convictions for trafficking in opium for ease of reading.

substance independently. Therefore, Defendant argues, the State inherently could not have met its burden of providing substantial evidence necessary to support convictions for both trafficking in methamphetamine and trafficking in opium.

When ruling on a defendant's motion to dismiss, a trial court determines "only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (citation and internal marks omitted). Stated differently, " 'if there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury.' " *State v. Gillard*, 386 N.C. 797, 832, 909 S.E.2d 226, 258 (2024) (quoting *State v. Horner*, 248 N.C. 342, 344–45, 103 S.E.2d 694, 696 (1958)). When determining whether substantial evidence exists, the evidence must be " 'considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.' " *Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790 (quoting *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015)). We review de novo whether the State met its burden in presenting substantial evidence of each essential element of the crime charged. *Gillard*, 386 N.C. at 832, 909 S.E.2d at 258 (citation omitted).

Defendant was convicted under section 90-95 of the North Carolina General Statutes for trafficking in both methamphetamine and opium by possession. Sections 90-95(h)(3b) and 90-95(h)(4) use similar language and address methamphetamine and opium trafficking, respectively. Section 90-95(h)(3b) provides:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or any mixture containing such substance shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:
>
> a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon. . . .

N.C. Gen. Stat. § 90-95(h)(3b) (2023). Section 90-95(h)(4) similarly provides:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium, opiate, or opioid, or any salt, compound, derivative, or preparation

> of opium, opiate, or opioid (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium, opiate, opioid, or heroin" and if the quantity of such controlled substance or mixture involved:
>
> . . .
>
> c. Is 28 grams or more, such person shall be punished as a Class C felon. . . .

N.C. Gen. Stat. § 90-95(h)(4) (2023).

The essential elements of trafficking in methamphetamine are that a defendant " '(1) knowingly possessed . . . methamphetamine, and (2) that the amount possessed was greater than 28 grams.' " *State v. Christian*, 288 N.C. App. 50, 53, 884 S.E.2d 492, 497 (2023) (citing *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003)); N.C. Gen. Stat. § 90-95(h)(3b). Likewise, the essential elements of trafficking in opium are that a defendant (1) knowingly possessed opium, and (2) the amount possessed was greater than twenty-eight grams. N.C. Gen. Stat. § 90-95(h)(4). Section 90-95(h) "explicitly provides that a defendant's criminal liability shall be based on the total weight of the mixture involved[,]" *State v. Ellison*, 366 N.C. 439, 440, 738 S.E.2d 161, 162 (2013), by including the language "if the quantity of such controlled substance or mixture involved[,]" immediately before setting out progressively higher punishments as the weight of the substance or mixture increases, N.C. Gen. Stat. §§ 90-95(h)(3b)(a)-(c), (4)(a)-(c).

In *State v. Ellison*, our Supreme Court addressed whether section 90-95(h)(4) "applies in cases involving prescription pharmaceutical tablets and pills." 366 N.C. at 440, 738 S.E.2d at 162. There, the defendants were arrested and convicted for trafficking in twenty-eight grams or more of a mixture containing opium after they sold ninety dihydrocodeinone pills weighing 75.3 grams. *Id.* The Court held a mixture means " 'a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.' " *Id.* at 442, 738 S.E.2d at 163 (quoting *Chapman v. United States*, 500 U.S. 453, 462 (1991)). As stated above, the Court held section 90-95(h)(4) "explicitly provides that a defendant's criminal liability shall be based on the total weight of the mixture involved." *Id.* at 440, 738 S.E.2d at 162. We find this logic controlling with respect to section 90-95(h)(3b) as well.

"In resolving issues of statutory construction, we look first to the language of the statute itself." *State v. Applewhite*, 386 N.C. 431, 435, 904 S.E.2d 749, 754 (2024) (citation and internal marks omitted). Moreover, " '[i]t is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes.' " *Ellison*, 366 N.C. at 443, 738 S.E.2d at 164 (quoting *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986)). We "give every word of the statute effect, presuming that the legislature carefully chose each word used," *State v. Daw*, 386 N.C. 468, 479, 904 S.E.2d 765, 774 (2024) (citations and internal marks omitted), and, where the language is unambiguous, "it is understood in accordance with its plain meaning," *Applewhite*, 386 N.C. at 435, 904 S.E.2d at 754 (citations and internal marks omitted).

Here, our precedent in *Ellison*, read in conjunction with the plain meaning of section 90-95, mandates we affirm the trial court's order denying Defendant's motion to dismiss. The pertinent language of section 90-95 used in both trafficking offenses—"any mixture containing such substance" and "if the quantity of such substance or mixture involved"—encompasses Item 1a of the State's Motion Exhibit 1. N.C. Gen. Stat. §§ 90-95(h)(3b), (4). The powder, as testified to by the State's forensic analyst, was a *mixture containing both* controlled substances: methamphetamine and fentanyl. And, because "criminal liability shall be based on the total weight of the mixture involved[,]" *Ellison*, 366 N.C. at 440, 738 S.E.2d at 162, there was sufficient evidence of a mixture meeting the threshold weight, twenty-eight grams, containing both controlled substances. Therefore, the essential elements of trafficking in a mixture that contains either, or both, methamphetamine and fentanyl are that a defendant (1) knowingly possess methamphetamine or fentanyl, and (2) that the amount of the mixture possessed was greater than twenty-eight grams.

Defendant's argument would have us rewrite the statute. By arguing that only a fifty-six gram mixture would suffice to make him liable under both sections of the statute, Defendant requests we read into section 90-95 that "any mixture containing [twenty-eight grams of] such substance" and "the quantity of such substance or mixture [containing twenty-eight grams of such substance] involved." This we will not do. *See Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950) ("We have no power to add to or subtract from the language of the statute.").

We recognize the language chosen by the General Assembly leaves open the possibility that a criminal defendant may be held liable for trafficking where they have a single gram of a controlled substance mixed with twenty-seven grams of an uncontrolled substance. However, the plain language of the statute mandates the result here. Thus, even if Item 1a of the State's Motion Exhibit 1 only contained a single gram of methamphetamine and a single gram of fentanyl, it also contained thirty-four and thirty-seven hundredths of another substance bringing the total weight within the trafficking statute's requirements. "Though we are not unmindful of the harsh results imposed by the statute, to conclude otherwise would encroach upon the role of the legislative branch." *Ellison*, 366 N.C. at 444, 738 S.E.2d at 164 (citing N.C. Const. art. I, § 6).

In sum, the State presented sufficient evidence to warrant submission of both charges to the jury because Defendant's criminal liability was based on the total weight of the mixture involved, and the mixture met the threshold weight under both statutes.

B. Jury Instructions

[2] Defendant contends the trial court erred by allowing the State's requested jury instructions. Specifically, Defendant argues including the language "any mixture containing methamphetamine" and "any mixture containing opi[um]" as contained in section 90-95(h) was confusing to the jury. As this is essentially an attempt to take another bite of the apple above, we disagree.

We review a trial court's decision to give certain jury instructions de novo. *State v. Greenfield*, 375 N.C. 434, 440, 847 S.E.2d 749, 754 (2020).

Trial courts are "not required to follow any particular form" when giving jury instructions "as long as the instruction adequately explains each essential element of the offense." *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (citations and internals marks omitted). Moreover, North Carolina courts generally approve "of jury instructions that are consistent with the pattern instructions." *Id.* (citation and internal marks omitted).

Here, the requested instructions and use of the phrase "any mixture containing" methamphetamine or opium are consistent with our Supreme Court's holding in *Ellison*, mirror the statutory language in section 90-95(h), and are consistent with pattern jury instruction 260.17. Therefore, the instruction appropriately conveyed the essential elements of the crime for which the jury was being instructed upon. Defendant's argument is without merit. Accordingly, we hold the trial court did not err when instructing the jury on the essential elements of sections 90-95(h)(3b) and 90-95(h)(4).

C. Sentencing

[3] Defendant contends the trial court erred by sentencing him to consecutive sentences for both trafficking offenses, arguing that the error resulted in double jeopardy. Specifically, Defendant contends that "the amount of fentanyl and the amount of methamphetamine are essential elements to the charges due to their weight" and that "[b]ecause there is a 28 gram threshold for both methamphetamine and fentanyl in this case, it is impossible to determine to which drug it should apply."

As a preliminary matter, the parties contest whether this issue is properly preserved. However, both acknowledge that "[a] sentence that was 'unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law' may be reviewed by this Court even where no objection or motion was made before the trial court." *State v. Hernandez*, 293 N.C. App. 283, 300–01, 899 S.E.2d 899, 913 (2024) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2023)). Therefore, the issue is properly before us, and we review Defendant's allegation de novo. *Id.* (citing *State v. Wright*, 212 N.C. App. 640, 642, 711 S.E.2d 797, 799 (2011)).

"The Fifth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, protects against double jeopardy, which includes multiple punishments for the same offense." *State v. Hall*, 203 N.C. App. 712, 716–17, 692 S.E.2d 446, 450 (2010) (first citing *State v. Cameron*, 283 N.C. 191, 197–98, 195 S.E.2d 481, 485 (1973); and then citing U.S. Const. amend. V).

> The test of [double jeopardy, or] former jeopardy[,] is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. . . . [I]f proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained[.]

Id. at 716–17, 692 S.E.2d at 450 (quoting *Cameron*, 283 N.C. at 198, 195 S.E.2d at 486) (first and second alterations in original); *accord Blockburger v. United States*, 284 U.S. 299, 304 (1932).

As previously mentioned, the elements under sections 90-95(h)(3b) and 90-95(h)(4) each contain requirements that the other does not. Under section 90-95(h)(3b), the first essential element is that a defendant "(1) knowingly possessed *methamphetamine*," *Christian*, 288 N.C.

App. at 53, 884 S.E.2d at 497 (emphasis added), whereas, the first essential element of trafficking in opium is that a defendant "(1) knowingly possessed *opium*," N.C. Gen. Stat. § 90-95(h)(4) (emphasis added). Furthermore, the twenty-eight-gram threshold is determined by the weight of the controlled substance *or mixture containing* the controlled substance. *See Ellison*, 366 N.C. at 440, 738 S.E.2d at 162. Again, the statute does not require all twenty-eight grams to be either completely methamphetamine or completely fentanyl; rather, the "mixture containing such substance" must weigh at least twenty-eight grams. N.C. Gen. Stat. §§ 90-95(h)(3b), (4). In sum, "[n]either the presence nor the amount" of the methamphetamine in the mixture "had any bearing on Defendant's conviction for possession [and transportation] of [fentanyl], and *vice versa*." *Hall*, 203 N.C. App. at 718, 692 S.E.2d at 451.

Thus, the statutory provisions in contention each require the finding of a different controlled substance as a key element for prosecution, and each provision does not require the controlled substance to constitute all twenty-eight or more grams. Accordingly, we hold the trial court did not err when sentencing Defendant to consecutive sentences pursuant to sections 90-95(h)(3b) and 90-95(h)(4).

D. Verdict and Judgments

[4] Defendant argues the verdict and judgment forms in 23-CRS-1542 were fatally defective because they failed to specifically name fentanyl—the opium contained in the mixture seized from Defendant. This is a question of law that we review de novo. *See State v. De la Sancha Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 467 (2011).

"Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citing *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972)). Our Supreme Court has held that "a verdict, apparently ambiguous, may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." *State v. Best*, 265 N.C. 477, 481, 144 S.E.2d 416, 419 (1965) (citation modified).

In this case, although the verdict solely contained the terms "opium/opiates" and not fentanyl, the indictments contained statements referencing fentanyl as the basis of the charges; the State's forensic scientist testified regarding the positive test for fentanyl; the trial court instructed the jury that fentanyl is opium; and the State submitted Exhibit 10, which lists fentanyl as a result of the laboratory test under Item 1a. Taking all the aforementioned facts into account, it appears that the jury properly understood the evidence and the verdicts in 23-CRS-1542 were based upon fentanyl. *See id.* ("When the warrant, the evidence and the charge are considered, it appears clearly the jury, by their verdict, found [the] defendant guilty of operating a motor vehicle on the public street of Graham while under the influence of intoxicating liquor.").

Accordingly, the verdict and judgment forms were not fatally defective.

III. Conclusion

For the aforementioned reasons, we hold Defendant received a fair trial free from error.

NO ERROR.

Judges CARPENTER and MURRY concur.

STORY HOMES CONSTRUCTION, LLC AND AARON THOMAS GUESS
AS QUALIFIER, PETITIONERS
v.
NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, RESPONDENT

No. COA25-94

Filed 17 September 2025

1. Licensing Boards—disciplinary action—general contractor—expired license—effect of stipulations

The superior court did not err or act in an arbitrary or capricious manner when it upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for fraud or deceit (for failing to disclose pending Board investigations on its license renewal form) and for gross negligence, incompetence, and/or engaging in misconduct (for allowing its building license to lapse for several months). Although petitioners argued that their stipulation to three of the charges against them at the administrative hearing were not an admission to the intent and wilfulness elements of the violations, they neither qualified their stipulations nor objected to the Board's counsel's characterization of the stipulations.

2. Licensing Boards—disciplinary action—general contractor —operating under expired license—proportionality of punishment

The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. Contrary to petitioners' assertion that the punishment imposed—six months' active suspension, twelve months' stayed suspension, a monetary fine of $15,000, and a requirement to take and pass the Level 1 Building Code Course—was not proportional to the violations, the Board's decision was appropriate given that multiple complaints about petitioners had been received and that petitioners had mischaracterized the pending complaints.

3. Licensing Boards—disciplinary action—general contractor—pre-hearing procedures—timing of subpoenas

The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. Despite petitioners' assertion on appeal, the timing of subpoenas issued by the Board (seven days before the hearing) was within allowable procedures; further, petitioners could have conducted discovery but chose not to do so.

4. Licensing Boards—disciplinary action—general contractor—license renewal—failure to disclose pending complaints

The superior court properly upheld the final decision of the N.C. Licensing Board for General Contractors imposing discipline on a construction company and its manager (petitioners) for operating under an expired license and for failing to disclose pending complaints against them in their license renewal application. There was no merit to petitioners' argument that since the Board was on actual notice of the pending complaints that had been filed against petitioners, the Board committed an error of law by asserting that petitioners committed a violation by failing to disclose those complaints. Petitioners were required, pursuant to N.C.G.S. § 87-13, to answer questions on the license renewal form candidly and with full disclosure.

Appeal by petitioner from order entered 28 February 2024 by Judge Tonia A. Cutchin in Iredell County Superior Court. Heard in the Court of Appeals 26 August 2025.

Burr & Forman LLP, by G. Wade Leach, III and Douglas K. Gartenlaub admitted pro hac vice, for petitioners-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins, Ryan Mitiguy, and Catherine E. Lee, for respondent-appellee.

TYSON, Judge.

Story Homes Construction, LLC ("Story Homes") and Aaron Thomas Guess ("Guess") (collectively "Petitioners") appeal from order affirming the decision of the North Carolina Licensing Board for General Contractors ("Respondent" or "Board"). We affirm.

I. Background

Story Homes is a North Carolina registered limited liability company. Guess is the registered agent and manager of Story Homes. Story Homes was issued a limited building license on 13 March 2018, which was valid until 1 March 2019.

From 25 October 2018 to 6 August 2019, Story Homes, as general contractor, requested and performed inspections on a single-family dwelling at 259 Stutts Road, Mooresville. Donna Barbour filed two complaints against Petitioners with the Board alleging Story Homes was working with an expired license and had exceeded the scope of its license on 21 May 2019 on the 259 Stutts Road project. The estimated cost on the building permit application was $400,000. The Board assigned file number 19 C 326 to these complaints.

Story Homes submitted a building permit application in Iredell County for the construction of a single-family dwelling located at 123 Widgeon Lane in Mooresville. The total estimated cost on the application was $400,000 and Story Homes was listed as the general contractor. Iredell County building standards division issued a building permit on 27 July 2018. On 27 March 2019 inspections occurred on the building location/setback and building slab. The Board assigned file number 19 C 328 to this action.

Story Homes submitted a building permit application in Iredell County for the construction of a single-family dwelling located at 253 Stutts Road in Mooresville on 24 April 2018. The total estimated cost on the application was $300,000 and Story Homes was listed as the general contractor. Iredell County building standards division issued a building permit on 25 April 2018. On 16 and 17 April 2019 the building shower pan inspection occurred. The low voltage final inspection was performed on 10 May 2019. The fireplace rough in, plumbing, sewer, and plumbing water supply were inspected on 24 May 2019. On 30 May 2019 the plumbing final, plumbing sewer, and plumbing water supply were inspected. The Board assigned file number 19 C 329 to this action.

Story Homes received notice of the complaints on or about 3 June 2019. Story Homes submitted a license renewal application on or about 10 June 2019.

On its June license renewal application, Story Homes answered "no" to Section 2, Question 3: "Is the licensee, any officer, principle [sic] shareholder, or member (if LLC) under investigation or engaged in any controversy with this Board or any other licensing, registration or certification agency that has not been previously disclosed to this Board?"

Story Homes answered "no" to Section 2, Question 3 on the license renewal application despite having received and being on notice of Barbour's complaint against Story Homes. Respondents conducted an administrative hearing on 18 January 2023.

During the hearing, Petitioners stipulated to the following:

> "Petitioner" is going to stipulate to three of the charges. We are going to stipulate to 19 C 326, 19 C 328, 19 C 329 which consist of the – where Respondent's license had lapsed and had pulled building permits within the three month or so until the license was renewed.

During the hearing, Respondent found: (1) Story Homes engaged in fraud or deceit by failing to disclose the pending investigations by the Board on the license renewal, constituting a willful violation of N.C. Gen. Stat. § 87-11(a) (2023); and, (2) Story Homes was grossly negligent, incompetent, and/or engaged in misconduct in allowing its building license to lapse from 1 March 2019 to 10 June 2019, constituting a willful violation of N.C. Gen. Stat. § 87-11(a) (2023).

On 25 January 2023, Respondent issued a Final Agency Decision against Story Homes, which included: an eighteen-month suspension, consisting of six months active suspension and twelve months stayed suspension; a monetary fine of $15,000; and a requirement for Story Homes to take and pass the Level 1 Building Code Course.

On 9 February 2023 Petitioners filed a Petition for Judicial Review and filed a Motion to Stay the Final Agency Decision. The superior court held a hearing on Petitioners' motion to stay in February 2023. During the hearing the superior court allowed the motion to stay and stayed the Final Agency Decision until the adjudication of the Petition for Judicial Review.

The superior court affirmed the Final Agency Decision on 28 February 2024. Petitioners appeal.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Petitioners argue the final agency decision was arbitrary and capricious because: (1) the decision was unsupported by evidence proving the intent element and the decision misconstrued Petitioners' stipulations of fact; (2) the punishment was disproportionate to the findings or evidence; and, (3) there was manifest unfairness when Respondent issued subpoenas seven days before the hearing and issued Petitioners' requested subpoenas after 5:00 p.m. the day before the hearing. Petitioners also argue the final agency decision was an error of law for Respondent to claim Petitioner had failed to disclose an investigation Respondent already knew about.

IV. Standard of Review

"The standard and scope of review for the trial court of an order of [an administrative hearing] is found in the provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act." *Appeal of Harper*, 118 N.C. App. 698, 700, 456 S.E.2d 878, 879 (1995) (citing *In re Brown*, 56 N.C. App. 629, 630, 289 S.E.2d 626, 626-27 (1982)).

The North Carolina Administrative Procedure Act ("APA") outlines two separate standards of review to apply when reviewing an agency decision. Which standard of review to apply depends upon the appealing party's alleged errors and arguments before this Court. N.C. Gen. Stat. § 150B-51 (2023).

A *de novo* standard of review is applied if a party argues the agency's "findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[,]" under the APA. N.C. Gen. Stat. § 150B-51(b)(1)-(4) and -51(c) (2023).

Under the *de novo* standard of review, the court " 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 590, 780 S.E.2d 543, 547 (2015) (citation omitted). Further, under the *de novo* standard of review, the appellate court "should generally defer to the administrative tribunal's 'unchallenged superiority' [as fact finder] to make findings of fact." *Early v. Cnty. of Durham, Dep't of Soc. Servs.*, 193 N.C. App. 334, 342, 667 S.E.2d 512, 519 (2008) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004)).

If the appealing party argues the agency's decision was "(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion[,]" this Court must apply the "whole record" test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and -51(c) (2023).

Under the whole record test standard of review, the court examines "the entire record, including the evidence which detracts from the agency's decision." *Walker v. N.C. Dep't of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990). Under the whole record test, the reviewing court determines whether an agency decision has a " 'rational basis in the evidence.' " *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (quoting *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981)).

V. Arbitrary and Capricious

Petitioners argue the superior court erred in affirming Respondent's Final Decision. They assert the Board's Final Decision was based upon an improper interpretation of a stipulation by Petitioners at the hearing; no evidence shows Petitioners acted with fraud or deceit, or were grossly negligent, incompetent, or they engaged in any misconduct. Petitioners also assert the punishment was not proportional to the evidence presented and the findings of fact; and, Respondent's refusal to enforce procedural requirements related to Petitioners' subpoenas, was arbitrary or capricious.

Petitioners carry the burden and "[t]he 'arbitrary or capricious' standard is a difficult one to meet." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 16, 565 S.E.2d 9, 19 (2002) (citation omitted). A final administrative decision "is arbitrary and capricious if it was 'patently in bad faith,' 'whimsical,' or if it lacked fair and careful consideration." *Teague v. W. Carolina Univ.*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686 (1993) (citation omitted).

A. Stipulations

[1] Petitioners assert the superior court erred in upholding Respondent's final decision due to an improper interpretation of their stipulation at the hearing.

During the hearing, Respondent's chairwoman had asked the parties if there were any motions or stipulations. Petitioners' counsel replied, after introducing himself for the record:

> The [Petitioners] are going to stipulate to three of the charges. We are going to stipulate to 19 C 326, 19 C 328, 19 C 329 which consist of the - - where [Petitioners'] license had lapsed and had pulled building permits within the three months or so until the license was renewed.
>
> We will likely asked (sic) [Guess] when [Guess] is called to testify a line of questions and testimony to basically ask for leniency in mitigation, but *we are stipulating to those charges*. (emphasis supplied)

Respondent's counsel responded:

> I'm fine with that as long as then if we're going to stipulate to those charges, then we stipulate to the admission of the evidence that proves those charges which would be Board Exhibit Number 2, Board Exhibit Number 3, Board Exhibit 4, Board Exhibit 5, Board Exhibit 6, and Board Exhibit Number 7, which are the exhibits that would be offered for those case files.

Petitioners' counsel did not object, and Respondent's chairwoman admitted those exhibits. "Stipulations are judicial admissions and are binding upon the parties absent well-established exceptions[.]" *Comstock v. Comstock*, 240 N.C. App. 304, 312, 771 S.E.2d 602, 609 (2015) (citing *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 582, 709 S.E.2d 367, 371 (2011)). "Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (citing *Rural Plumbing and Heating, Inc. v. H.C. Jones Construction Co., Inc.*, 268 N.C. 23, 31, 149 S.E.2d 625, 631 (1966)).

Petitioners assert the verbal stipulation was not an admission to the intent and willfulness elements of the charges. However, their stipulations in the hearing before the Board do not support this position. Petitioners' counsel stated, "we are stipulating to those charges" and did not qualify the stipulation. Petitioners' counsel also did not object to Respondent's counsel's characterizing the stipulation and Respondent allowing the stipulation with the supporting exhibits. Petitioners' argument is overruled. *Moore*, 113 N.C. App. at 141, 437 S.E.2d at 531.

Petitioners further argue the agency decision was arbitrary, capricious, and an abuse of power. They assert no evidence supports the conclusion Petitioners had acted with fraud or deceit, or were otherwise grossly negligent, incompetent, or engaged in any misconduct. Respondent's counsel introduced unobjected evidence and exhibits to support all three charges during the hearing. Again, Petitioners' argument is without merit. *Id.*

B. Proportional Punishment

[2] Petitioners argue the superior court erred by affirming Respondent's final decision. They assert the punishment was not proportional to the findings of fact or evidence presented to the Board during the hearing. Petitioners challenge the six months' active suspension, the twelve months' stayed suspension, and assert the monetary fine of $15,000 was not proportional to their merely allowing the license to lapse and checking the incorrect box on the renewal application.

Petitioners point to a proceeding before Respondent, wherein the license had lapsed and the punishment imposed was a six-month's stayed suspension and a $5,000 fine. The very case Petitioners cite was a single complaint, and here there were three stipulated violations, where the fine imposed was for $5,000 each. This other single proceeding also did not involve a mischaracterization to Respondent of pending complaints, as Petitioners' proceedings involved. Petitioners failed to show reversible error and the superior court properly affirmed Respondent's final decision. *Moore*, 113 N.C. App. at 141, 437 S.E.2d at 531.

C. Subpoenas

[3] Petitioners argue Respondent's omission and refusal to issue subpoenas resulted in manifest unfairness. Petitioners assert issuing subpoenas seven (7) days before the hearing resulted in a "trial by ambush." This timing purportedly forced Petitioners to scramble to request subpoenas of Respondent's witnesses, and their requested subpoenas were not issued until 5:00 p.m. the day before the hearing.

Contrary to Petitioners' assertion our Rules of Civil Procedure allow them to engage in discovery; Petitioners did not engage in any discovery. N.C. Gen. Stat. § 150B-39(a) (2023) ("Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, [N.C. Gen. Stat. §] 1A-1.").

Also, contrary to Petitioners' assertion, the subpoenas were issued within the "three days of receipt or request" as is provided in 21 N.C.A.C. 12A.0827(a)(1)-(4). Petitioners' arguments are overruled. The final decision was not arbitrary and capricious.

VI. Failure to Disclose

[4] Petitioners argue it was an error of law for Respondent to assert Petitioners had failed to disclose investigations Respondent was already aware of.

On its 10 June license renewal application, Story Homes answered "no" to Section 2, Question 3: "Is the licensee, any officer, principle [sic] shareholder, or member (if LLC) under investigation or engaged in any controversy with this Board or any other licensing, registration or certification agency that has not been previously disclosed to this Board?" Story Homes answered "no" to Section 2, Question 3 on the license renewal application despite being on actual notice of Barbour's complaint against Story Homes.

Story Homes received notice of the complaints on or about 3 June 2019. Our General Statutes forbid "giv[ing] false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license[.] N.C. Gen. Stat. § 87-13 (2023). Contrary to Petitioners' assertions, the purpose of the question is to compel full disclosure and a candid reply to Respondent when reviewing original or renewal applications. Petitioners' argument is without merit and is overruled. *Id.*

VII. Conclusion

Petitioners have failed to show Respondent's final decision was arbitrary or capricious or affected by errors of law. The superior court did not err in affirming Respondent's final decision. The order of the superior court is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 17 September 2025)

BLADES v. BLUSKY RESTORATION CONTRACTORS, LLC No. 24-186	Carteret (21CVS000696-150)	Affirmed
COSTANTINO v. COSTANTINO No. 24-902	Rowan (21CVD001307)	Affirmed in Part; Vacated in Part; and Remanded
DAVIS v. HAYES HOFLER, P.A. No. 25-179	Durham (21CVS001592-310)	Dismissed
FIELDS v. RANA No. 24-628	Wake (20CVS002678-910)	NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART; AFFIRMED IN PART.
FREDELL v. LINCOLN CNTY. No. 24-1121	Lincoln (24CVS000289-540)	Affirmed.
HIBRITEN MOUNTAIN, LLC v. DIGGS No. 24-671	Caldwell (22CVS000455)	Affirmed in Part, Vacated in Part and Remanded
IN RE C.S.R. No. 24-621	Guilford (19JT000369)	Affirmed
IN RE E.H.T. No. 25-355	Catawba (22JT000091-170) (23JT000056-170)	Affirmed
IN RE FORECLOSURE OF CARPENTER No. 24-687	Wake (13SP003348-910)	Dismissed
IN RE J.C.R.R. No. 25-364	Yancey (23JT000024-990) (23JT000025-990)	Affirmed
IN RE L.H.M. No. 25-141	Randolph (24JT000069-750)	Affirmed
IN RE L.K. No. 24-1123	Cumberland (24JB000038)	Remanded
IN RE S.T.S. No. 25-365	Stokes (23JT000055-840)	Affirmed

McDANIEL v. GOODWILL INDUS., INC. No. 25-402	Cabarrus (24CVS000821-120)	Affirmed
SANTREE N.C. LLC v. HINES No. 25-252	Pitt (24CVD002919-730)	Dismissed
STATE v. ARMSTRONG No. 24-519	Johnston (21CR052341-500) (22CR000259-500)	No Error
STATE v. BLACKBURN No. 24-1012	Guilford (22CR352854-400)	No Error
STATE v. COTTINGHAM No. 23-715	Cumberland (17CR062793-250)	No Error
STATE v. DAVIS No. 24-672	Guilford (20CRS065648)	Dismissed
STATE v. DINGLE No. 25-17	Cumberland (23CRS250900-250)	No Error
STATE v. DUMAS No. 24-645	Stanly (18CRS051077) (23CRS000225)	No Error
STATE v. FOX No. 24-652	Durham (21CRS052155-310) (21CRS052156-310)	Dismissed
STATE v. GREENE No. 24-738	Watauga (23CRS357678)	No Error
STATE v. JACKSON No. 24-611	New Hanover (20CR057069-640) (20CR057070-640)	No Error
STATE v. JONES No. 24-959	Nash (23CRS000609) (23CRS000610) (23CRS209142)	No Error
STATE v. LITTLEJOHN No. 24-410	Rutherford (22CRS50742) (22CRS746)	Dismissed
STATE v. McLEOD No. 24-784	Wake (23CR372306-910)	No Error

STATE v. MEDLEY No. 24-543	Randolph (20CR051310-750)	No PREJUDICIAL ERROR
STATE v. MURRAY No. 24-942	Mecklenburg (22CR204742-590)	No Error
STATE v. PRINCE No. 24-814	Gaston (22CR330441-350)	No Plain Error in part; Dismissed without Prejudice in part.
STATE v. RASCOE No. 24-897	Nash (22CRS272182)	No Error
STATE v. STOKLEY No. 25-249	Pasquotank (20CR000649-690) (20CR050213-690) (20CR050215-690)	No Error
STATE v. TEAL No. 25-390	Iredell (23CR279800-480)	No Error
STATE v. TELLO No. 24-670	Onslow (15CRS056796) (15CRS056797) (15CRS056798)	No Error
STATE v. VELASQUEZ-GUEVARA No. 24-844	Wake (21CR002147-910) (21CR216866-910)	No Error
VETTE v. SANTOS No. 25-165	Mecklenburg (23CVS017088-590)	Affirmed
WALLACE & WALLACE PROPS., LLC v. AQE SERVS., LLC No. 23-951	Anson (22CVS000134-030)	Affirmed
WILLIAMS v. CRANDALL No. 25-309	Wake (24CV004387-910)	Affirmed
WINTERS v. YA No. 24-572	Mecklenburg (20CVD002600-590)	Affirmed
ZHANG v. ZHANG No. 24-1073	Wake (22CVS006041-910)	Affirmed

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