301 N.C. App.—No. 1 Pages 1-173

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 28, 2026

MAILING ADDRESS: The Judicial Department
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OF
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[1] Died 18 November 2025.

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COURT OF APPEALS

CASES REPORTED

Filed 1 October 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Dismissal of appeal by trial court—failure to timely serve record on appeal—no determination of substantial or gross violation—In a foreclosure proceeding stemming from the nonpayment of homeowners' association assessments and related costs, where respondent homeowner entered notice of appeal to the Court of Appeals seeking appellate review of four orders in the matter, the trial court abused its discretion by dismissing her appeal on the basis that she failed to timely serve a proposed record on appeal on petitioner as required by Appellate Rule 11(b). The trial court failed to determine whether respondent's noncompliance with Rule 11(b) (a nonjurisdictional rule) constituted a substantial or gross violation, the first step in a proper consideration of whether dismissal—or any other sanction—was

CHILD ABUSE, DEPENDENCY, AND NEGLECT

dismiss, including: defendant left her six-year-old daughter alone outside in a nearby public park in the evening while she went inside her apartment and, when defendant did not return, the child wandered alone for at least thirty-five minutes along crowded streets and ended up about a mile and a half away to a busy intersection where she was observed talking to strangers. Defendant's lack of supervision created a substantial risk that her daughter could be harmed, either by the daughter's own accord or by others. **State v. Benton, 32.**

Misdemeanor child abuse—lack of supervision—sufficiency of evidence— The State presented substantial evidence to support a charge of misdemeanor child abuse to overcome defendant's motion to dismiss, including: defendant left her six-year-old daughter alone outside in a nearby public park in the evening while she went inside her apartment; when defendant did not return, the child wandered alone for at least thirty-five minutes along crowded streets and ended up about a mile and a half away; defendant made no effort to locate her daughter and told police she presumed her daughter had gone home with a friend. Actual physical injury was not required for purposes of the offense, and the circumstances surrounding defendant's lack of supervision were sufficient to send the charge to the jury. **State v. Benton, 32.**

CIVIL PROCEDURE

Rule 12(b)(6) motion to dismiss—evidence outside of pleadings—improperly considered—constitutional claims remanded—transfer to three-judge panel required—In an action filed by plaintiff police officer against the State and certain State defendants, including a district attorney who issued a letter pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), barring plaintiff from testifying for the State in future criminal or traffic cases, which resulted in plaintiff losing his job, the trial court erred where: the district attorney submitted evidence outside of the pleadings in support of his Civil Procedure Rule 12(b)(6) motion to dismiss; plaintiff moved to strike the evidence, correctly pointing out that its consideration would convert defendant's 12(b)(6) motion into a motion for summary judgment; and the court incorporated the contested evidence into its findings of fact when granting defendant's motion to dismiss without ruling on plaintiff's motion to strike or providing plaintiff a reasonable opportunity to respond, as required under Rule 56. Thus, the court's judgment was vacated and the matter was remanded for rehearing on plaintiff's constitutional claims against the district attorney and his claim against the State defendants raising an as-applied challenge to N.C.G.S. § 17C-16 (requiring anyone who received a *Giglio* letter to send a copy to the Criminal Justice Standards Division for entry into its database). On remand, the trial court was to take into account new Supreme Court precedent that would potentially impact its reconsideration of plaintiff's claims. Additionally, where plaintiff sufficiently alleged a facial constitutional challenge to section 17C-16, the trial court was required to comply with N.C.G.S. § 1-267.1 by resolving all matters not contingent upon the outcome of the facial constitutional claim and then transfer the case to a three-judge panel in the Superior Court of Wake County. **Leech v. State of N.C., 21.**

CONSTITUTIONAL LAW

Confrontation Clause—right to cross-examine—impeachment of witness—limitation by trial court—harmless error analysis—In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, the trial court did not violate defendant's rights under the Confrontation Clause of the Sixth Amendment when it prevented him from cross-examining one of the State's main witnesses about whether that witness might attain habitual felon status if convicted of certain criminal charges. Defendant was still able to effectively impeach the witness for potential bias by eliciting testimony about the witness's pending charges and the witness's hope that, in return for helping the State in this case, the prosecutor—who had also been assigned to prosecute the witness's pending charges—might give him a better outcome in his own criminal cases. The trial court, then, acted properly within its discretion to preclude repetitive testimony when it limited defendant's cross-examination of the witness. In any event, any perceived error was harmless in light of the ample circumstantial evidence incriminating defendant for the murder. **State v. McClinton, 99.**

Effective assistance of counsel—failure to object—use of aggravating factor for sentencing—no prejudice shown—In a prosecution for interfering with an electronic monitoring device (which defendant wore as a condition of his post-release supervision), where the State's written notice of its intent to prove an aggravating factor—as required by N.C.G.S. § 15A-1340.16(a6)—was not timely, having been filed 28 rather than 30 days before trial, defendant could not show that he received ineffective assistance of counsel because, even assuming that his counsel's failure to object to the trial court's use of the aggravating factor in sentencing constituted deficient performance, there was no reasonable probability that, but for the error, the jury's finding of the aggravating factor, or the resulting sentence, would have been different. **State v. Hooks, 81.**

Effective assistance of counsel—murder trial—omission of evidence—no prejudice shown—In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, defendant did not receive ineffective assistance of counsel when his defense attorney chose not to play a video to the jury that would have shown inconsistencies in a key eyewitness's testimony about whether defendant or the victim made a derogatory remark before shots were fired. The totality of the evidence—including text messages between defendant and the victim, eyewitness testimony describing the altercation, and cell phone location data placing defendant near the club at the time of the shooting—supported a finding of defendant's guilt regardless of who had made the derogatory statement; thus, there was no reasonable possibility that, even if defense counsel had introduced the video, the result of the proceeding would have been different. **State v. McClinton, 99.**

Right to speedy trial—three-year delay—Barker factors—In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, the trial court properly denied defendant's motion to dismiss for lack of a speedy trial in light of the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). Despite the three-year delay between when defendant was charged and when the trial occurred, and although defendant filed multiple speedy trial motions (both pro se and through counsel), defendant's right to a speedy trial was not violated where there were valid reasons for the delay, including that: defendant served an 18-month prison sentence for a probation violation; defendant had four different attorneys, each of whom needed time to "get up to speed" on the case; and one of the detectives was called for military duty during the time leading up to trial. Further, the delay did not prejudice defendant's ability to gather evidence or otherwise prepare a defense. **State v. McClinton, 99.**

CRIMINAL LAW

Child abuse and neglect—prosecutor's closing arguments—use of facts from prior cases—In a prosecution for misdemeanor child abuse and contributing to the delinquency of a minor arising from defendant's lack of supervision of her six-year-old daughter, who she left alone in a public park for an extended period of time in the evening, the trial court did not abuse its discretion by permitting the prosecutor to relate the facts and findings from two prior negligent supervision cases. The arguments were appropriate where the prosecutor used those cases to highlight the types of issues to be considered when determining whether a child had been subjected to a substantial risk of harm but did not argue for defendant's conviction based on any similarities between the instant case and the prior cases. **State v. Benton, 32.**

Jury instructions—short form murder indictment—simple assault precluded—In a prosecution arising from the victim's death after having been physically beaten by defendant during a fight, the trial court properly denied defendant's motion for additional instructions on simple assault after the jury had been instructed on second-degree murder and voluntary manslaughter and had begun its deliberations (defendant was ultimately convicted of voluntary manslaughter). The short form murder indictment charging defendant with second-degree murder, despite not specifying a murder by assault, precluded the lesser offense of simple assault. **State v. Ramsey, 125.**

Murder trial—prosecutor's closing argument—defendant's inconsistent statements—no mistrial required—In a retrial for first-degree murder, the trial court did not abuse its discretion by failing to declare a mistrial after defendant objected to a portion of the State's closing argument, in which one of defendant's interrogation videos was played for the jury and the prosecutor asked, "Was that a lie or did you just forget it?" The State's comment did not constitute an improper comment on defendant's constitutional right not to testify but, rather, emphasized inconsistencies in defendant's statements during the police investigation and defendant's failure to provide exculpatory evidence regarding those discrepancies. **State v. Lamm, 89.**

Second murder trial—prosecutor's references to charges dismissed in first trial—no collateral estoppel—In defendant's retrial for first-degree murder, the trial court did not abuse its discretion by overruling defendant's objections to remarks by the State (during jury selection, opening statements, and closing arguments) that defendant had raped, kidnapped, and sexually assaulted the victim; the State's comments did not violate defendant's right to be free from double jeopardy, even though charges of first-degree rape and first-degree kidnapping were dismissed in defendant's first trial for lack of sufficient evidence. The State was not collaterally estopped from introducing or arguing the truth of evidence that defendant committed those acts where the references were made to explain the context, motive, or chain of events giving rise to the murder charge and because the State had wide latitude to argue all inferences that may reasonably be drawn from the evidence. **State v. Lamm, 89.**

DRUGS

Constructive possession—sufficiency of circumstantial evidence—no exclusive possession of place where contraband was found—In a prosecution for charges including possession of methamphetamine and possession of drug paraphernalia, both of which arose after law enforcement discovered the illegal items inside a house where defendant and three others were present, the trial court properly denied defendant's motion to dismiss both charges where there was sufficient circumstantial evidence indicating that defendant constructively possessed the items. Specifically, defendant—accompanied by her co-defendant in the case—was seen walking out of the bedroom where police later found the drugs and drug paraphernalia; suspiciously, defendant and her co-defendant left the bedroom as soon as law enforcement arrived; police also found some of defendant's personal items inside the bedroom, including her driver's license; and both of the illegal items were left out in plain view. **State v. Verdi, 140.**

Motion for immunity from prosecution—lack of overdose evidence—voluntariness of guilty plea—The trial court did not err by denying defendant's motion to dismiss drug charges for immunity and by subsequently accepting defendant's guilty plea where defendant did not meet any of the listed conditions in N.C.G.S. § 90-96.2(b) for immunity, including the threshold requirement that he had experienced an overdose. Although law enforcement had been dispatched to assist defendant, who was unconscious in his vehicle with drugs and drug paraphernalia in plain sight, defendant was able to wake up and exit his car when an officer rapped on his window. Since there was no error in the denial of the request for immunity, defendant's guilty plea was made knowingly and voluntarily. Further, where the plea agreement included a provision preserving the immunity issue and the appellate court issued a writ of certiorari granting review, defendant's decision to enter the plea was an informed choice and he received the benefit of his bargain. **State v. Branham, 43.**

Possession—pattern jury instruction—portion defining constructive possession omitted—plain error analysis—In a prosecution for charges including possession of methamphetamine and possession of drug paraphernalia, both of which arose after law enforcement discovered the illegal items inside a house where defendant and three others were present, the trial court erred when giving the pattern jury instruction for actual and constructive possession (N.C.P.I. - Crim. 104.41) where the court omitted the portion formally defining constructive possession. Nevertheless, the court's error did not amount to plain error where it still adequately explained the concept of constructive possession, stating that if the jury found defendant had exercised control over the premises where the drugs were found—regardless of whether or not she owned the house—it could infer that she was aware of the drugs' presence and had the power and intent to control its disposition and use. Additionally, the court used similar language, illustrative of constructive possession, when instructing the jury on possession of methamphetamine. **State v. Verdi, 140.**

EVIDENCE

Authentication—cell phone video—illustrative purposes—In a prosecution arising from the victim's death after having been physically beaten by defendant during a fight—defendant was ultimately convicted of voluntary manslaughter—the trial court did not err by admitting cell phone video evidence for illustrative purposes only, with a limiting instruction, where the State laid a proper foundation through a witness's testimony stating that the video fairly and accurately represented the fight as she saw it. **State v. Ramsey, 125.**

Rule 408—admission of a compromise to settle—not applicable to criminal defendants—admission of letter proper—In a prosecution on charges including attempted first-degree murder, the trial court's admission of a letter defendant sent from jail to law enforcement—admitting to shooting "a gang banger" in the incident

EVIDENCE—Continued

for which he was on trial and seeking to work undercover in exchange for having the charges against him dropped—the trial court properly overruled defendant's objection to the introduction of the letter on the basis that it was an inadmissible compromise to settle pursuant to Evidence Rule 408. In criminal cases, there is no policy in North Carolina favoring such compromises, and, hence, Rule 408 was not applicable to bar the admission of defendant's letter for consideration as substantive evidence of his guilt. **State v. Wilson, 149.**

HOMICIDE

Felony murder—predicate felonies—motions to dismiss—sufficiency of evidence—In a prosecution for felony murder—arising from a drive-by shooting—the trial court properly denied defendant's motions to dismiss each of the three predicate felonies upon which a first-degree felony murder conviction could be based: assault with a deadly weapon with intent to kill, firing into an occupied dwelling, and discharging a firearm within a motor vehicle. As to the first two predicate felonies, defendant's appellate argument that no evidence tended to show that he fired a gun "at" anyone was rejected where the victim died as the result of a gunshot wound, two witnesses testified that defendant fired a gun during the drive-by, and a third witness testified to seeing a gun in defendant's hand immediately after hearing multiple shots fired. As to the third predicate felony, defendant's appellate argument failed in light of precedent holding that the offense applied where a firearm was fired within a vehicle, even if the victim of the shooting was located outside the vehicle. **State v. Hardaway, 55.**

JUDGMENTS

Criminal—clerical error—wrong felony class listed—Where the trial court committed a clerical error on defendant's criminal judgment by listing the offense of trafficking fentanyl by possession as a Class C felony rather than a Class E felony, the criminal judgment was remanded for correction. **State v. Santana, 133.**

Drug prosecution—costs and fines imposed—erroneously docketed as civil judgments—no determination of default—After defendant was convicted of multiple drug offenses and the trial court entered judgment imposing costs and a $250,000 fine, the trial court erred by immediately docketing the costs and fine as civil judgments without first determining that defendant had defaulted in payment as required by N.C.G.S. § 15A-1365; therefore, the court's civil judgments were vacated. The criminal judgment was remanded to the trial court to determine whether defendant had defaulted in payment or, if not, to clarify that the costs and fine were to be imposed in the criminal judgment. **State v. Santana, 133.**

JURY

Selection—Batson challenge—lack of purposeful discrimination—race-neutral single parenthood criteria—In a prosecution for misdemeanor child abuse and contributing to the delinquency of a minor (based on defendant's lack of supervision of her six-year-old daughter, who she left alone in a public park for an extended period of time in the evening), in which defendant raised a *Batson* claim to challenge the State's use of peremptory strikes to remove three black prospective jurors, the trial court did not err by determining that defendant failed to meet her burden of showing purposeful discrimination. The court did not clearly err by determining that the State's race-neutral reason for striking the jurors—on the basis that they were all single parents, who might have viewed the circumstances of defendant's lack of supervision with more sympathy—was reasonable and not pretextual, particularly where the State applied its single parenthood criteria universally without regard to race (the State did not strike another black prospective juror because she was not a single parent and used an additional two peremptory strikes against white prospective jurors). **State v. Benton, 32.**

Selection—Batson objection—no purposeful discrimination by the State—clear error not shown—In a prosecution for felony murder—arising from a drive-by shooting—the trial court properly denied defendant's *Batson* objection to the State's exercise of a peremptory challenge to a Black prospective juror where the court, in the third step of its *Batson* analysis, determined that the State's proffered nondiscriminatory reasons for excusing the juror (based upon his demeanor) were not pretextual, and, thus, that the State did not engage in purposeful racial discrimination by excusing the juror. Although the excused prospective juror was the first Black person questioned during voir dire, nothing suggested that the case at trial was particularly susceptible to racial discrimination (while defendant was Black, the race of the victim and of key witnesses did not appear in the record), and there was no indication of disparate questioning of prospective jurors based on race. As to defendant's argument that the demeanor of a white juror who was not excused was analogous to that of the excused Black juror, the appellate court noted that such issues are best resolved by the trial court's direct observations rather than on the cold record. **State v. Hardaway, 55.**

PROCESS AND SERVICE

COVID-19 protocols for contactless mail delivery—insufficient under Civil Procedure Rule 4—order of foreclosure vacated—In a foreclosure proceeding stemming from the nonpayment of homeowners' association assessments and related costs, at a hearing on respondent homeowner's amended motion to set aside and vacate the order of foreclosure, the trial court erred in holding that contactless delivery of certified mail under the United States Postal Service's COVID-19 protocols constituted legally effective service of process. Since the purpose of using certified mail for service of process is to ensure delivery to a natural person such that actual notice of the proceedings would be made known to the addressee, contactless delivery did not comply with Civil Procedure Rule 4(j)(1)(c). That defect in service of process rendered the clerk's subsequent order authorizing sale of the subject property void, and, accordingly, the trial court abused its discretion in denying respondent's motion to set aside the foreclosure. **In re Foreclosure of Rogers, 1.**

REAL PROPERTY

Restrictive covenant—nuisance prohibition—void for vagueness—In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court properly granted plaintiff's motion to dismiss defendants' counterclaims to the extent they were based on the "Nuisance Covenant." The trial court did not err by determining that the Nuisance Covenant, which barred "noxious or offensive activity" and anything that might become "an annoyance or nuisance to the neighborhood," was void for vagueness, where the covenant's terms were subjective and not sufficiently clear and unambiguous as to be enforceable. **Villazon v. Osborne, 153.**

Restrictive covenant—prohibition on temporary residential structures—evidence of permanency—In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court did not err by partially granting plaintiff's amended motion for summary judgment regarding defendants' counterclaims to the extent those claims were based on the "Prohibited Residential Structures Covenant," which barred "structure[s] of a temporary character." Where the covenant contained a list of prohibited structures rather than construction materials, plaintiff's use of shipping containers to construct her residence did not, by itself, render that dwelling temporary, and the trial court's determination that aspects of the residence (including its block foundation, welded parts, and that it was constructed in compliance with a building permit and the county building code) rendered it a permanent structure was a reasonable interpretation of the plain and unambiguous language of the covenant. **Villazon v. Osborne, 153.**

Restrictive covenants—residential purpose limitation—parking considerations—In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court properly entered a directed verdict in favor of plaintiff regarding defendant's claims that plaintiff breached the "Residential Purpose Covenant," which required lots to be used for residential purposes only, and the "Parking Covenant," which prohibited obstruction of road traffic. Even when viewing the facts in the light most reasonable to defendants, there was no merit to defendants' argument that a "residential purpose" required habitation—thus, plaintiff's use of one lot for recreational purposes only was not in violation of the plain terms of that covenant—and, further, there was no evidence to support defendants' contention that plaintiff admitted she bought an adjacent lot to use solely for parking. **Villazon v. Osborne, 153.**

SEARCH AND SEIZURE

Reasonable expectation of privacy—bag containing narcotics—left in public area upon noticing police—intent to abandon—In a prosecution for multiple drug-related crimes, where defendant accompanied a woman to a local electronics store where they were both suspected of committing a prior theft, after which defendant, upon being confronted by police about the theft, left a black handbag containing narcotics and $65,000 unattended at a kiosk for forty minutes until police discovered it, the trial court did not err by denying defendant's motion to suppress evidence from the bag. The court's findings of fact—which were supported by competent evidence—showed that defendant never mentioned the bag or attempted to retrieve it during that forty-minute period, even though it would have taken him "mere seconds" to return to the kiosk where it sat unattended, and only admitted ownership when questioned by police about it. In turn, these findings supported a conclusion that defendant relinquished his reasonable expectation of privacy in the bag and intended to abandon it. **State v. Pardo, 112.**

SENTENCING

Drug-related charges—trial court's failure to consider conditional discharge —remand—After defendant was convicted of possession of methamphetamine and possession of drug paraphernalia, the trial court's judgment imposing a suspended sentence and supervised probation was vacated and the matter was remanded for resentencing, where the court did not follow the mandate in N.C.G.S. § 90-96 requiring trial judges to consider conditional discharge for eligible first-time offenders (of which defendant was one). There was no indication in the record that conditional discharge was requested or considered, nor did the court enter a written finding that defendant was inappropriate for it. Importantly, defendant's consent was not required in order to trigger the court's duty under section 90-96 to consider conditional discharge. **State v. Verdi, 140.**

Notice of aggravating factors—interfering with an electronic monitoring device—post-release supervision—waiver of notice—In a prosecution for interfering with an electronic monitoring device (which defendant wore as a condition of his post-release supervision), while the State's written notice to defendant of its intent to prove an aggravating factor—as required by N.C.G.S. § 15A-1340.16(a6)—was not timely, having been filed 28 rather than 30 days before trial, defendant waived his right to 30 days notice. Defendant made no objection to the introduction at trial of a prior judgment entered upon revocation of probation—which supported the aggravating factor that, within the previous ten years, defendant had willfully committed a probation violation—or when the notice of aggravating factors was discussed during the charge conference. Moreover, defendant made no argument on appeal demonstrating any prejudice resulting from his lack of two additional days of notice. **State v. Hooks, 81.**

N.C. COURT OF APPEALS

2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

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

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF FORECLOSURE OF A CLAIM OF LIEN BY IRISH CREEK SECTION 2 OWNERS' ASSOCIATION, INC. AGAINST TRENITA ROGERS

No. COA24-788

Filed 1 October 2025

1. **Appeal and Error—dismissal of appeal by trial court—failure to timely serve record on appeal—no determination of substantial or gross violation**

   In a foreclosure proceeding stemming from the nonpayment of homeowners' association assessments and related costs, where respondent homeowner entered notice of appeal to the Court of Appeals seeking appellate review of four orders in the matter, the trial court abused its discretion by dismissing her appeal on the basis that she failed to timely serve a proposed record on appeal on petitioner as required by Appellate Rule 11(b). The trial court failed to determine whether respondent's noncompliance with Rule 11(b) (a nonjurisdictional rule) constituted a substantial or gross violation, the first step in a proper consideration of whether dismissal—or any other sanction—was warranted and appropriate. Accordingly, the appellate court reached the merits of respondent's appeal.

2. **Process and Service—COVID-19 protocols for contactless mail delivery—insufficient under Civil Procedure Rule 4—order of foreclosure vacated**

   In a foreclosure proceeding stemming from the nonpayment of homeowners' association assessments and related costs, at a hearing on respondent homeowner's amended motion to set aside and vacate the order of foreclosure, the trial court erred in holding that contactless delivery of certified mail under the United States Postal Service's COVID-19 protocols constituted legally effective service of process. Since the purpose of using certified mail for service of process is to ensure delivery to a natural person such that actual notice of the proceedings would be made known to the addressee, contactless delivery did not comply with Civil Procedure Rule 4(j)(1)(c). That defect in service of process rendered the clerk's subsequent order authorizing sale of the subject property void, and, accordingly, the trial court abused its discretion in denying respondent's motion to set aside the foreclosure.

Appeal by Respondent from an order entered 6 December 2023 by Judge Jeffery B. Foster in Pitt County Superior Court dismissing appeal of orders entered 8 February 2023 and 3 March 2023. Heard in the Court of Appeals 9 April 2025.

Q Byrd Law, by Quintin D. Byrd, for Respondent-Appellant.

Jeremy Clayton King, P.A., by Jeremy C. King, for Irish Creek Section 2 Owners Association, Inc., Petitioner-Appellee.

Jordan Price Wall Gray Jones & Carlton, PLLC by Hope Derby Carmichael and Frank W. Bullock III, for Hope Derby Carmichael, Trustee, Petitioner-Appellee.

Christopher P. Edwards, Attorney, PLLC, by Christopher P. Edwards, for Woodson Furlough Jr., Petitioner-Appellee.

WOOD, Judge.

Respondent-Appellant Trenita Rogers ("Rogers") appeals to this Court by petition for writ of certiorari for review of five orders stemming from the foreclosure of her home: (1) The 7 December 2023 order dismissing Rogers' appeal; (2) the 8 February 2023 order denying Rogers' amended motion to set aside foreclosure; (3) the 3 March 2023 order awarding additional Trustee fees; (4) the 14 March 2023 order granting the HOA's motion for attorneys' fees; and (5) the 14 March 2023 order granting Woodson Furlough, Jr.'s motion for attorney's fees. On 10 May 2024, this Court granted Rogers' petition with respect to the 7 December 2023 order and granted Rogers' petition as to the 8 February 2023, 3 March 2023, and two 14 March 2023 orders, "without prejudice to reconsideration by the panel to which this matter is assigned should that panel determine [the trial court] did not commit reversible error in dismissing petitioner's appeal." After careful review of the record and applicable law, we hold the trial court committed reversible error by dismissing Rogers' appeal. We reverse and remand the trial court's 8 February 2023 order denying Rogers' amended motion to set aside foreclosure, and we vacate the trial court's subsequent orders.

I. Factual and Procedural Background

Rogers purchased a single-family home located at 305 Boyne Way, Winterville ("Subject Property"), in January 2010. The Subject Property is, and has been since the time of purchase, located within the Irish Creek Section 2 Owners' Association, Inc. development ("Irish Creek HOA"). The Subject Property remained Rogers' primary residence during all relevant times of the case proceedings.

On 24 March 2021, the Irish Creek HOA sent a demand letter to Rogers via first-class mail stating she owed $1,391.23 in unpaid homeowner's association assessments. The letter stated that payment in full could be made within fifteen days of receipt without incurring additional attorney costs and fees in regard to collection of this debt. If the amount was not paid, Irish Creek HOA would turn the account over for collection to Jordan Price Wall Gray Jones & Carlton ("Jordan Price"), and Rogers would be responsible for fees and costs incurred with collecting the debt. Rogers did not satisfy the unpaid assessments owed to Irish Creek HOA within the fifteen-day period provided.

On 3 May 2021, Irish Creek HOA filed a Claim of Lien ("COL 1") in the amount of $1,391.23 plus $350.00 in costs and attorney fees against the Subject Property. Within COL 1, Irish Creek HOA appointed Hope Derby Carmichael ("Trustee") as Trustee for the foreclosure. Trustee certified to the court that the COL 1 was sent via first-class and certified mail with return receipt requested to Rogers at the Subject Property. However, the record on appeal does not contain a copy of the green return receipt card for the COL 1. Trustee provided instead a printout of the United States Postal Service ("USPS") electronic delivery receipt record for COL 1 which states that the certified mail item was "Delivered, Left with Individual" on 3 May 2021, but the electronic delivery receipt record does not contain the name or the first initial or last name of the person with whom it had been left.

On 16 September 2021, Trustee filed a second Claim of Lien ("COL 2") in the amount of $1,491.23 plus $1,497.50 in costs and attorney fees against the Subject Property. Trustee certified to the court that COL 2 was sent by first-class and certified mail with return receipt requested to Rogers at the Subject Property. Again, the record on appeal does not contain a copy of the green return receipt requested card for the COL 2. Instead, Trustee again provided a printout of the USPS electronic delivery receipt record for COL 2 which states that the certified mail item was "Delivered, Left with Individual" on 18 September 2021, but the electronic delivery receipt record does not include the name or the first initial or last name of the person with whom it had been left.

During the Covid-19 pandemic, the USPS instituted and followed alternative Covid-19 protocols for certified mail delivery. Under Covid-19 protocols mail carriers were instructed to knock and, if identification was needed for delivery, to ask the customer to hold their identification up to a window. After checking their identification, the mail carrier was required to enter

> the customer's first initial and last name on their handheld delivery device or hardcopy PS Form 38811 or 3849. In place of the customer's signature, [the mail carrier] printed their own initials, route number, and notation "C19." Rather than handing the item directly to the customer, [the alternative protocol required the mail carrier to leave] the [certified mail] item in the mail receptacle or [an] appropriate location by the door.

U.S. Postal Serv., *Delivering During the COVID-19 Pandemic: How the U.S. Postal Serv. Kept the Nation Connected*, at 13 (Sept. 2022), https://about.usps.com/who/profile/history/pdf/delivering-during-covid-19.pdf [hereinafter *Delivering During COVID-19*]. The electronic delivery receipt for each piece of certified mail sent by Trustee to Rogers at the Subject Property address appears to be initialed by the mail carrier following these protocols in some variation in lieu of the required "Signature of Recipient." However, no delivery receipt included in the record for any piece of certified mail contains any notation that could appear to be a "customer's first initial and last name."

On 18 September 2021, Trustee filed a Notice of Hearing Prior to Foreclosure Sale ("NOH"). On the same day, the NOH was sent by first-class and certified mail to Rogers at the Subject Property. Trustee again only provided a printout of the USPS electronic delivery receipt rather than a green card return receipt. The USPS electronic record indicates the NOH was "Delivered, Left with Individual" on 21 September 2021. The electronic delivery receipt notation appears to be illegible letters followed by the number 19 with no first initial and last name of the customer. On 17 September 2021, the Pitt County Sheriff's Office attempted personal service of the NOH but the Return of Service on Foreclosure Hearing indicated the NOH was not personally served but was instead posted at the Subject Property. The Return of Service on Foreclosure Hearing was filed on 21 September 2021.

On 24 September 2021, Trustee filed an Amended Notice of Hearing Prior to Foreclosure Sale ("Amended NOH"). The Amended NOH was sent by first-class and certified mail with return receipt requested to Rogers at the Subject Property. Trustee again provided a printout of the USPS electronic delivery record rather than a green return receipt card. This time, the USPS electronic delivery record states the Amended NOH was "Delivered to Agent for Final Delivery" on 27 September 2021. There is no additional information provided regarding final delivery. The electronic delivery receipt notation appears to be letters followed by the numbers 19 with no first initial and last name of the customer.

On 28 September 2021, the Pitt County Sheriff's Office again attempted personal service of the Amended NOH but the Return of Service on Amended Foreclosure Hearing indicated the Amended NOH was not personally served but was instead posted at the Subject Property. On 29 September 2021, the Return of Service on Amended Foreclosure Hearing was filed. Service by posting had not been ordered or authorized by the court. In an affidavit in support of service by posting filed 21 December 2021, the same day as the foreclosure hearing to authorize sale, Trustee averred the Sheriff's posting of the NOH and Amended NOH was warranted because "service was not otherwise obtainable and those entitled to service were not readily located, despite reasonable attempts."

Rogers did not attend the foreclosure hearing to authorize sale of the Subject Property which occurred before the Assistant Clerk of Superior Court on 21 October 2021. On the same day as the hearing, the Clerk entered an Order Authorizing Sale allowing Trustee to foreclose on the Subject Property. The Clerk found Rogers had received timely and effective notice of the hearing. On 25 October 2021, Trustee sent a copy of the Order Authorizing Sale to Rogers by first-class mail. On 9 December 2021, a Notice of Lien Holder's Sale of Real Property ("Notice of Sale") was filed stating the Subject Property would be sold by public auction on 13 January 2022 at 10:45am at the Pitt County Courthouse. The Notice of Sale was also published once a week for two consecutive weeks in *The Daily Reflector*, a Pitt County newspaper.

From 14 January 2022 to 1 August 2022, more than thirty upset bids were submitted and filed with the Clerk of Superior Court. A copy of each bid was sent to Rogers by first-class mail. The final and highest upset bid was submitted by Appellee Woodson Furlough, Jr. ("Furlough") in the amount of $221,618.32 on 1 August 2022. On 31 August 2022, Trustee executed a Trustee's Deed to convey the Subject Property to Furlough and recorded it on 1 September 2022.

On 14 September 2022, Trustee executed an Affidavit in Support of Final Report and Account of Foreclosure Sale and an Affidavit Regarding Surplus Funds, both sent by first-class mail. On 21 September 2022, Furlough filed a Petition for Possession of Foreclosed Real Estate and sent Rogers a Notice to Vacate via first-class and certified mail. On 23 September 2022, the Final Report and Account of Foreclosure Sale was filed.

Although Rogers resided at the Subject Property during all relevant times, she did not respond to any notice, mailing, posting, or newspaper advertisement for the foreclosure. Rogers claims she first learned of the foreclosure when Furlough contacted her directly by telephone in late August 2022.

On 11 October 2022, Rogers filed a Motion for Relief from Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 in which she averred that because she had never been properly served with either the NOH or the Amended NOH, the trial court lacked jurisdiction over her to authorize the sale of the Subject Property and, therefore, the Order Authorizing Sale was void.

On 8 November 2022, Rogers filed an Amended Motion to Set Aside and Vacate Order of Foreclosure ("Amended MSA") pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) and (c) and filed an affidavit asserting, in pertinent part:

> 7. I was not aware that my property was located within a Homeowners' Association until after the foreclosure hearing and bidding period.
>
> 8. I cannot recall ever receiving any bills from Irish Creek Section 2 Owners Association, Inc., and do not believe I ever received such bills.
>
> 9. I did receive letters from Jordan, Price, Wall, Gray, Jones & Carlton PLLC ("Jordan Price"), but I did not receive certified mail from that firm.

> 10. I believed that the letter from Jordan Price were legal advertisements and junk mail.
>
> 11. I was never served with a notice of hearing in this matter by a sheriff.
>
> 12. I was never served with a notice of hearing by certified mail.
>
> 13. I did not see any notices posted at my property.
>
> 14. I did not know about the foreclosure hearing until after the hearing was completed, an order authorizing sale of the Property was entered, and the foreclosure bidding period had ended.
>
> 15. I would have been able to pay the arrears in HOA assessments if I received notice of the foreclosure hearing.
>
> 16. I would, in fact, have paid the arrears in HOA assessments if I received such notice.

On 14 November 2022, Rogers filed a Motion for Injunctive Relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 65, asserting that the sale price was grossly inadequate and requested that the court prohibit Furlough from disposing of Rogers' personal property until the Rule 60 Motion could be heard. A Superior Court judge granted her Rule 65 motion for a temporary restraining order ("TRO"). On 9 December 2022, the Rule 60 hearing took place before the Assistant Clerk of Court and an order denying Rogers' motions was entered on 15 December 2022.

The Clerk took judicial notice of a prior Claim of Lien filed by Irish Creek HOA in September 2013 which was "canceled due to payment to the claimant on October 15, 2013." The Clerk found "Rogers stated that she did not know who had paid the 2013 Claim of Lien and did not know anything about any of the Claims of Lien at all." Further, the Clerk found Rogers had contemplated selling the Subject Property in 2015 and had filled out and signed four times a Residential Property and Owners' Association Disclosure Statement that named Irish Creek HOA and noted the assessments of $10 per month.

On 22 December 2022, Rogers filed a notice of appeal from the order filed 15 December 2022 denying her Amended MSA. Rogers appealed the matter to Superior Court.

A *de novo* foreclosure hearing was conducted in Superior Court on 24 January 2023. The trial court heard extensive arguments regarding whether service and notice of the foreclosure were improper or insufficient, and specifically, whether service was impacted by the USPS certified mail COVID protocols. Ultimately, in an order filed on 8 February 2023, the trial court made the following conclusions of law:

> 11. [Trustee] submitted prima facie evidence that she achieved proper service upon Ms. Rogers under Rule 4 of the North Carolina Rules of Civil Procedure.
>
> . . . .
>
> 14. Ms. Rogers' failure to open 40+ pieces of mail which the trustee sent to her, any one of which would have notified her of these proceedings and permitted her to take action prior to the sale becoming final, is inexcusable neglect.
>
> 15. Service of the Amended NOH upon Ms. Rogers complied with the requirements of Rule 4 of the North Carolina Rules of Civil Procedure and other applicable North Carolina Law and satisfied due process requirements of the North Carolina and United States Constitutions.
>
> 16. "If a property owner receives actual notice of the foreclosure hearing and could have taken advantage of the relief provided in N.C. Gen. Stat. § 45-21.34, assuming he had grounds, or he could have objected to the method of service, the property owner cannot later argue service on him was inadequate." *Adams v. Bank United of Texas FSB*, 167 N.C. App. 395, 405, 606 S.E.2d 149, 156 (2004).

During this hearing, Trustee served a Motion for Additional Fees upon Rogers' counsel that Trustee had filed that morning. Furlough's counsel and counsel for Irish Creek HOA gave notice of their intentions to file motions to recover attorneys' fees, which were subsequently filed on 27 January 2023 and on 7 February 2023. After the hearing, Rogers filed motions in opposition to each on 6 February 2023, 8 February 2023, and 15 February 2023. The trial court filed an order dissolving the 14 November 2022 TRO on 1 February 2023, giving Rogers twenty days to remove her personal belongings from the Subject Property.

On 3 March 2023, the trial court entered an Order Awarding Additional Trustee's Fees and Costs. The trial court awarded Trustee "fees and costs incurred in defending Ms. Rogers' meritless Amended Motion in the total amount of $15,737.00 as supported by the Affidavit filed by [Trustee]." On 14 March 2023, the trial court entered two additional attorney's fees orders: one awarding $4,260.00 to Irish Creek HOA and one awarding $6,465.35 to Furlough for fees and costs incurred to defend "Ms. Rogers' meritless Amended Motion."

On 27 March 2023, Rogers filed, *pro se*, a Notice of Appeal ("NOA") to this Court pursuant to Rule 3 from the 3 March 2023 Order Awarding Additional Trustee's Fees and Costs and the 8 February 2023 order denying her Amended MSA that was served on 23 February 2023.

After filing a *pro se* NOA, Rogers contacted Attorney Quintin Byrd ("Byrd") for assistance but did not formally retain him as counsel at this time. Rogers hoped to save money by ordering the hearing transcripts herself so that she could retain Byrd as counsel by the time required to produce the proposed record on appeal. The exact timeline of communication between Rogers and Byrd after Rogers made initial contact with him is unclear; but on 3 April 2023, Byrd made the initial contact to Allyson McNiff ("McNiff"), the court reporter at the 24 January 2023 hearing, to ask if she had a recording and if she was able to enter into an appellate contract. Byrd did not file a notice of appearance as counsel for Rogers until 31 July 2023 and insists that he was not acting as counsel for Rogers even though he communicated with McNiff to assist Rogers to order transcripts.

Between 3 April 2023 and 6 April 2023, McNiff, Byrd, and Rogers exchanged emails regarding the transcript contract. McNiff was initially not receiving emails from Rogers so Byrd stepped in and assisted in connecting Rogers and McNiff via email. After McNiff and Rogers communicated back and forth directly a few times, Byrd stepped in again to assist Rogers send McNiff the transcript deposit. McNiff received the $422.50 transcript deposit "via Intuit from Quintin Byrd, Esquire." McNiff delivered the complete transcript via Byrd's law firm email address on 25 May 2023. Byrd did not take any action in response to McNiff's delivery of the transcript via his email and did not file a notice of appearance for Rogers until 31 July 2023.

On 13 July 2023, Trustee filed a Motion to Dismiss the Appeal pursuant to Rules 11 and 25 of the North Carolina Rules of Appellate Procedure on the basis of Rogers' failure to serve the proposed record on appeal within forty-five days after delivery of the transcript. N.C. R. App. P. 11, 25. On 3 August 2023, Rogers filed a Motion to Extend Time to Serve Proposed Record on Appeal. On 18 September 2023, the matter came on for hearing. Byrd argued the time by which to serve the proposed record on appeal could not have expired because he was not formally representing Rogers at the time the transcript was ordered and sent to him and, therefore, delivery of the transcript to his email was not valid. Bryd argued "that [he] was helping her in the goal of her being able to hire [him]." On 7 December 2023, the trial court entered an order dismissing Rogers' appeal for failing "to serve a proposed record on appeal upon the Trustee within forty-five days after delivery of all transcripts that have been ordered, the time allowed by Rule 11(b) of the Appellate Rules."

II. Analysis

On 2 February 2024, Rogers petitioned this Court for writ of certiorari concerning five trial court orders. First, Rogers requests review of the order filed on 7 December 2023 dismissing the appeal of the orders filed on 8 February 2023 denying the motion to set aside foreclosure and on 3 March 2023 allowing additional trustee fees and costs. The trial court's dismissal ended Rogers' ability to appeal these orders. *High Point Bank & Tr. Co. v. Fowler*, 240 N.C. App. 349, 352, 770 S.E.2d 384, 386 (2015) (quoting *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) ("No appeal lies from an order of the trial court dismissing an appeal . . . the proper remedy to obtain review in such case being by petition for writ of certiorari.")).

Next, Rogers requests review of the two orders entered 14 March 2023 granting the motion for attorney's fees for Irish Creek HOA and granting the motion for attorney's fees for Furlough. Neither of these orders were included in Rogers' notice of appeal to this Court filed on 27 March 2023.

A. Trial Court Dismissal of Appeal

[1] "[A] motion to dismiss an appeal is a matter within the discretion of the trial court," thus the review is limited to whether "there was a clear abuse of discretion[.]" *E. Brooks Wilkins Fam. Med., P.A. v. WakeMed*, 244 N.C. App. 567, 576-77, 784 S.E.2d 178, 185 (2016) (quoting *Lawrence v. Sullivan*, 192 N.C. App. 608, 614-15, 666 S.E.2d 175, 179 (2008)).

Rogers argues the trial court erred in dismissing her appeal based on its finding that the proposed record on appeal was not timely served because the transcript was erroneously found to have been properly delivered on 25 May 2023. Further, Rogers argues a violation of Rule 11 does not meet the level of "substantial failure" or "gross violation" necessary for dismissal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

"The appellate courts of this state have long and consistently held that the rules of appellate practice are mandatory and that failure to follow these rules will subject an appeal to dismissal." *In re Foreclosure of a Deed of Tr. Executed by Moretz*, 287 N.C. App. 117, 125, 882 S.E.2d 572, 578 (2022) (cleaned up) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). Our Supreme Court has specifically articulated three circumstances where noncompliance of the rules of appellate practice could impair the court's task of review to warrant dismissal. "Our cases indicate that the occurrence of default under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements[.]" *Dogwood*, 362 N.C. at 194, 657 S.E.2d at 363. Rule 11 is a nonjurisdictional requirement of the appellate rules.

In *Dogwood*, our Supreme Court declared the appropriate analysis for appellate courts grappling with violations of nonjurisdictional appellate rules:

> [T]he appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a "substantial failure" or "gross violation." In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.
>
> . . . .
>
> To summarize, when a party fails to comply with one or more nonjurisdictional appellate rules, the court should *first* determine whether the noncompliance is substantial or gross under Rules 25 and 34. *If it so concludes, it should then determine* which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

362 N.C. at 199-201, 657 S.E.2d at 366-67 (emphasis added).

On appeal, Appellees assert the trial court properly dismissed Rogers' appeal because she violated three rules of Appellate Procedure. However, the trial court cited only Rule 11(b), the failure to serve a proposed record on appeal within forty-five days after delivery of all transcripts ordered, as the basis for granting dismissal of the appeal pursuant to Rule 25. N.C. R. App. P. 11(b). Rule 25 states:

> If after giving notice of appeal from any court . . . the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.

N.C. R. App. P. 25(a).

While a party's "failure to timely serve the proposed record, standing alone, may warrant dismissal[,]" our Supreme Court has stated, "[w]e stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *In re Foreclosure of Moretz*, 287 N.C. App. at 124, 882 S.E.2d at 577; *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365 (emphasis added).

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court *may* consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review[,] [] whether and to what extent review on the merits would frustrate the adversarial process[,] . . . [and] the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.

Dogwood, 362 N.C. at 200, 657 S.E.2d at 366-67 (emphasis added).

Here, it appears the trial court failed to complete the first step of the *Dogwood* analysis as there is not a determination of whether Rogers' noncompliance with Rule 11(b) constitutes a substantial or gross violation *before* it subsequently dismisses her appeal for failing "to serve a proposed record on appeal upon the Trustee within forty-five days after delivery of all transcripts that have been ordered[.]" A dismissal cannot even be considered until the trial court has determined there is a substantial or gross violation. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102 (2010) ("Neither dismissal nor other sanctions under North Carolina Rules of Appellate Procedure 25 or 34 should be considered unless the noncompliance is a 'substantial failure' to comply with the Rules or a 'gross violation' of the Rules."). The trial court further states in its conclusions of law:

> 4. Ms. Rogers has demonstrated a pattern of neglecting to take timely action with regard to her legal affairs.

> 5. Ms. Rogers has demonstrated a lack of candor with the Court throughout her participation in these proceedings.
>
> 6. Ms. Rogers failed to serve a proposed record on appeal upon the Trustee within forty-five days after delivery of all transcripts that have been ordered, the time allowed by Rule 11(b) of the Appellate Rules. The aforementioned failure is solely attributable to Ms. Rogers.
>
> 7. Ms. Rogers failed to take the steps required to present her appeal for decision and the aforementioned failure renders her appeal subject to dismissal pursuant to Rule 25(a) of the Appellate Rules.

Based on these conclusions, the trial court has not determined whether Rogers' noncompliance with our rules of appellate procedure amount to a substantial or gross violation. However, the trial court goes on to treat the noncompliance as a substantial or gross violation by dismissing Rogers' appeal based on the consideration of a single appellate rule violation and what appears to be concern for Rogers' character for honesty and "regard" for "her legal affairs." We hold the trial court's dismissal of Rogers' appeal based on these considerations in addition to its failure to appropriately determine whether the noncompliance amounted to a gross or substantial violation before dismissing the appeal constitutes an abuse of discretion. *See Dogwood*, 362 N.C. at 199-201, 657 S.E.2d at 366-67. We grant Rogers' petition for writ of certiorari and address the merits of her appeal.

B. Service of the Amended Notice of Foreclosure Hearing

[2] "A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *In re Foreclosure of George*, 377 N.C. 129, 140, 856 S.E.2d 483, 491 (2021) (quoting *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). An abuse of discretion is only found when "the trial court's determinations are 'manifestly unsupported by reason.' " *In re George*, 377 N.C. at 140, 856 S.E.2d at 491. "As a result, 'a ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* If a judgment is found void under Rule 60(b)(4) due to a defect in service of process, the trial court abuses its discretion if it does not grant a motion to set aside. *Cnty. of Mecklenburg v. Ryan*, 281 N.C. App. 646, 652, 871 S.E.2d 110, 116 (2022).

On 8 November 2022, Rogers filed the Amended MSA on the basis of Rule 60(b) and (c), which allow a party to obtain relief from a final judgment or order for several reasons, including when "[t]he judgment is void" or when "[a]ny other reason justifying relief from the operation of the judgment" exists. N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), (6). Rogers asserted in her motion that she was "never properly served notice of the foreclosure proceeding," and was unaware her home had been foreclosed on and sold until Furlough, the high bidder, called her by telephone to inform "her that he had purchased her home." Further Rogers asserted,

> [t]he record for the foreclosure proceedings shows that it was fatally defective because the HOA failed to meet the basic, fundamental requirement of providing Ms. Rogers with Rule 4 service. Because her basic due process rights were violated – and because the sale price for her Home was grossly inadequate – this sale and deed should be set aside.

Rogers argued the affidavit of service of process relied entirely on a "facially defective mailing to claim that it served [her] with the notice of hearing" because Rogers herself did not sign the certified mail receipt. The electronic return receipt printout reflects delivery by a notation made by the mail carrier, in partial compliance with Covid-19 procedures.

On 9 December 2022, a hearing on Rogers' Amended MSA took place before the Pitt County Clerk of Court. The Clerk ultimately found the *presumption of service* was met by Trustee and that Rogers was unable to *rebut the presumption* of proper service. Additionally, the Clerk found there was no need to consider Rogers' motion regarding adequacy of purchase price because notice for the 21 October 2021 hearing was proper and accordingly denied Rogers' Amended MSA. Rogers filed a notice of appeal to the Superior Court on 22 December 2022. The Superior Court heard arguments from the parties on 24 January 2023 and denied Rogers' Amended MSA for reasons similar to those of the Clerk of Court.

On appeal, Rogers argues the trial court incorrectly found the USPS Covid-19 protocols evidencing delivery to be effective service of process during the 24 January 2023 hearing on her Amended MSA. Rogers argues there is no evidence the mail carrier personally delivered the notice to the addressee and that the trial court wrongly determined Trustee's affidavit of service was sufficient to create a rebuttable presumption of service, thus the burden was improperly shifted to Rogers. We agree.

Trustee purported to complete service of process by sending the Amended NOH to Rogers via USPS certified mail to the Subject Property address. Service of process is authorized "[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and *delivering to the addressee*." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (emphasis added). Trustee, in accordance with N.C. Gen. Stat. § 1-75.10(a)(4), filed an affidavit of service of process with the court. N.C. Gen. Stat. § 1-75.10(a)(4). Trustee attached to the affidavit a copy of a USPS electronic delivery receipt and printout for the Amended NOH as evidence of proof of service.

N.C. Gen. Stat. § 1-75.10(a)(4) governs service of process and states:

> (a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . . .
>
> (4) Service by Registered or Certified Mail . – In the case of service by registered or certified mail, by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. *That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee*; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (emphasis added).

In determining whether service of process is valid, our Supreme Court has stated:

> "Where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there *is no valid service*." Therefore, where service of process is had by leaving the summons and complaint with a person other than the named defendant the substitute person must be a "person of suitable

> age and discretion," who lives with defendant in his "dwelling house or usual place of abode," and the summons must be left with the substitute person *at their usual* place of abode. *If delivery is made elsewhere the service is invalid.*

Guthrie v. Ray, 293 N.C. 67, 69-70, 235 S.E.2d 146, 148 (1977) (cleaned up) (emphasis added) (quoting *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915)). This Court in *Granville Medical Center v. Tipton*, stated that "Rule 4(j2)(2) raises a presumption that the person who *received the mail* and *signed* the receipt was an agent of the addressee authorized to be served or to accept service of process." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 492, 586 S.E.2d 791, 797 (2003).

Here, the record on appeal indicates Trustee sent Rogers four pieces of mail via USPS certified mail: (1) COL 1, (2) COL 2, (3) NOH, and (4) the Amended NOH. COL 1, COL 2, and NOH all indicate on the USPS electronic delivery receipts that they were "Delivered, Left with Individual." The COL 1 electronic delivery receipt appears to say "covid 19" in place of the signature of recipient but does not include any indication it was actually left with an individual as no initials or names are included. The COL 2 electronic delivery receipt contains illegible letters or some sort of symbol in front of "19," also not including *any* indication it was actually left with an individual. The NOH electronic delivery receipt, similar to COL 2, contains illegible letters or some sort of symbol in front of "19," again not including *any* indication it was actually left with an individual. However, the Amended NOH electronic delivery receipt, the only certified mail referenced in Trustee's affidavit as proof of service, veers further away from offering proof of delivery as it does not even indicate it was delivered to an individual; the Amended NOH electronic delivery receipt states it was "Delivered to Agent *for* Final Delivery." Additionally, the mail carrier's notation in lieu of a signature appears to read "DLGC19n2" and the receipt contains no other initials or names. Trustee does not provide any additional proof of final delivery of the Amended NOH or who the agent was who received the delivery and was to complete the final delivery. As Trustee's affidavit lacks both a return receipt with a proper signature and *any* indication of who received the Amended NOH, the affidavit cannot meet the burden to establish the presumption of valid service. *See id.* at 491-93, 586 S.E.2d at 796-98.

This Court has issued unpublished opinions on the issue *sub judice*. Although "unpublished opinion[s] establish[] no precedent and [are] not binding authority" they may be used as persuasive authority and we find the analyses set forth in the following unpublished opinions cited herein to be persuasive and compelling. *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000). This Court has "previously held service [was] insufficient in cases where the signature line on the return receipt of registered or certified mailings does not reflect actual receipt by a natural person, either the addressee themselves or an authorized agent." *Luxeyard, Inc. v. Klinek*, 293 N.C. App. 472, 899 S.E.2d 926, 2024 WL 1635646, at *3 (2024) (unpublished) (citing *Yves v. Tolentino*, 287 N.C. App. 688, 689-90, 884 S.E.2d 70, 71-73 (2023)); *see Hamilton v. Johnson*, 228 N.C. App. 372, 378-79, 747 S.E.2d 158, 162-63 (2013); *see also Scott v. Vural*, 288 N.C. App. 104, 883 S.E.2d 661, 2023 WL 2377787, at *2-3 (2023) (unpublished)). Indeed, the purpose of sending notice by certified mail is to ensure that it is delivered to a natural person such that actual notice of the proceedings be made known to the addressee. USPS Covid-19 protocols allowing contactless service of certified mail "cannot be held to comply with the purposeful practice of service under Rule 4(j)(1)(c)." *Luxeyard*, 2024 WL 1635646, at *3.

It is well established that "[t]he purpose of a summons is to give notice to a person to appear in a certain place and time to answer a complaint against him." *Yves*, 287 N.C. App. at 690, 884 S.E.2d at 72. Thus, "a person relying on the service of a notice by mail must show *strict compliance* with the requirements of the statute." *In re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968) (emphasis added) (citation omitted). The purpose of certified mail and its signature requirement is to ensure that proof exists that someone actually received the service of notice.

The USPS contactless certified mail delivery procedures implemented during Covid-19 removed attributes of certified mail that generally make it a suitable vehicle for service of process in accordance with N.C. Gen. Stat. § 1-75.10(a)(4). "Where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service." *Guthrie*, 293 N.C. at 69, 235 S.E.2d at 148 (quoting *S. Lowman*, 168 N.C. at 18, 84 S.E. at 22). Removing the signature confirmation by the addressee leaves certified mail in line with first-class mail in part because no one but the mail carrier can confirm whether the mail was delivered to the addressee as the mail carrier was instructed to print their *own* initials in the signature line. Accepting the mail carrier's notation of "Covid 19" in some variation as a signature defeats the very purpose of requiring the recipient's signature and removes the assurance that the certified mail was actually *received* by a person. Thus, we cannot accept the mail carrier's initials as proof the addressee has received the certified mail. Further, the mail carrier purporting to deliver the Amended NOH in the case *sub judice* failed to fully comply with USPS Covid-19 protocols in that the mail carrier did not do as instructed, notate the first initial and the last name of the customer receiving the certified mail after viewing the customer's identification card. *Delivering During COVID-19*, at 13.

As stated, Trustee's affidavit of service of process references only the Amended NOH. The electronic delivery receipt attached to the affidavit for the Amended NOH indicates it was "Delivered to Agent for Final Delivery" and includes the mail carrier's Covid-19 notation in lieu of signature. The electronic delivery receipt offers *nothing* as evidence to confirm whether the Amended NOH was left at the Subject Property *at all* as the mail carrier is the only person who made any notation on the receipt and, when doing so, also failed to include the customer's first initial and last name per USPS protocol. Without offering some confirmation that the Amended NOH was actually delivered to an individual able to receive service on behalf of the addressee, the strict requirements of the statute cannot be found satisfied.

Further, the trial court found as a fact that Rogers did *not* sign the return of service green card but that the "green card"[1] indicated it had been served under USPS Covid-19 protocols. However, the return receipt "green card" is not included in the record on appeal, rather printouts of electronic delivery receipts and tracking information are included. While USPS Covid-19 protocols did not require Rogers to *sign* the delivery return receipt, Covid-19 protocols did require the mail carrier to notate the receiving customer's first initial and last name. None of the certified mail electronic delivery receipt records contain a notation of a first initial and last name, thus, the purported delivery of the certified mailing to Rogers cannot be found to comply with even the USPS Covid-19 delivery protocols.

The trial court incorrectly found that Trustee "submitted prima facie evidence that she achieved proper service upon Ms. Rogers under Rule 4 of the North Carolina Rules of Civil Procedure," and wrongly shifted the

1. While the Superior Court references a "green card" return receipt in their findings, and a "green card" is referenced by parties in the hearing transcript, the record on appeal does not contain a "green card." It appears that the "green card" referenced is actually the USPS electronic return receipt printout for the Amended NOH that is referenced throughout this opinion and included in the record.

burden to Rogers to rebut the presumption of proper service. Therefore, we find the trial court committed reversible error in concluding service upon Rogers was proper and complied with Rule 4.

As we are unable to find that the return receipt was even in compliance with Covid-19 protocols, we certainly cannot find that it met the specific requirements of N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c). We cannot presume valid service when there is no evidence to support the finding of valid service without a proper signature. For this reason, we find the evidence of delivery unsatisfactory, thus we cannot presume valid service under N.C. Gen. Stat. § 1-75.10(a)(4).

Before the Clerk of Court and the Superior Court, and again on appeal, Appellees argue service by posting by the sheriff was proper and sufficient pursuant to N.C. Gen. Stat. § 45-21.16 and that Rogers has not offered any evidence that the NOH or Amended NOH were *not* posted at the Subject Property to rebut a presumption of service by this method. Rule 4 allows service by publication or by posting when "[a] party [] cannot with due diligence be served by personal delivery, registered or certified mail, or by designated delivery service . . . ." N.C. Gen. Stat. § 1A-1, Rule 4(j1). "In order to utilize service of process by publication under this statute it is necessary that [Trustee] file with the court an affidavit showing the 'circumstances warranting the use of service by publication.' " *Edwards v. Edwards*, 13 N.C. App. 166, 169, 185 S.E.2d 20, 22 (1971). The Clerk of Court addressed this issue in its order stating "[t]he required affidavit regarding posting has not been filed in this matter, and the Trustee may not rely on the sheriff's posting to establish service."[2] We agree Appellees may not rely on service by posting by the sheriff to establish service.

Because of the defect in service of process, the Clerk's order authorizing sale of the Subject Property filed 21 October 2021 is void. Therefore, we hold the trial court abused its discretion in denying Rogers' motion to set aside the foreclosure. *See Ryan*, 281 N.C. App. at 652, 871 S.E.2d at 116. Thus, we reverse the trial court's order.

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2. Further, we note that Trustee's affidavit does not indicate the circumstances warranting the use of posting as required by showing an exercise of due diligence to personally serve Rogers. N.C. Gen. Stat. § 45-21.16(a). "Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Williamson v. Savage*, 104 N.C. App. 188, 192, 408 S.E.2d 754, 756 (1991) (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980)).

On appeal, Rogers also raises the issue of inadequacy of the purchase price of the Subject Property. Neither the Clerk of Court nor the Superior Court reached Rogers' argument regarding the adequacy of the purchase price realized from the foreclosure sale at trial because they found the foreclosure sale to have been proper. Because we hold service of process to be invalid and reverse the trial court, and because the issue of adequacy of the purchase price was not reached by the court below, we remand this issue to the trial court.

Because we reverse the trial court's order denying Rogers' motion to set aside, the three subsequent orders awarding attorney fees are vacated.

III. Conclusion

After careful review of the record and applicable law, we hold the trial court erred by dismissing Rogers' appeal as there was no gross or substantial violation of appellate rules, thus the 7 December 2023 order dismissing Rogers' appeal is reversed. Further, we hold the trial court erred by finding Trustee complied with N.C. Gen. Stat. § 1A-1, Rule 4(j) to create a valid presumption of service and reverse the trial court's order denying Rogers' amended motion to set aside and vacate the foreclosure order. We vacate the three subsequent orders awarding attorney fees. Lastly, we remand to the trial court for consideration of the proper remedy, Furlough's status as a good faith purchaser, and the adequacy of the purchase price.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges ARROWOOD and FREEMAN concur.

SEANPATRICK LEECH, Plaintiff
v.
STATE OF NORTH CAROLINA, JOSHUA STEIN, in his official capacity as Attorney General of the State of North Carolina, PHILIP BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, TIMOTHY MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, and MICHAEL WATERS, in his official capacity as District Attorney for the Eleventh Prosecutorial District of North Carolina, Defendants

No. COA24-1113

Filed 1 October 2025

Civil Procedure—Rule 12(b)(6) motion to dismiss—evidence outside of pleadings—improperly considered—constitutional claims remanded—transfer to three-judge panel required

In an action filed by plaintiff police officer against the State and certain State defendants, including a district attorney who issued a letter pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), barring plaintiff from testifying for the State in future criminal or traffic cases, which resulted in plaintiff losing his job, the trial court erred where: the district attorney submitted evidence outside of the pleadings in support of his Civil Procedure Rule 12(b)(6) motion to dismiss; plaintiff moved to strike the evidence, correctly pointing out that its consideration would convert defendant's 12(b)(6) motion into a motion for summary judgment; and the court incorporated the contested evidence into its findings of fact when granting defendant's motion to dismiss without ruling on plaintiff's motion to strike or providing plaintiff a reasonable opportunity to respond, as required under Rule 56. Thus, the court's judgment was vacated and the matter was remanded for rehearing on plaintiff's constitutional claims against the district attorney and his claim against the State defendants raising an as-applied challenge to N.C.G.S. § 17C-16 (requiring anyone who received a *Giglio* letter to send a copy to the Criminal Justice Standards Division for entry into its database). On remand, the trial court was to take into account new Supreme Court precedent that would potentially impact its reconsideration of plaintiff's claims. Additionally, where plaintiff sufficiently alleged a facial constitutional challenge to section 17C-16, the trial court was required to comply with N.C.G.S. § 1-267.1 by resolving all matters not contingent upon the outcome of the facial constitutional claim and then transfer the case to a three-judge panel in the Superior Court of Wake County.

Appeal by Plaintiff from order entered 3 June 2024 by Judge Edwin G. Wilson, Jr. in Person County Superior Court. Heard in the Court of Appeals 13 August 2025.

Ellis & Winters LLP, by Jeffrey S. Warren, Jonathan D. Sasser, Michelle A. Liguori, and Tyler C. Jameson, for the Plaintiff.

Attorney General Jeff Jackson, by Special Deputy Attorney General, Elizabeth Curran O'Brien, for Michael Waters; and Special Deputy Attorney General Michael E. Bulleri, for Philip Berger and Timothy Moore, Defendants-Appellees.

WOOD, Judge.

SeanPatrick Leech ("Plaintiff") appeals from an order granting Motions to Dismiss for defendant Michael Waters ("Defendant Waters") and defendants State of N.C., Joshua Stein, Philip Berger, and Timothy Moore (collectively "State Defendants"). On appeal, Plaintiff raises three issues, (1) did the trial court err in considering the Affidavit of Defendant Waters and other evidence outside the pleadings when ruling on Defendant's Motion to Dismiss; (2) did the trial court err in granting Defendant Water's Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6); and (3) did the trial court err in granting the State Defendants' Motion to Dismiss pursuant to Rule 12(b)(6). After careful review of the record, we vacate the trial court's order and remand for rehearing.

I. Factual and Procedural Background

The following facts are alleged in Plaintiff's complaint. In April 2021, the Roxboro Police Department ("RPD") received a 911 call about a rape in progress. The RPD dispatched an officer to the home of the alleged victim to investigate. The officer arrested the suspect at the scene, and the victim left the home. When the alleged victim returned home a few days later, she found a boxcutter in her bedroom that she did not recognize. She called RPD to report what she found, and RPD sent Plaintiff to interview the victim. Multiple times the victim denied the boxcutter was used during the alleged rape and stated she did not know from where the boxcutter came. Plaintiff returned to his patrol car and called his supervisor ("Sergeant") to explain the situation. Plaintiff told Sergeant he intended to dispose of the boxcutter if the original investigating officer confirmed there was no report of a boxcutter during the rape. According to Plaintiff, Sergeant approved his plan. Plaintiff then met with the responding officer who confirmed the findings in the report, also denying that a boxcutter was used in the rape. Having confirmed that a boxcutter was not used during the alleged rape nor listed as evidence, Plaintiff disposed of it. Plaintiff did not knowingly dispose of evidence.

Approximately one week after Plaintiff disposed of the boxcutter, the District Attorney's ("DA") office contacted RPD seeking photographs of the boxcutter. Plaintiff immediately explained the situation and his disposal of the boxcutter.

On 25 May 2021, the RPD began an internal affairs investigation. Plaintiff fully cooperated with the investigation and accepted responsibility for his actions. He was not deceitful or misleading.

On 26 July 2021, Defendant Waters, the District Attorney, informed Plaintiff that his office was investigating potential impeachment evidence within the meaning of *Giglio v. United States*. Defendant Waters met with Plaintiff but did not disclose what evidence, if any, was under consideration in his *Giglio* determination. According to Plaintiff, Defendant Waters did not inform Plaintiff that anyone had accused him of dishonesty or indicated he believed Plaintiff was being dishonest.

On 26 September 2021, Defendant Waters sent a *Giglio* letter to Plaintiff which stated the DA's office would "no longer be able to use [Plaintiff] as a witness for the State of North Carolina in any criminal or traffic case." Defendant Waters also sent the letter to Plaintiff's employer, RPD. The basis stated for the letter was,

> (1) Plaintiff mishandled potential evidence in a felony prosecution, and
>
> (2) when confronted, identified a fellow officer who reportedly advised that if not used in the crime, disposing of the boxcutter was permissible. The fellow officer denies the assertion in any conversation. This assertion by [Plaintiff] is not corroborated by other evidence and this dishonesty has implication beyond the destruction of the boxcutter.

Defendant Waters identified Sergeant as the "other officer." This assertion of dishonesty conflicted with the findings of the internal affairs investigation which determined only "that there was an inconsistency in [Plaintiff's] and [Sergeant's] statement[s]." According to Plaintiff, Sergeant's statements conflicted during the investigations. First, Sergeant "denied having a phone call conversation with [Plaintiff] . . .

about the agreement to 'scrap' the [boxcutter]." Then, Sergeant changed his story stating, he "did not recall discussing approval to 'scrap' the [boxcutter]."

At the time Defendant Waters published the *Giglio* letter Plaintiff was not involved with any current judicial proceedings or criminal processes and there was no way for Defendant Waters to know whether Plaintiff's alleged conduct could "negate the guilt of the accused or mitigate the offense." Defendant Waters offered no explanation for how Plaintiff's conduct would trigger a blanket *Brady*[1] or *Giglio*[2] obligation in the future.

On 27 September 2021, Plaintiff received Notice of Pre-Disciplinary Conference from the RPD which indicated that "based on the findings of each allegation below, and specifically Allegation 4, *Giglio*, the recommended disciplinary action is termination." The notice explained that Plaintiff had two options: face termination, which would result in the generation of a public record explaining the circumstances of his termination, or resign, which would not. Plaintiff chose to resign in an effort to salvage his reputation and mitigate the effect of the *Giglio* Letter. As the termination was recommended specifically because of the *Giglio* letter and RPD and the City of Roxboro have no authority to withdraw, rescind, or even challenge Defendant Waters' *Giglio* letter, appealing the termination would have been futile.

On 1 October 2021, the *Giglio* Statute, N.C. Gen. Stat. § 17C-16, went into effect. The statute requires anyone who has received a *Giglio* letter notifying them that they may not be called to testify to provide a copy of that notification to the Criminal Justice Standards Division ("CJSD") to be entered into its database. Additionally, if any officer in the *Giglio* Statute's database seeks to transfer his or her certification to another law enforcement agency, the Statute directs the CJSD to republish the *Giglio* determination to the officer's new agency head and either the local elected district attorney or, if the new agency is a state agency, to every elected district attorney in the State. The statute provides an

1. Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215, 218 (1963) prosecution has an obligation to disclose evidence favorable to the defense where the evidence is material either to guilt or to punishment. This includes impeachment evidence against government witnesses as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985).

2. *Giglio* created the obligation for prosecutors to disclose evidence that could affect the credibility of its witnesses even if that evidence is with another prosecutor. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 109 (1972).

officer with the right to a review hearing for the sole purpose of determining whether he or she had actually been issued a *Giglio* letter; however, the statue does not allow for a review of the letter's allegations to determine whether the allegations support the publication of the letter. N.C. Gen. Stat. § 17C-16(d).

In July 2022, Plaintiff's counsel contacted the Department of Justice ("DOJ") requesting an independent investigation and opportunity to contest the allegations. A DOJ investigator conducted an investigation, and on 22 February 2023, Plaintiff was heard before the Probable Cause Committee of the Criminal Justice Education and Training Standards Commission ("CJSC"). The Probable Cause Committee found no probable cause to support either of the accusations in the *Giglio* letter; however, neither the Probable Cause Committee nor the CJSC have the authority to withdraw or rescind the *Giglio* letter or to remove Plaintiff from the CJSD database.

On 13 March 2023, through counsel Plaintiff requested that Defendant Waters withdraw the *Giglio* letter considering the independent investigation and hearing. On 24 April 2023, Defendant Waters informed Plaintiff's counsel that Defendant would not withdraw Plaintiff's *Giglio* letter.

On 16 June 2023, Plaintiff filed a complaint against both Defendant Waters for constitutional violations as well as State Defendants for both a facial challenge and an as applied challenge to N.C. Gen. Stat. § 17C-16. State Defendants filed a Motion to Dismiss on 24 July 2023, and Defendant Waters filed a Motion to Dismiss on 21 August 2023. The trial court conducted a hearing on 6 February 2024. On 21 February 2024, the trial court requested all parties to answer seven questions by filing supplemental briefings. Attached to Defendant Waters' supplemental brief was an affidavit and two letters. On 26 April 2024, Plaintiff filed an Objection and Motion to Strike Defendant Waters' supplemental materials. On 3 June 2024, the trial court entered an order granting both Motions to Dismiss without ruling on Plaintiff's Motion to Strike. The trial court cited Defendant Waters' supplemental materials in its dismissal order. On 26 June 2024, Plaintiff filed notice of appeal.

II. Analysis

On appeal Plaintiff raises three issues: (1) did the trial court err in considering the Affidavit of Defendant Waters and other evidence outside the pleadings when ruling on Defendant's Motion to Dismiss; (2) did the trial court err in granting Defendant Waters' Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6); and (3) did the trial court err in granting the State Defendant's Motion to Dismiss pursuant to Rule 12(b)(6).

A. Consideration of Evidence Outside the Pleadings

Plaintiff contends the trial court erred when it (1) allowed Defendant Waters to submit evidence outside the pleadings including an affidavit and two letters, (2) did not respond to Plaintiff's Motion to Strike the evidence, and (3) utilized the evidence in its findings of fact when ruling on the Motion to Dismiss without providing a reasonable opportunity for Plaintiff to respond based on Rule 56. We agree.

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2024). Under a 12(b)(6) determination "the trial court is limited to reviewing the allegations made in the complaint. . . . [The 12(b)(6) motion] is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleading are presented to and not excluded by the court." *Blue v. Bhiro*, 381 N.C. 1, 5-6, 871 S.E.2d 691, 694-95 (2022) (cleaned up). Further, "matters outside the pleading" includes "evidentiary materials used to establish facts." *Id.* at 6, 871 S.E.2d at 695. We review the question of law, whether a Rule 12(b)(6) motion has been converted to a Rule 56 motion, *de novo*. *Id.* at 5, 871 S.E.2d at 694.

It is well settled that if documents are attached to and expressly incorporated within a complaint, they become part of the complaint and may be considered at the 12(b)(6) hearing. Additionally, "a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (quoting *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001)). In contrast, when the plaintiff "simply refers to a document that was not the subject of [the] action, and the defendant attaches that document or an affidavit concerning that document to support a Rule 12(b)(6) or Rule 12(c) motion, the trial court's consideration of that document converts the motion into one for summary judgment." *Holton v. Holton*, 258 N.C. App. 408, 419, 813 S.E.2d 649, 657 (2018).

In *Horne v. Town of Blowing Rock*, this Court held it necessary and proper for the trial court to convert the town's motion to dismiss from a 12(b)(6) to a summary judgment motion where plaintiff referenced an insurance policy to support the town's alleged waiver of government immunity in his negligence complaint but the town attached an endorsement from the policy and an insurance adjustor's affidavit to support its motion and the trial court relied on those items to support its ruling. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 31, 732 S.E.2d 614, 618 (2012). This Court held similarly in *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (finding that when "none of [the] documents were attached to the complaint or were the subject of plaintiff's complaint" then conversion to summary judgment was appropriate) and *Jenkins v. Batts*, 248 N.C. App. 202, 207, 788 S.E.2d 628, 632 (2016) (noting "the trial court's consideration of affidavits and other information outside the pleadings would have converted such motion into a motion for summary judgment.").

When the trial court considers information outside the pleadings and thereby converts a 12(b)(6) motion to one for summary judgment, the parties must be given reasonable time and "opportunity to present all material made pertinent" by the evidence presented outside the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2024). This is meant to "preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings." *Coley v. N.C. Nat. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979).

In the case *sub judice*, neither Plaintiff's original claim nor Defendant Waters' first response explicitly references Defendant Waters' notice letter or Plaintiff's response letter, which now are contested. On 21 February 2024, the trial court submitted seven questions to the parties and requested their responses by supplemental briefing. The trial court allowed Plaintiff thirty days to file a response brief and allowed Defendant Waters thirty days to respond to Plaintiff's filing. Plaintiff requested permission to respond to Defendant Waters' brief, which the trial court denied.

Most of the questions concerned questions of law or hypothetical situations. However, question six stated:

> District Attorney Waters met with Plaintiff Leech one month after commencement of Internal Affairs' investigation

> into potential destruction of evidence. There, District Attorney Waters informed Plaintiff Leech that his office was investigating potential *Giglio* impeachment evidence. In what ways was this insufficient to put Plaintiff Leech on notice that he may receive a *Giglio* impairment? In what ways was this inadequate to satisfy any due process obligations?

Plaintiff's brief in response to the trial court's questions, including question six, did not include any reference to the letters in contest, solely reiterating the allegations in the complaint, and the law as they interpreted it. Similarly, the State Defendants' response noted, "matters related to whether, when, and how *Giglio* letters are issued, are not impacted by the *Giglio* statutes. Therefore, State Defendants take no position with respect to this question or Plaintiffs' response." "Matters related to whether, when and how" clearly indicates that the response to question six relates to the evidentiary facts of the matter. This is made clear by Defendant Waters' response brief wherein he explicitly referenced the letters and attached both letters and his affidavit as evidence of Defendant Waters' notice to Plaintiff.

On 26 April 2024, in response to the factual evidence and affidavit added to Defendant Waters' brief, Plaintiff filed an Objection and Motion to Strike describing the materials outside the pleadings and contending that the motion should have been converted to summary judgment and the trial court should have given Plaintiff the opportunity to rebut the evidence. The trial court did not enter a ruling on Plaintiff's Objection and Motion to Strike prior to granting Defendant Waters' Motion to Dismiss. However, the trial court clearly considered the attached materials in contest when issuing its order granting Defendant Waters' Motion to Dismiss. The trial court found as facts,

> 10. Two months later, on July 26, 2021, DA Waters sent Plaintiff a letter notifying him that DA Waters' office was conducting an investigation into potential impeachment evidence within the meaning of *Giglio v. United States*.
>
> 11. Plaintiff subsequently requested a meeting with DA Waters to discuss the allegations made under *Brady v. Maryland* and *Giglio v. United States* against Plaintiff that formed the basis of DA Waters' investigation. Plaintiff and DA Waters later met to discuss the allegations.

Because the trial court allowed material clearly outside of the original pleadings, the 12(b)(6) motion was converted to a motion for summary judgment. The trial court failed to respond to Plaintiff's Objection and Motion to Strike and did not allow Plaintiff time or opportunity to rebut the evidence presented outside the pleadings. Thus, the trial court erred. Therefore, we must remand the claims against Defendant Waters, to allow Plaintiff opportunity to respond as Rule 56 requires. Additionally, we must remand the as-applied challenge to N.C. Gen. Stat. § 17C-16 against State Defendants. "An as-applied challenge requires a defendant to show the statute at issue is unconstitutional as applied to the facts of his specific case." *State v. Nanes*, 297 N.C. App. 863, 870, 912 S.E.2d 202, 209 (2025). As Plaintiff was denied the full opportunity to respond to the underlying factual issues in this case, we must also remand the as-applied claim. However, the facial challenge to N.C. Gen. Stat. § 17C-16 requires our further consideration.

B. Facial Constitutional Claim

As the trial court correctly points out, N.C. Gen. Stat. § 1-267.1 states when a facial challenge is properly raised in a civil proceeding, the trial court must transfer the case to a three-judge panel in the Superior Court of Wake County. *Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 272, 841 S.E.2d 307, 311-12 (2020).

"A facial challenge is an attack on a statute itself as opposed to a particular application. Complaints alleging broad constitutional violations constitute facial challenges." *Alexander v. N.C. State Bd. of Elections*, 281 N.C. App. 495, 503, 869 S.E.2d 765, 771 (2022) (quoting *Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 311). "To state a facial claim for violation of procedural due process rights, the complainant must allege (1) that the 'State has interfered with a liberty or property interest' and (2) that the State did not use 'a constitutionally sufficient procedure to interfere with the liberty or property interest.' " *Ballard v. Shelley*, 257 N.C. App. 561, 568, 811 S.E.2d 603, 608 (2018) (quoting *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308, 750 S.E.2d 46, 48–49 (2013)). Additionally, our Supreme Court recently stated "[b]ecause our Fruits of Labor test is a fact intensive inquiry . . . the trial court erred when it entered summary judgment[,]" indicating that facial challenges under the Fruits of Labor clause are fact intensive and summary judgment is rarely proper. *N.C. Bar & Tavern Ass'n v. Stein*, No. 126PA24, 388 N.C. 149, 919 S.E.2d 684, 2025 WL 2427604, at *1 (N.C. Aug. 22, 2025).

In the case *sub judice* Plaintiff clearly raised a "facial challenge to the *Giglio* statute [N.C. Gen. Stat. § 17C-16] for violation of N.C. Const. art. I, § 19" and requested the trial court to declare the statute to be in violation of the North Carolina Constitution. Plaintiff contends that law enforcement officers are denied any due process protections including notice or hearing prior to being listed in the *Giglio* database based on vague and subjective standards. This claim is analogous to the due process claim this Court heard in *In re W.B.M.* concerning N.C. Gen. Stat. § 7B-323 requirements for inclusion on the Responsible Individuals List. *In re W.B.M.*, 202 N.C. App. 606, 621, 690 S.E.2d 41, 52 (2010) (finding, ". . . an individual has a right to notice and an opportunity to be heard before being placed on the RIL.").

When a sufficient facial claim is clearly alleged, the trial court, in compliance with N.C. Gen. Stat. § 1-267.1, must resolve all matters not "contingent upon the outcome of the challenge to the act's facial validity" and then transfer the case to a three-judge panel in the Superior Court of Wake County. N.C. Gen. Stat. § 1A-1, Rule 42 (2024). Therefore, as noted *supra*, we remand the claims against Defendant Waters, as well as the claim for an as-applied challenge to N.C. Gen. Stat. § 17C-16, for the trial court to resolve before transferring the case to the necessary three-judge panel in the Superior Court of Wake County.

C. Changes to Current Caselaw

Finally, we note a significant change in the standard of review for North Carolina State Constitutional claims brought under the Fruits of Labor clause, as it applies to this case upon remand. N.C. Const. art. I, § 1. This change is predicated by our Supreme Court's decision in *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 904 S.E.2d 720 (2024) which was more recently reaffirmed in both *N.C. Bar & Tavern Ass'n v. Stein*, No. 126PA24, 388 N.C. 149, 919 S.E.2d 684, 2025 WL 2427604 (N.C. Aug. 22, 2025) and *Howell v. Cooper*, No. 252A23, 388 N.C. 71, 919 S.E.2d 212, 2025 WL 2427597 (N.C. Aug. 22, 2025). All three Supreme Court opinions were decided after the trial court's ruling and further clarified this Court's previous ruling in *Kinsley v. Ace Speedway Racing, Ltd.*, 284 N.C. App. 665, 877 S.E.2d 54 (2022) on which the trial court's order heavily relied.

The Supreme Court in *Kinsley* clearly defined a "twofold inquiry" to determine whether State action may survive constitutional inquiry under the fruits of their own labor clause: "(1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 424, 904 S.E.2d 720, 726 (2024) (quoting *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697 (1988)). When addressing proper purpose under the first prong, the Court went on to explain that while the State may assert a proper purpose, "the plaintiff may rebut that assertions with evidence demonstrating that the State's asserted purpose is not the true one, and instead the State is pursuing a different unstated purpose." *Id.* at 425, 904 S.E.2d at 726. Additionally, when analyzing the facts for the second prong the Court stated,

> [t]he means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated. This requires assessing two fact-specific questions—first, how effective is the state action at achieving the desired public purpose and, second, how burdensome is that state action to the targeted businesses. The analysis then becomes "a question of degree"—given all the options available to the state to advance the governmental purpose, was it reasonable for the state to choose this approach, with its corresponding benefits and burdens?

Id. at 426, 904 S.E.2d at 727 (quoting *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 66, 366 S.E.2d 697 (1988)). This new binding precedent may impact the trial court's reconsiderations of the claims against Defendant Waters as well as the claim for an as-applied challenge to N.C. Gen. Stat. § 17C-16.

III. Conclusion

After a thorough review of the record, we conclude the trial court erred in allowing material clearly outside of the original pleadings and failing to allow Plaintiff time or opportunity to respond. We therefore vacate and remand for rehearing on the claims against Defendant Waters, as well as the claim against State Defendants for an as-applied challenge to N.C. Gen. Stat. § 17C-16, giving Plaintiff the opportunity to respond as Rule 56 requires and with consideration of the new precedent from our Supreme Court. *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 904 S.E.2d 720 (2024); *N.C. Bar & Tavern Ass'n v. Stein*, No. 126PA24, 388 N.C. 149, 919 S.E.2d 684, 2025 WL 2427604 (N.C. Aug. 22, 2025); *Howell v. Cooper*, No. 252A23, 388 N.C. 71, 919 S.E.2d 212, 2025 WL 2427597 (N.C. Aug. 22, 2025). Additionally, as Plaintiff sufficiently pled a facial constitutional claim, the trial court must comply with N.C. Gen. Stat. § 1-267.1, resolve all matters not "contingent upon the outcome of the challenge to the act's facial validity" and then transfer the case to a three-judge panel in the Superior Court of Wake County. It is so ordered.

VACATED AND REMANDED.

Chief Judge DILLON and Judge GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
LETOYA BENTON

No. COA25-92

Filed 1 October 2025

1. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—lack of supervision—sufficiency of evidence

The State presented substantial evidence to support a charge of misdemeanor child abuse to overcome defendant's motion to dismiss, including: defendant left her six-year-old daughter alone outside in a nearby public park in the evening while she went inside her apartment; when defendant did not return, the child wandered alone for at least thirty-five minutes along crowded streets and ended up about a mile and a half away; defendant made no effort to locate her daughter and told police she presumed her daughter had gone home with a friend. Actual physical injury was not required for purposes of the offense, and the circumstances surrounding defendant's lack of supervision were sufficient to send the charge to the jury.

2. Child Abuse, Dependency, and Neglect—contributing to the delinquency of a juvenile—lack of supervision—sufficiency of evidence

The State presented substantial evidence to support a charge of contributing to the delinquency of a minor to overcome defendant's motion to dismiss, including: defendant left her six-year-old daughter alone outside in a nearby public park in the evening while she went inside her apartment and, when defendant did not return, the child wandered alone for at least thirty-five minutes along crowded streets and ended up about a mile and a half away to a busy intersection where she was observed talking to strangers. Defendant's lack of supervision created a substantial risk that her daughter could be harmed, either by the daughter's own accord or by others.

3. Criminal Law—child abuse and neglect—prosecutor's closing arguments—use of facts from prior cases

In a prosecution for misdemeanor child abuse and contributing to the delinquency of a minor arising from defendant's lack of supervision of her six-year-old daughter, who she left alone in a public park for an extended period of time in the evening, the trial court did not abuse its discretion by permitting the prosecutor to relate the facts and findings from two prior negligent supervision cases. The arguments were appropriate where the prosecutor used those cases to highlight the types of issues to be considered when determining whether a child had been subjected to a substantial risk of harm but did not argue for defendant's conviction based on any similarities between the instant case and the prior cases.

4. Jury—selection—Batson challenge—lack of purposeful discrimination—race-neutral single parenthood criteria

In a prosecution for misdemeanor child abuse and contributing to the delinquency of a minor (based on defendant's lack of supervision of her six-year-old daughter, who she left alone in a public park for an extended period of time in the evening), in which defendant raised a *Batson* claim to challenge the State's use of peremptory strikes to remove three black prospective jurors, the trial court did not err by determining that defendant failed to meet her burden of showing purposeful discrimination. The court did not clearly err by determining that the State's race-neutral reason for striking the jurors—on the basis that they were all single parents, who might have viewed the circumstances of defendant's lack of supervision with more sympathy—was reasonable and not pretextual, particularly where the State applied its single parenthood criteria universally without regard to race (the State did not strike another black prospective juror because she was not a single parent and used an additional two peremptory strikes against white prospective jurors).

Appeal by defendant from judgment entered 7 June 2024 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Heidi M. Williams, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender, Callie S. Thomas, and Kathryn L. VandenBerg, for the defendant.

TYSON, Judge.

Letoya Benton ("Defendant") appeals judgment entered 7 June 2024 upon the jury's verdicts convicting her of misdemeanor child abuse and contributing to the delinquency of a minor. We find no error.

I. Background

Defendant and her six-year-old daughter, "Susan," were spending time at the park near their residence on the evening of 18 June 2022. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Defendant left Susan outside at the park while she went inside her apartment to use the bathroom. At some point while Defendant was inside the apartment, Susan wandered away from the park alone on foot.

Between 7:00 p.m. and 8:00 p.m., Janicka Coleman ("Ms. Coleman") drove up to the intersection of North Tryon Street and Sugar Creek Road in Charlotte, where she noticed a young girl standing very close to the street speaking to two men in a car. Sensing the girl may be in danger, Ms. Coleman rolled down her window, called out to her, and convinced Susan to get inside her vehicle. After the young girl was unable to explain where she lived or provide the names of her parents, Ms. Coleman drove to a nearby gas station and contacted police.

Charlotte-Mecklenburg Police Officer Nathan Spann ("Officer Spann") responded to Ms. Coleman's call. He arrived at the gas station and met Ms. Coleman at approximately 8:15 p.m. Officer Spann testified the child had identified herself as "Susan," but she was unable to provide her parents' legal names. Officer Spann took Susan with him to the police station for further investigation.

Officer Spann testified they arrived at the police station at approximately 8:30 p.m., at which point he contacted the Charlotte-Mecklenburg Public School System to obtain the name and contact information of Susan's parents. After getting Defendant's phone number, Officer Spann attempted to call her six times. The call service informs the recipient a law enforcement officer is attempting to make contact. Officer Spann was unsuccessful in reaching Defendant. At 9:30 p.m., Officer Spann called Susan's aunt, who immediately came to the police station. Approximately five minutes after the call with Ms. Lawrence, Defendant placed a 911 call to report Susan missing.

Defendant arrived at the police station at approximately 9:50 p.m. Defendant told Officer Spann she thought Susan was at a friend's house and did not feel the need to immediately call and report her missing. Defendant told Officer Spann she did not answer his six prior phone call attempts because her phone was dead.

Police released Susan to her aunt on 18 June 2022 and took Defendant into custody. Defendant was subsequently charged with misdemeanor child abuse and contributing to the delinquency of a juvenile. On 4 June

2024, the jury returned guilty verdicts on both charges. Defendant was sentenced as a prior record level I offender to 30 days' imprisonment and 12 months' supervised probation, amended to unsupervised probation upon proof Defendant had completed a parenting class. Defendant gave oral notice of appeal.

II. Jurisdiction

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

III. Issues

Defendant argues three issues on appeal: (1) no substantial evidence existed demonstrating each element of the offenses charged; (2) the trial court erred by allowing the State to make improper remarks during its closing argument; and, (3) the trial court erred in allowing racially discriminatory peremptory strikes of jurors.

IV. Substantial Evidence

Defendant argues the trial court erred in not granting her Motion to Dismiss. Defendant asserts the evidence presented was insufficient to support a finding and conclusion she had put her child at substantial risk of physical injury. We disagree.

A. Standard of Review

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (internal quotation marks omitted).

"When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (internal citations omitted). The evidence, including any contradictions and discrepancies, must be viewed in the light most favorable to the State. *Id.*

"If the record reveals that substantial evidence of the charged offenses has been presented, the case is for the jury and the motion to dismiss should be denied." *State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) (internal quotation marks omitted). Substantial evidence is the amount necessary to persuade a rational juror to accept a particular conclusion. *Id.*

B. Analysis

1. Misdemeanor child abuse

[1] Defendant argues insufficient evidence supports the charge of misdemeanor child abuse because no evidence tends to show she created or allowed to be created a substantial risk of physical injury to Susan. We disagree.

Our General Statutes establishes a Class A1 misdemeanor for "[a]ny parent of a child less than 16 years of age" to create or allow to be created a substantial risk of physical injury upon anything other than purely accidental means. *See* N.C. Gen. Stat. § 14-318.2(a) (2023). Actual physical injury to the child is not a required element to satisfy § 14-318.2(a), nor does this statute require the parent to have intended for some physical injury to occur as result of their action or inaction. *See State v. Watkins*, 247 N.C. App. 391, 395-96, 785 S.E.2d 175, 177-78 (2016).

North Carolina's courts have previously held evidence of a parent failing to appropriately supervise a young child is sufficient to support a charge of misdemeanor child abuse under section 14-318.2(a). *See id.* at 395-96, 785 S.E.2d at 178 (holding substantial evidence existed where a mother left her infant son in his car seat on a snowy afternoon with the window cracked for less than ten minutes); *see also State v. Reed*, 249 N.C. App. 116, 161-64, 789 S.E.2d 703, 730-31 (Stephens, J., dissenting), *rev'd per curiam based on dissent*, 371 N.C. 106 (2018) (holding a mother's decision to leave her toddler playing outside near a pool for five to ten minutes was sufficient to withstand a motion to dismiss).

For a lack of parental supervision to rise to a level constituting misdemeanor child abuse, this Court considers: (1) the age of the child; (2) whether the child was left truly alone; (3) the duration of time the child was unsupervised; and, (4) the physical environment in which the child was left. *See Watkins*, 247 N.C. App. at 395-96, 785 S.E.2d at 177-78.

Here, Defendant left Susan unattended outside in a nearby public park while she went inside her apartment to purportedly use the bathroom. The record demonstrates no other adult being present and watching Susan while Defendant was inside. While it is unclear how long Defendant was inside her apartment prior to Susan walking away from the park, the record indicates Susan was wandering crowded streets alone for at least thirty-five minutes after Defendant left her unattended. The fact a six-year-old female was able to walk one-and-a-half miles demonstrates she was left unsupervised for a significant period of time. Although it is unclear for precisely how long Defendant was inside her apartment, Defendant made no effort to locate Susan when she noticed she was no longer in the park. Defendant simply presumed she had gone home with a friend. This lack of diligent supervision and actual knowledge of six-years-old Susan's whereabouts is sufficient basis for a reasonable juror to find and conclude Defendant was guilty of misdemeanor child abuse. We affirm the trial court's denial of Defendant's motion to dismiss on this ground.

2. Contributing to the delinquency of a juvenile

[2] Defendant argues insufficient evidence tends to show she created or allowed to be created a substantial risk of physical injury to Susan. Defendant asserts Susan ending up in an unsafe location was not "reasonably foreseeable" and did not create a substantial risk of physical injury. We disagree.

The North Carolina statute for the crime of contributing to the delinquency and neglect of a juvenile provides:

> Any person who is at least 18 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected . . . shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-316.1 (2023).

A neglected juvenile is defined in part as "one who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (internal quotation omitted). To appropriately adjudicate a child as "neglected," our courts have required "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *Matter of J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (internal quotation omitted).

This Court has previously deemed a parent leaving a child unsupervised in an outdoor location to be conduct that is sufficient to establish neglect. *See Watkins*, 247 N.C. App. at 395-96, 785 S.E.2d at 178. In *Watkins*, we concluded an infant being left alone, helpless, and outside of the "line of sight" of a supervising parent established danger of abduction or physical harm. *Id.* This Court has also held exposure to an injurious environment by a supervising adult can sufficiently establish "an unacceptable risk of harm[.]" *In re D.C.*, 183 N.C. App. 344, 352-53, 644 S.E.2d 640, 644-45 (2007) (concluding that leaving a child unattended in a hotel room during the night is sufficient to support the determination neglect occurred).

Where a juvenile has been left unattended for long enough to be faced with a threat to their safety, either from themselves or from external forces, the lack of adult supervision is sufficient to rise to the level of a contribution to neglect. *See, e.g.*, *id.*; *Watkins*, 247 N.C. App. at 395-96, 785 S.E.2d at 178. *But see In re D.S.*, 286 N.C. App. 1, 16-18, 879 S.E.2d 335, 346 (2022) (holding that there were insufficient findings of fact to support neglect where an infant was left unattended in his crib for five minutes while the father was home).

Here, Defendant conclusively left Susan outside of her line of sight when she entered her apartment. By leaving Susan unsupervised, Defendant created the risk Susan could be harmed by her own accord or at the hands of a third party. In fact, Susan did end up in an "injurious environment" when she was discovered alone and speaking to strangers on the side of a busy intersection. Susan's whereabouts opened her up to the substantial risk of being struck by oncoming traffic, being abducted by a passerby, or a number of other conceivable ill fates, which could have resulted in physical or emotional harm. The jury could have also considered the child's fear and trepidation of being alone in a public park and that she walked over a mile alone to a busy intersection and interacted with strangers.

Because Defendant left Susan unsupervised for long enough to allow her to wander out of the park and walk over a mile from home to find herself in such a precarious location, a jury could find and conclude Defendant created an "unacceptable risk of harm" to her daughter. Because these evidentiary findings were sufficient for the trial court to deny Defendant's motion to dismiss, we affirm the trial court's ruling.

V. Closing Argument

[3] Defendant argues the trial court erred by permitting the prosecutor to make improper arguments about other case law during his closing argument. Defendant asserts the prosecutor made improper comparisons between the present case and two prior cases, and those comparisons unfairly prejudiced her in a manner sufficient to warrant a new trial. We disagree.

A. Standard of Review

> The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted).

B. Analysis

In North Carolina, the whole case may be argued to the jury, including issues of law and fact. *See* N.C. Gen. Stat. § 7A-97 (2023). "This statute grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes." *State v. Lawson*, 285 N.C. App. 404, 412, 878 S.E.2d 1, 7 (2022) (quoting *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986)) (internal quotation marks omitted).

There are recognized limits on what portions of case law counsel may reference and rely on during closing arguments. *See Gardner*, 316 N.C. at 611, 342 S.E.2d at 876. Counsel is only permitted to argue provisions of law from previous cases that are applicable to the facts of the case at hand. *State v. McMorris*, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976). Further, it is impermissible for counsel to read the facts of a published opinion together with the jury's result to imply such a verdict should be returned in the case at hand due to the similarity of issues. *See Gardner*, 316 N.C. at 611, 342 S.E.2d at 876 (internal citation omitted).

Here, the prosecutor relayed the facts from two published decisions, *Watkins* and *Reed*, both of which involved negligent supervision of young children as evidence of misdemeanor child abuse, to the jury during closing arguments. *Watkins*, 247 N.C. App. 391, 785 S.E.2d 175; *Reed*, 249 N.C. App. 116, 789 S.E.2d 703. In relaying the facts and findings from *Watkins* and *Reed*, the prosecutor aimed to show the jury the types of issues to be considered when deciding whether a substantial risk of harm was imposed on a child. The prosecutor provided: "So those are the types of things that these – that you are to look at when you're determining the substantial risk of harm from someone to a child." While the prosecutor doubtlessly analogized the facts of *Watkins* and *Reed* to those in the present case, he never compared the previous facts and holdings in a way to directly or implicitly argue Defendant should be convicted due to the similarity of parental behaviors at issue. The prosecutor stated: "Those are the [facts and circumstances] you must consider when determining whether or not there's a substantial risk of physical injury."

Our precedent permits counsel to argue the facts of a previous case with "wide latitude" to show how the relevant law is applied and to present all reasonable inferences that can be drawn from the evidence. *State v. Jones*, 355 N.C. at 128, 558 S.E.2d at 105. *See also Gardner*, 316 N.C. at 611, 342 S.E.2d at 876. *Contrast State v. Simmons*, 205 N.C. App. 509, 515, 698 S.E.2d 95, 100-01 (2010) (holding the prosecutor's closing argument remarks, "in that case, and, again, a Pitt County jury just as yourself found that defendant guilty," were impermissible).

The State made appropriate arguments and remained within the confines of what is permissible to present analogous facts and argue to a jury. The trial court's allowance of the prosecutor's testimony over Defendant's objection is not shown to be an abuse of discretion. We need not address the issue of prejudice to Defendant by the decision. Defendant's argument is overruled.

VI. Peremptory Strikes

[4] Plaintiff argues the trial court committed clear and prejudicial error in denying Defendant's *Batson* motion challenging peremptory strikes used against prospective jurors Phillips, Tyler, and Simpson. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69. We disagree.

A. Standard of Review

The standard of review for a trial court's ruling pursuant to *Batson v. Kentucky* is "highly deferential," and "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477-79, 170 L. Ed. 2d 175, 181-82 (2008). This highly deferential standard requires an appellate court to "consider whether the trial court's ruling regarding [a] defendant's *Batson* challenge was clearly erroneous." *State v. Clegg*, 380 N.C. 127, 140, 867 S.E.2d 885, 897 (2022). "Such clear error is deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *Id.* at 141, 867 S.E.2d at 897 (internal quotation marks and citation omitted). A mistake cannot conclusively have been committed where "[t]wo permissible views of the evidence" exists. *State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000).

B. Analysis

The analysis in *Batson v. Kentucky* "provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race[.]" *Snyder*, 552 U.S. at 476, 170 L. Ed. 2d at 180.

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."

Id. at 476-77, 170 L. Ed. 2d at 180-81 (citation and internal quotation marks omitted).

Here, the trial court found Defendant had made a sufficient *prima facie* case, and the prosecutor provided a race-neutral reason for his use of peremptory strikes. The only issue before this Court is whether the trial court was clearly erroneous in its determination that Defendant did not prove purposeful discrimination.

When analyzing step three of *Batson*, the trial court "must determine whether the defendant has satisfied his burden of proving purposeful discrimination." *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000).

> "In determining the presence or absence of intentional discrimination, this Court will consider various factors including 'the susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors."

Id. (quoting *State v. White*, 349 N.C. 535, 548-49, 508 S.E.2d 253, 262 (1998)). Ultimately, all relevant facts and circumstances are viewed holistically, *see Flowers v. Mississippi*, 588 U.S. 284, 302, 204 L. Ed. 2d 638, 655-56 (2019), to determine whether the prosecutor's demeanor exhibited any discriminatory intent, *Snyder*, 552 U.S. at 477, 170 L. Ed. 2d at 181.

Defendant objected to the prosecutor's decision to strike potential jurors "Phillips, Tyler, and Simpson." The prosecutor explained all his peremptory strikes had been used to eliminate single parents from the jury, due to the possibility a "single parent might look upon the facts of this case similarly to how this case was handled by the defendant" and be more sympathetic towards Defendant's actions. The prosecutor further explained he chose not to strike another black prospective juror, "Smith," because she was not a single parent. The trial court found the prosecutor's rationale was "reasonable and not pretextual" and was not discriminatory between "white single parents versus black single parents."

On these facts, Defendant has not shown the trial court committed clear error in denying her *Batson* motion. The prosecutor ultimately used five peremptory strikes: three against black prospective jurors and two against white prospective jurors. The record reflects the prosecutor's methodology was used universally without regard to race, as all prospective jurors were asked if they were married and had children during *voir dire*. No convincing evidence was offered the strikes used on the basis of single parenthood were pretextual for racial exclusion. We are unconvinced, in light of the totality of circumstances, the strikes used on Phillips, Tyler, and Simpson were motivated to any extent by race.

Defendant urges us to alternatively remand this case if we do not find clear error existed in the trial court's ruling on the *Batson* motion. We are not inclined to do so. The trial court allowed the prosecution to provide reasoning for the peremptory strikes, permitted both parties to address the merits of the prosecution's proffered reasoning, and only then exercised the decision to deny Defendant's motion. The record is clear the trial court adequately considered the totality of the evidence and made sufficient findings based upon that evidence. We discern no error in the trial court's denial of Defendant's *Batson* motion. *Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211; *Flowers*, 588 U.S. at 302, 204 L. Ed. 2d at 655-56; *Snyder*, 552 U.S. at 477, 170 L. Ed. 2d. at 181. Defendant's argument is overruled.

VII. Conclusion

The trial court: (1) made sufficient findings of fact to support the denial of Defendant's motion to dismiss; (2) did not commit prejudicial error in allowing the prosecutor to reference the facts from prior cases involving the negligent supervision of young children as evidence of misdemeanor child abuse during closing argument; and, (3) did not err in denying Defendant's *Batson* motion in light of the peremptory strikes used on prospective jurors Phillips, Tyler, and Simpson. Defendant received a fair trial, free from the prejudicial errors she preserved and argued on appeal. We discern no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges GORE and MURRY concur.

STATE OF NORTH CAROLINA
v.
BRIAN BRANHAM, Defendant

No. COA24-927

Filed 1 October 2025

1. Appeal and Error—jurisdiction—guilty plea—denial of motion to determine immunity—certiorari granted

In an appeal from defendant's plea of guilty to drug charges, which defendant entered after his motion to dismiss for immunity pursuant to N.C.G.S. § 90-96.2(c) was denied by the trial court, the appellate court granted defendant's petition for writ of certiorari upon determining that defendant had demonstrated possible merit and extraordinary circumstances and that review would serve the interests of judicial economy. Since defendant did not have a statutory right to appeal from the denial of his motion on immunity, the appellate court exercised its discretion to review whether the immunity motion was properly denied and whether the plea was knowing and voluntary.

2. Drugs—motion for immunity from prosecution—lack of overdose evidence—voluntariness of guilty plea

The trial court did not err by denying defendant's motion to dismiss drug charges for immunity and by subsequently accepting defendant's guilty plea where defendant did not meet any of the listed conditions in N.C.G.S. § 90-96.2(b) for immunity, including the threshold requirement that he had experienced an overdose. Although law enforcement had been dispatched to assist defendant, who was unconscious in his vehicle with drugs and drug paraphernalia in plain sight, defendant was able to wake up and exit his car when an officer rapped on his window. Since there was no error in the denial of the request for immunity, defendant's guilty plea was made knowingly and voluntarily. Further, where the plea agreement included a provision preserving the immunity issue and the appellate court issued a writ of certiorari granting review, defendant's decision to enter the plea was an informed choice and he received the benefit of his bargain.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 23 February 2024 and 22 April 2024 by Judge Michael S. Adkins in Rowan County Superior Court. Heard in the Court of Appeals 20 March 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Ronnie K. Clark, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant–Appellant.

MURRY, Judge.

Brian Branham (Defendant) appeals the trial court's denial of his motion to dismiss for immunity under N.C.G.S. § 90-96.2(c) and its acceptance of his guilty plea. For the following reasons, this Court holds that the trial court did not err by denying the motion.

I. Background

On 30 November 2020, 911 dispatched the Rowan County Sheriff's Office to assist an unconscious Defendant behind the wheel of a running vehicle. The 911 caller knocked on his window without a response and left the scene. Upon arrival, Alcohol Law Enforcement Agent Jerry Dean observed Defendant still unconscious in the car. He knocked on Defendant's car window to wake him up. As Defendant exited the vehicle, Agent Dean observed a needle and a plastic baggie filled with heroin on the driver's seat. Lieutenant Brian Barkley, who arrived soon after, observed Defendant standing outside of his car. Lieutenant Barkley also saw the same paraphernalia and drugs in plain view. After paramedics arrived, Lieutenant Barkley asked Defendant if he had any medical problems or needed medical assistance. Defendant responded, "No."

On 19 April 2021, a grand jury indicted Defendant for felony possession of a Schedule I controlled substance and related drug paraphernalia.

On 23 May 2023, Defendant moved to dismiss the prosecution through a "motion to determine immunity," (motion) arguing that N.C.G.S. § 90-96.2 (Good Samaritan Law[1]) granted him immunity from prosecution in these circumstances. On 19 February 2024, the trial court heard the motion. At the hearing, Defendant testified to intravenously injecting fentanyl and losing consciousness. Although no witness testified to administering him medical treatment, Defendant believed that he received Narcan[2] because he "came back and vomited." Defendant testified to "refus[ing] to go to the hospital." Lieutenant Barkley and Agent Dean testified to Defendant's refusal of medical care and his concurrent appearance inconsistent with a drug overdose. Neither observed Defendant receiving any medical care for a drug-related overdose. Further, Lieutenant Barkley stated that he did not observe any evidence of treatment, such as "medical devices, medicine, or waste from treatment." On 23 February 2024, the trial court denied Defendant's motion for its "fail[ing] to satisfy the statutory requirements to qualify for immunity from prosecution under [N.C.]G.S. § 90-96.2."

On 22 April 2024, Defendant entered a guilty plea to felony possession of a Schedule I controlled substance, possession of drug paraphernalia, failure to appear, and habitual felon status. Defendant's plea arrangement purported to "preserve[ ] the issue of denial of [hi]s motion for appeal" and his "inten[t] to appeal the final judgment of conviction in 20CRS54385 and 22CRS929 pursuant to N.C.[G.S. §] 15A-979." At Defendant's plea hearing, the trial court's plea colloquy included:

> THE COURT: Do you understand that following a plea of guilty there are limitations on your right to appeal?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: The prosecutor, your lawyer and you inform the Court that the following are all the terms and conditions of your plea: That you preserve the right—or the issue of the denial of your pretrial motion for appeal and that you intend to appeal the final judgment of conviction in 20CRS54385 and 22CRS929 pursuant to General Statutes 15A-979?
>
> DEFENDANT: Yes, sir.

---

1. *See Luke* 10:25–37 (parable of Good Samaritan).

2. "Narcan" is the brand name for the medication naloxone which can reverse an opioid overdose.

(Quotation modified.) After the trial court accepted his plea, Defendant gave oral notice of appeal, at which point the trial court "note[d] his appeal in this case pursuant to his transcript with respect to appealing the issue" of the trial court's "ruling on his pretrial motion."

II. Procedural Jurisdiction

[1] Defendant argues his plea agreement was "not the product of informed choice, violated North Carolina law, and was improperly accepted" because it did not preserve in law the right to appeal the denial of his motion. As a threshold matter, Defendant must show a statutory right to appeal from his guilty plea. *State v. Pimenthal*, 153 N.C. App. 69, 72 (2002). A defendant generally waives any right to appeal a conviction if he pleads guilty. *See* N.C.G.S. § 15A-1444(a1) (2023). Here, Defendant recognizes the denial of his pretrial motion for immunity under N.C.G.S. § 90-96.2 as not being an issue for appellate review as a matter of right and instead petitions this Court for a writ of certiorari (PWC). *See* N.C. R. App. P. 21(a)(1) [hereinafter Rule 21]. In his PWC, Defendant asks this Court to review (1) whether his plea was knowing and voluntary and (2) whether the trial court erred by denying his pretrial motion for immunity under N.C.G.S. § 90-96.2.

A. *State v. Demaio*

Defendant invokes *State v. Demaio*, 216 N.C. App. 558 (2011), to argue that his plea was not a product of informed choice, and as a result, his plea was improperly accepted by the trial court. In *Demaio*, the defendant's plea agreement purported to "preserve[ ] [his] right to appeal the denial[s]" of two pre-trial motions for which he had no statutory right. *Id.* at 561. After the defendant petitioned this Court, it reversed and remanded the trial court's judgment for rehearing. *Id.* at 565. The *Demaio* Court reasoned that "the plea agreement violated the law" because the defendant had no discernable right to appeal from any particular statute, Rule 21, or the procedural outline of *State v. Bolinger*, 320 N.C. 596, 601 (1987). *Id.* Given those restraints, the Court ultimately held that:

> If a defendant does not have an appeal as of right and we are *not permitted* under Rule 21 or *Bolinger* to grant certiorari on issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law.

Id. at 565 (emphasis added). *Demaio* syllogized the conditional legality of defendant plea agreements: *if* a defendant's plea falls outside

Demaio's jurisdictional proscription, *then* it violates the law. *Id.* at 565. Only three authorities "permitted" this Court to grant appellate review: (1) statutory right, (2) Rule 21, or (3) *Bolinger*'s challenge to a procedurally faulty guilty plea itself. *See Bolinger*, 320 N.C. at 601 (extending guilty-plea defendant's appealable issues to procedural challenge not at issue here).

Our Supreme Court later abrogated this proposition as an undue restraint on granting certiorari. Our Supreme Court considered the jurisdictional limits of our discretionary authority to grant certiorari in *State v. Ledbetter*, 371 N.C. 192 (2018). It held that:

> Absent specific statutory language limiting its jurisdiction, the Court maintains its discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent it from issuing writs or have *any* bearing upon a decision to do so.

Id. at 197 (citation modified).

In so holding, it clarified Rule 21's purported jurisdictional limits as a gratuitous abdication of discretion. *See id.* at 196. ("By concluding it is procedurally barred from exercising its discretionary authority to assert jurisdiction . . . the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction . . . ."). The Supreme Court has since clarified that Rule 21 merely proceduralizes an inherent judicial power "that *litigants* must use to petition for a writ of certiorari"; it does not intrinsically "limit the Court of Appeals itself." *In re R.A.F.*, 384 N.C. 505, 507 (2023); *see* Rule 1(c). Our discretionary power to issue writs is instead "provided by statute or rule of the Supreme Court, or, *in the absence [there]of* . . . , according to . . . the common law." N.C.G.S. § 7A-32(c); *accord Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927) ("Certiorari is a discretionary writ[ ] . . . issued only for good or sufficient cause . . . ."). As a result, we may "broad[ly]" issue writs "in aid of [our] own jurisdiction" "unless a more specific statute revokes or limits [them]." *R.A.F.*, 384 N.C. at 507; *e.g.*, N.C.G.S. § 7A-32(c).

In the case *sub judice*, Defendant argues he cannot receive "the benefit of his bargain" because the negotiated condition "explicitly invoked a right to appeal that did not exist." He argues there is "no way" for him to achieve this benefit under *Demaio* but also asks us to provide it under our broader Rule 21 conception. *Ledbetter*, 371 N.C. 195–97. Defendant would have us sever *Demaio*'s holding from its Rule 21 framework by adopting its conclusion without its rationale. In other words, Defendant wants it both ways.

The *Demaio* Court vacated the defendant's plea on the flawed belief that it lacked a jurisdictional mechanism to bring about the plea agreement's end. *Demaio*, 216 N.C. at 565. It reasoned that, because it could not review the defendant's motion as promised, it had no choice but to "place [the d]efendant back in the position he was before he struck his bargain." *Id.* at 565. *Demaio*'s conclusion is inextricable from our former Rule 21 interpretation. To hold otherwise would cherry-pick precedent at best and flirt with logical impossibility at worst. Thus, this Court holds that Defendant cannot receive the benefit of his bargain under *Ledbetter* while arguing its impossibility under *Demaio*.

B. *Cryan v. Nat'l Council*

Given the preceding analysis, we now turn to Defendant's PWC. Recognizing our "broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits" it, *R.A.F.*, 384 N.C. at 507 (quoting *Ledbetter*, 371 N.C. at 195), our Supreme Court "establishe[d] a two-factor test to assess whether certiorari review is appropriate." *Cryan v. Nat'l Council of YMCAs of U.S.*, 384 N.C. 569 (2023). The appellant must show (1) either "merit or that error was probably committed below," and (2) that "extraordinary circumstances" "justify" appellate review. *Id.* at 572–53 (first quoting *State v. Grundler*, 251 N.C. 177, 189 (1959); and then quoting *Moore v. Moody*, 304 N.C. 719, 720 (1982)). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Id.*

Applying *Cryan*, Defendant shows merit by demonstrating that he has yet to receive the benefit of his plea bargain. *Grundler*, 251 N.C. at 189; *see In re Snelgrove*, 208 N.C. 670, 672 (1935) (interpreting "merit" as "reasonable grounds for asking that the case be brought up and reviewed on appeal."). Because we *may* grant certiorari on the issue that "[D]efendant was promised would be preserved for appeal," we can provide Defendant the benefit of his bargain. *Demaio*, 216 N.C. at 565. Defendant has also shown extraordinary circumstances by highlighting the lack of case law analyzing immunity motions under N.C.G.S. § 90-96.2. *See Cryan*, 384 N.C. at 573 ("extraordinary circumstances" include "a relatively new statutory scheme which has limited jurisprudence surrounding it"). And in the interest of judicial economy, resolving Defendant's appeal ensures he receives the benefit of his bargain and eliminates the need for further proceedings. Therefore, this Court grants his PWC. We do not establish a per se rule that all unappealable motions *must* be granted appellate review; we simply exercise our discretion to address the merits of Defendant's appeal in light of the compelling and specific circumstances above.[3]

III. Substantive Analysis

Upon review of Defendant's motion, this Court holds that the trial court did not erroneously interpret the Good Samaritan Law and affirms the trial court's denial of the motion. Doing so gives Defendant the benefit of his bargain and frees the trial court of any error in accepting his guilty plea.

A. Defendant's Motion

Defendant asserts that the trial court erroneously interpreted the Good Samaritan Law and that he should be immune from prosecution. A trial court must dismiss certain charges against a defendant who "has been granted immunity by law from prosecution," N.C.G.S. § 15A-954, because "[i]mmunities are not mere bars to conviction or judgment; they are protections against being charged or haled into court at all." *State v. Osborne*, 275 N.C. App. 323, 327 (2020) (distinguishing § 90-96.2's grant of prosecutorial immunity from our common law's recognition of jurisdictional immunity).[4] In *State v. Osborne*, a concurring opinion noted that:

> [t]he legislature's intent in passing N.C.G.S. § 90-96.2 was to ensure that victims of drug overdoses, and those who may be with them or come across them, do not refrain from seeking medical attention out of fear of criminal prosecution. In light of the opioid overdose epidemic in this state, the legislature enacted a policy to sacrifice prosecutions for possession of small amounts of drugs in order to save lives.

State v. Osborne, 372 N.C. 619, 637 (2019) (Earls, J., concurring). We agree. The Good Samaritan Law protects an overdose victim from

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3. Unlike the dissent suggests, we do not create a right to appeal immunity motions. We simply apply existing appellate rules to address the merits of Defendant's argument and grant him the benefit of his bargain.

4. North Carolina has broadly recognized tis crucial distinction between statutory and inherent prosecutorial protections. *Compare* N.C.G.S. § 90-96.2(a), (c3) (granting "limited immunity from prosecution" to someone who renders medical aid for a drug overdose), *with Steelman v. City of New Bern*, 279 N.C. 589, 592 (1979), (documenting North Carolina's common-law recognition of "governmental immunity"). *But see, e.g.*, *Lambert v. Town of Sylva*, 259 N.C. App. 294, 301 (2018) (characterizing "[g]overnmental immunity [a]s an affirmative defense" that "must be plead[ed] by the defendant" "like other forms of immunity").

prosecution for certain drug crimes if the incriminating evidence was obtained through his timely request for and receipt of medical assistance. N.C.G.S. § 90-96(a)–(b). The exemptions include a "felony violation . . . for possession of less than one gram of any controlled substance." *Id.* § 90-96.2(c). We review the denial of a defendant's motion to dismiss *de novo*. *Smith*, 186 N.C. App. 57, 62 (2007). Because a motion to determine immunity is functionally a motion to dismiss, "the evidence must be considered in the light most favorable to the State," which "is entitled to every reasonable inference to be drawn therefrom." *State v. Gibson*, 342 N.C. 142, 150 (1995).

To sustain a motion for immunity dismissal as a drug-overdose victim under N.C.G.S. § 90-96.2(b), a would-be defendant must show that he:

> (1) Sought medical assistance for a drug-related overdose by contacting the 911 system, a law enforcement officer, or emergency medical services personnel;
>
> (2) Acted in good faith when seeking medical assistance, upon a reasonable belief that he was the first to call for assistance;
>
> . . . .
>
> (4) Did not seek the medical assistance during the course of a lawful search; and that
>
> (5) The evidence for prosecution of the subsection (c3) [offenses] was obtained as a result of the person seeking medical assistance for the drug-related overdose.

N.C.G.S. § 90-96.2(b)(1)–(2), (4)–(5) (citation modified). The General Assembly defines a "drug-related overdose" as "an acute condition, including . . . extreme physical illness, coma, or death resulting from the consumption or use of a controlled substance and that a lay person would reasonably believe to be a drug related overdose that requires medical assistance." *Id.* § 90-96.2(a). It further defines an "acute illness" as "a condition . . . serious enough to require medical care or treatment to avoid a reasonable possibility of death or permanent harm." *Id.* § 58-67-88(a).[5]

5. We note that "statutes addressing the same subject matter generally should be read" "*in pari materia*" "as if they were one law." Lisa Schultz Bressman et al., *The Regulatory State* 208–09 (3d ed. 2020) (describing various "Whole Code Canons") (quotation omitted).

Defendant argues that the trial court erred by requiring him to show one of the listed conditions in subdivision (a) instead of applying a reasonable-person standard. Defendant testified at the motion hearing that he "intravenously injected the fentanyl and went out" and that "[i]t's just the way it is when you overdose." He further admitted to "overdos[ing] quite a few times." Defendant's evidence shows only his drug-induced unconsciousness, not that the caller reasonably believed it resulted from drugs. Defendant testified that first responders gave him Narcan. But Agent Dean's ability to quickly awaken him by tapping on the car window indicates a degree of unconsciousness far short of an "acute illness." Based on his training and experience, Lieutenant Barkley testified that individuals recovering from an overdose are usually "cyanotic, sweating, clammy," of which Defendant showed no physical signs. Viewing this evidence in a light most favorable to the State, Defendant did not overdose for the purposes of § 90-96.2(b)(1). Thus, Defendant cannot meet the threshold requirement of experiencing a drug-related overdose which triggers immunity from prosecution. The remaining elements under § 90-96.2(b) are either nonconclusive or operate in Defendant's favor. But because we find that Defendant cannot satisfy § 90-96.2(b)(1), we need not analyze the remaining provisions. Because his motion cannot meet the Good Samaritan Law's requirements on the merits, this Court holds that he is not entitled to its immunity from prosecution and that the trial court did not err in denying the motion.

B. Defendant's Plea

[2] Defendant asserts that the trial court erred in accepting his plea agreement because he "[can]not receive the benefit of his bargain." The trial court cannot accept a guilty plea "without first determining that the plea is a product of informed choice." N.C.G.S. § 15A-1022(b). A defendant's guilty plea "must be made knowingly and voluntarily . . . after full appraisal of the consequences." *State v. Harbison*, 315 N.C. 175, 180 (1985) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). The guilty plea must be "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court." *State v. Smith*, 352 N.C. 531, 550–51 (2000) (quoting *Brady v. United States*, 397 U.S. 742, 755 (1960)). We review *de novo* whether a defendant made an "informed choice by virtue of the fact that he did not get the benefit of his bargain [a]s a question of law." *State v. Tinney*, 229 N.C. App. 616, 621 (2013).

Once accepted by the trial court, the plea binds "both the defendant and the State" to its terms. *State v. Tyson*, 189 N.C. App. 408, 413–14 (2008) (quotation omitted). Plea arrangements, "[w]hen viewed in light of the analogous law of contracts, . . . normally arise in the form of unilateral contracts." *State v. Collins*, 300 N.C. 142, 149 (1980). And a defendant who pleads guilty is "entitled to . . . the benefit of his bargain." *State v. Wall*, 348 N.C. 671, 676 (1998). If the State cannot "fulfill promises made to the defendant in negotiating a plea bargain[,] the defendant is entitled to relief, typically in the form of specific performance . . . or withdrawal of the plea itself," *i.e.*, "recission." *State v. King*, 218 N.C. App. 384, 390 (2012) (quotation omitted) (holding specific performance was best option in defendant's circumstance).

Here, Defendant pled guilty according to the plea agreement on the express condition that he could "preserve[ ] the issue of [the] denial of [his] pretrial" "motion to determine immunity" under N.C.G.S. § 15A-979. Although this statute applies only to suppressive motions, *see id.* § 15A-979(b), the trial court advised Defendant—who confirmed his understanding—that pleading guilty would expressly limit his right to appeal to only those conditions specified in the agreement's text. But because Defendant pled guilty "in consideration for" the State's promise upon which he relied, he is entitled to the benefit of that promise. *Wall*, 348 N.C. at 676. By granting certiorari and reviewing Defendant's motion as promised in his plea agreement, we hold that Defendant made an "informed choice" to enter into the plea agreement that also "provide[s] him the benefit of his bargain." *Demaio*, 216 N.C. at 562. As a result, we hold that the trial court did not err by accepting his guilty plea.

IV. Conclusion

For the reasons above, this Court holds that the trial court did not err either (1) by denying his motion to determine immunity under N.C.G.S. § 90-96.2 or (2) by permitting Defendant to enter into his plea agreement.

NO ERROR.

Judge GORE concurs.

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

HAMPSON, Judge, concurring in part, dissenting in part.

I agree with the majority in issuing certiorari to provide us with appellate jurisdiction in this matter. However, I agree with both the

State and Defendant that—where Defendant's plea was not the product of informed choice—the proper outcome in this case is to vacate the Judgment and underlying plea agreement and remand this matter to the trial court, where Defendant "may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement[.]" *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998). Accordingly, I concur in part and dissent in part.

As both parties agree, Defendant has no right to appeal based on his challenge to the trial court's denial of Defendant's Motion to Dismiss pursuant to N.C. Gen. Stat. § 90-96.2 (2023). First, no provision of N.C. Gen. Stat. § 15A-1444 provides any right of appeal from a guilty plea in this instance. Second, nothing in the text of N.C. Gen. Stat. § 90-96.2 itself provides for any right of appeal.[1] Moreover, in *Osborne*, this Court held that Section 90-96.2 does not provide any jurisdictional requirement, but rather simply grants "traditional immunity from prosecution." *State v. Osborne*, 275 N.C. App. 323, 328, 853 S.E.2d 241, 245-46 (2020). We further noted "[t]his type of immunity must be asserted as a defense by the defendant in the trial court proceeding. The failure to raise the issue waives it and precludes further review on appeal." *Id.* (citation omitted). Thus, by entering a guilty plea, Defendant has waived all such traditional non-jurisdictional defenses. *See State v. Caldwell*, 269 N.C. 521, 526, 153 S.E.2d 34, 37–38 (1967) ("An accused by pleading guilty waives all defenses other than that the indictment charges no offense.").

In addition, Defendant has made no motion before the trial court to withdraw his plea. "Thus, according to N.C.G.S. § 15A-1444 defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea[.]" *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). Instead, "Defendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *Id.*

Indeed, our Courts recognize:

> if a defendant does not have an appeal of right, our statute provides for the defendant to seek appellate review

1. I fear the majority's judicial creation of a right to appeal—by way of certiorari—the denial of a motion to dismiss made pursuant to N.C. Gen. Stat. § 90-96.2 unsupported by any statutory text will lead to unintended consequences. First, contrary to *Osborne*, the majority seems to elevate Section 90-96.2 to jurisdictional status. Second, application of the majority's reasoning might lead one to think there could be a right to an interlocutory appeal, prior to judgment, of a denial of a motion under this statute by way of certiorari.

> by filing a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) (2009). . . . If a defendant does not have an appeal as of right and we are not permitted under Rule 21 or *Bolinger* to grant certiorari on issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law. In such a situation, the appellate court must place "the defendant back in the position he was in before he struck his bargain[.]" "[T]he appellate court should vacate the judgment and remand the case to the trial court where defendant 'may withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] withdraw his plea and attempt to negotiate another plea agreement that does not violate [State law].' "

State v. Demaio, 216 N.C. App. 558, 564-65, 716 S.E.2d 863, 867-68 (2011) (citations omitted).

Here, the plea agreement violates the law. As a term of the plea arrangement, Defendant was purportedly permitted to preserve his right to appeal the denial of his pretrial motion under Section 90-96.2. There is simply no right to appeal the denial of such a motion following the entry of a guilty plea. Moreover, there is no indication that in entering this plea, Defendant was made aware that his right to appeal was in question. *See, e.g., State v. Tinney*, 229 N.C. App. 616, 622, 748 S.E.2d 730, 735 (2013) (declining to apply *Demaio* where "Defendant had ample notice that the provision in his plea agreement reserving his right to challenge the validity of the transfer order on appeal was, in all probability, unenforceable and elected to proceed with his guilty plea in spite of the fact that he knew that the provision in question was of questionable validity.").[2] As such, it was not the product of an informed choice. *Id.* (a guilty plea entered pursuant to a transcript of plea which purports to reserve the right to seek appellate review of a particular legal issue which is not

2. The majority's concerns notwithstanding, if a defendant may be shown to have knowingly planted a poison-pill term in a plea arrangement, application of *Tinney* would prevent a defendant from taking advantage of the situation precisely because the Defendant entered the plea knowingly and as the product of an informed choice. Moreover, vacating and remanding does not necessarily lead to a windfall for a defendant, as the State may simply proceed on the original charges in the indictment(s) rather than merely the lesser offenses in a plea arrangement. *See, e.g., State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

subject to such review following the entry of a guilty plea does not result in the entry of a plea which "is a product of informed choice.").

Thus, in this case, Defendant's plea arrangement violates the law. Therefore, the Judgment entered upon that arrangement cannot stand. Consequently, this Court should—as requested by both parties—vacate the judgment and remand this matter to the trial court, where Defendant may withdraw his plea and either proceed to trial on the original charges or attempt to negotiate a new plea agreement. *See Wall*, 348 N.C. at 676, 502 S.E.2d at 588.

STATE OF NORTH CAROLINA
v.
JEREMIAH EZEIL HARDAWAY

No. COA24-538

Filed 1 October 2025

1. Appeal and Error—preservation of issues—felony murder—predicate felonies—motion to dismiss for insufficient evidence

In a prosecution for felony murder, defendant's challenge to the sufficiency of the evidence supporting the three predicate felonies was preserved for appellate review where, during the charge conference, defendant objected to jury instructions—on all three felonies on sufficiency of the evidence grounds and on two of the felonies on the basis that the State had disclosed its intent to prove only one predicate felony prior to trial. Further, defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all evidence.

2. Homicide—felony murder—predicate felonies—motions to dismiss—sufficiency of evidence

In a prosecution for felony murder—arising from a drive-by shooting—the trial court properly denied defendant's motions to dismiss each of the three predicate felonies upon which a first-degree felony murder conviction could be based: assault with a deadly weapon with intent to kill, firing into an occupied dwelling, and discharging a firearm within a motor vehicle. As to the first two predicate felonies, defendant's appellate argument that no evidence tended to show that he fired a gun "at" anyone was rejected where the victim died as the result of a gunshot wound, two witnesses testified that defendant fired a gun during the drive-by, and a third witness testified to seeing a gun in defendant's hand immediately after hearing multiple shots fired. As to the third predicate felony, defendant's appellate argument failed in light of precedent holding that the offense applied where a firearm was fired within a vehicle, even if the victim of the shooting was located outside the vehicle.

3. Jury—selection—Batson objection—no purposeful discrimination by the State—clear error not shown

In a prosecution for felony murder—arising from a drive-by shooting—the trial court properly denied defendant's *Batson* objection to the State's exercise of a peremptory challenge to a Black prospective juror where the court, in the third step of its *Batson* analysis, determined that the State's proffered nondiscriminatory reasons for excusing the juror (based upon his demeanor) were not pretextual, and, thus, that the State did not engage in purposeful racial discrimination by excusing the juror. Although the excused prospective juror was the first Black person questioned during voir dire, nothing suggested that the case at trial was particularly susceptible to racial discrimination (while defendant was Black, the race of the victim and of key witnesses did not appear in the record), and there was no indication of disparate questioning of prospective jurors based on race. As to defendant's argument that the demeanor of a white juror who was not excused was analogous to that of the excused Black juror, the appellate court noted that such issues are best resolved by the trial court's direct observations rather than on the cold record.

Chief Judge DILLON concurring.

Judge HAMPSON concurring in result only by separate opinion.

Appeal by Defendant from Judgment entered 22 September 2023 by Judge Craig Croom in Alamance County Superior Court. Heard in the Court of Appeals 5 March 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Benjamin Szany, for the State.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Samuel J. Ervin, IV, for Defendant-Appellant.

PER CURIAM.

Factual and Procedural Background

Jeremiah Ezeil Hardaway (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of First-Degree Murder based on Felony Murder. The Record before us, including evidence presented at trial, tends to reflect the following:

Kalen Turner, Tyler Poteat, Jashaun Thompson, and Defendant were high school classmates and were mutual acquaintances with Lamona Boone. Several months prior to the underlying incident in this case, Turner and Thompson had a falling out over an accusation Turner made about Thompson to Boone, who was in a relationship with Thompson at the time. Multiple public confrontations ensued with Turner and Poteat on one side and Thompson and Defendant on the other.

On 8 September 2019, Defendant and Thompson saw and approached Turner, Poteat, and Cazaria Russell in a Walmart. Turner suggested they take their fight outside, but after leaving the Walmart, Turner Poteat, and Russell went to a friend's house. The argument continued online through messages on a social media platform. In one message, Turner told Defendant and Thompson "if you all got an issue you all know where I am at. Pull up."

That evening, a group of people in two or three cars, including Defendant and Thompson, drove up to the house where Poteat and Turner were. Thompson and Turner immediately engaged in a physical altercation. Defendant ran to confront Poteat, but the two were separated. Defendant then ran to a car, got a gun, and began waving it around. After someone said they were calling the police, Defendant and several others left. The next morning, 9 September 2019, Defendant messaged Turner that "we can do a round two if you feel like we jumped you." Turner agreed to another fight.

In the evening of 9 September 2019 after an unsuccessful attempt at a fight, Poteat, Russell, Russell's brother Myson, and several others were walking to Turner's house when Defendant passed them in his black PT Cruiser along with two other cars "full of people[.]" Defendant had repeatedly messaged Turner asking him where he was. Once Poteat and his group arrived at Turner's house they sat on the porch. Three cars occupied by Defendant, Thompson, and others drove by again. This group drove to a nearby church parking lot and rearranged themselves among the vehicles, with Defendant and Thompson in a car driven by

Warren Mongo. According to Thompson, Mongo, and another witness, Defendant sat in the front passenger seat.

Although the group decided to "go back home and leave the situation alone," they still drove past Turner's house. As the vehicles slowly drove past Turner's home, multiple witnesses heard gunshots. Poteat testified he heard a shot, saw Defendant "holding a gun," and saw "sparks" before he "took off." Russell testified to hearing "at least five or six shots" and ducking down. As the vehicle slowed, Turner testified he saw Defendant's eyes before "the fire started from the gun started coming out." Mongo testified he saw a gun in Defendant's hand immediately after shots had been fired. Thompson testified he saw Defendant "place his hand out of the window" and saw the gun, "[t]he flash then followed after the gunshots."

Myson Russell sustained a gunshot wound to the chest. He subsequently died from that wound. Police found five shell casings in the street near the scene of the incident and a sixth in a grassy area just off the edge of the road. At trial, Detective Adam Snow with the Burlington Police Department testified the spread of the shell casings indicated "they had been shot from something that was moving[.]" Police also discovered a fresh bullet hole in Mr. Turner's residence on the side that faced the street where the shell casings were found. Turner's niece was present in the home at the time of the shooting.

On 23 September 2019, Defendant was indicted for First-Degree Murder and Discharging a Weapon Into an Occupied Dwelling. On 26 September 2023, the State voluntarily dismissed the Discharging a Firearm Into an Occupied Dwelling charge. This case came on for trial on 12 September 2023.

During jury selection, the State simultaneously exercised three peremptory challenges: to Eric M, a Black man, Nelson N, a Hispanic man of Mexican heritage, and Brandy F, a white woman. Defendant objected to the challenge of Mr. Moore and Mr. Navarro under *Batson v. Kentucky*. The trial court found Defendant had made a prima facie showing of discrimination and held a *Batson* hearing. The State proffered facially race-neutral reasons for the challenge, and the trial court found those reasons credible and held Defendant had not shown purposeful discrimination, overruling the *Batson* challenge.[1]

At trial, the State sought to present evidence to support the charge of First-Degree Murder based on premeditation and deliberation and

1. On appeal, Defendant raises a *Batson* issue only as to Eric M.

based on felony murder. The State submitted three predicate felonies in support of the felony murder theory: Assault With a Deadly Weapon With Intent to Kill, Firing Into an Occupied Dwelling, and Discharging a Firearm Within a Motor Vehicle. At the close of the State's evidence, Defendant moved to dismiss all charges based on insufficient evidence. The trial court denied the Motion. Defendant renewed his Motion to Dismiss after declining to present evidence, and the trial court again denied the Motion.

During the charge conference on the jury instructions, defense counsel objected to the submission of all three predicate felonies: "We would object to all three particularly in light that the defense prior to trial asked that the State disclose what theories they were pursuing and at that time they only mentioned those that were charged under premeditation, deliberation, and the discharging into an occupied dwelling." Defense counsel also stated, "I don't think . . . all the elements are satisfied, particularly with the felony murder rule portion or felony or murder in the perpetration of a felony components." The trial court determined instruction on all three predicate felonies was proper and instructed the jury accordingly. The trial court also instructed the jury: "You must be unanimous that the defendant committed or attempted to commit one of these felonies and that the defendant had the intent to commit that felony, but you need not be unanimous as to which one the defendant committed or attempted to commit."

On 22 September 2023, the jury returned a verdict finding Defendant guilty of First-Degree Murder based on Felony Murder. The verdict form did not require the jury to specify which predicate felony or felonies supported the conviction. The trial court entered a Judgment sentencing him to life imprisonment without possibility of parole.

Issues

The issues on appeal are whether: (I) Defendant's challenges to the denial of his Motions to Dismiss were preserved for appellate review; (II) the trial court erred by denying Defendant's Motions to Dismiss and instructing the jury on each of the predicate felonies charged; or (III) the trial court erred by overruling Defendant's *Batson* objection.

Analysis

I. Preservation

[1] As a threshold matter, the State argues Defendant failed to properly preserve his challenge to the sufficiency of the evidence because, in the

State's view, his objection at trial rested exclusively on a lack of pretrial notice. We disagree.

Our Rules of Appellate Procedure provide: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. Rule 10(a)(1) (2024). Further, our Supreme Court has held "[b]ecause our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, it follows that, under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

During the charge conference, the trial court asked defense counsel whether he would like to be heard on the predicate felonies. Counsel for Defendant responded: "We would object to all three. We would object to all three particularly in light that the defense prior to trial asked that the State disclose what theories they were pursuing and at that time they only mentioned those that were charged under premeditation, deliberation, and the discharging into [a]n occupied dwelling." Further, during the charge conference but prior to the above express objections, counsel for Defendant argued "I don't think . . . all the elements are satisfied, particularly with the felony murder rule portion or felony or murder in the perpetration of a felony components. . . . The only evidence presented by the State is that the shooter was shooting into the air. And so I think there is certainly argument both ways on a lot of these elements and it's not sufficient or fully satisfied by the State's evidence."

Additionally, Defendant moved to dismiss the charges against him at the close of the State's evidence, and again after the close of all evidence. At the close of the State's case in chief, Defendant contended the State had not presented sufficient evidence to support the murder charges and the discharging a firearm into an occupied dwelling charge. Counsel for Defendant expressly argued "as far as the occupied dwelling goes, there's not been any evidence at all, not one scintilla of evidence as they say, that any bullet fired from that vehicle at all struck this building." Defense counsel likewise challenged the sufficiency of the evidence for First-Degree Murder and argued, "even given the benefit of all reasonable inferences that the jury could not come back with a guilty beyond a reasonable doubt in both of these charges." And, indeed, the State's response to these arguments was that there was sufficient evidence to support each charge, including sufficient evidence to support the three predicate felonies it alleged. Thus, the sufficiency of the evidence to support the First-Degree Murder charge, including the three predicate felonies alleged, was submitted to the trial court for consideration. Therefore, Defendant's challenge to the sufficiency of the evidence to support the First-Degree Murder charge was preserved for appellate review.

II. Sufficiency of the Evidence

[2] Defendant contends the trial court erred by instructing the jury because there was insufficient evidence to support the three alleged predicate felonies: Assault with a Deadly Weapon with Intent to Kill (AWDWIK), Firing Into an Occupied Dwelling, and Discharging a Firearm Within a Motor Vehicle. "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted).

"[U]npreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard." *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020) (citations omitted). As we determined *supra*, Defendant's challenges to the jury instructions were preserved for appeal. Thus, we apply harmless error review. "[H]armless-error review requires a defendant show that 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises,' unless the error relates to a constitutional right." *State v. Leaks*, 379 N.C. 57, 62, 864 S.E.2d 217, 220 (2021) (quoting N.C. Gen. Stat. § 15A-1443(a)). Defendant has not alleged violation of a constitutional right; therefore, he bears the burden of showing prejudice. *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (citing N.C. Gen. Stat. § 15A-1443(a)).

Here, Defendant sought to dismiss the First-Degree Murder charge at the close of the State's evidence and after his case-in-chief based on insufficient evidence. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Wilson*, 269 N.C. App. 648, 651, 839 S.E.2d 438, 441 (2020) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

"If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)). "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorably to [the] defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state." *Sumpter*, 318 N.C. at 107-08, 347 S.E.2d at 399. However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

Here, Defendant was charged with Felony Murder. "Felony murder elevates a homicide to first-degree murder if the killing is committed in the perpetration or attempted perpetration of certain felonies or any 'other felony committed or attempted with the use of a deadly weapon[.]' " *State v. Frazier*, 248 N.C. App. 252, 262, 790 S.E.2d 312, 320 (2016) (quoting N.C. Gen. Stat. § 14-17(a)). The State put forward three different predicate felonies upon which the jury could base a conviction for Felony Murder: AWDWIK, Firing Into an Occupied Dwelling, and Discharging a Firearm Within a Motor Vehicle. We address each in turn.

A. *AWDWIK and Firing Into an Occupied Dwelling*

"[T]he elements of assault with a deadly weapon with intent to kill are: '(1) an assault; (2) with a deadly weapon; (3) with the intent to kill.' " *State v. Garris*, 191 N.C. App. 276, 287, 663 S.E.2d 340, 349 (2008) (quoting *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998)). An assault is "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967).

"A specific intent to kill is an essential element of assault with a deadly weapon with intent to kill[.]" *State v. Daniel*, 333 N.C. 756, 763, 429 S.E.2d 724, 729 (1993) (citations omitted). However, "an intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Barlowe*, 337 N.C. 371, 379, 446 S.E.2d 352, 357 (1994). "Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred." *State v. Cromartie*, 177 N.C. App. 73, 77, 627 S.E.2d 677, 680 (2006); *see also State v. Patton*, 115 N.C. 753, 756, 20 S.E. 538, 539 (1894) ("[W]hen the statute makes the 'intent to kill' an essential element of the offense, the intent to shoot will be held synonymous with the intent to kill.").

Our statutes describe the offense of Firing Into an Occupied Dwelling, in pertinent part, as follows:

> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles . . . into any building, structure, . . . or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling . . . is guilty of a Class D felony.

N.C. Gen. Stat. § 14-34.1(a)-(b) (2023). Thus, the elements of this offense are: "(1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995) (citation omitted).

Defendant's contention as to each of these offenses is the same: he argues the Record does not reflect evidence he fired "at" anyone or at Turner's house. We disagree.

The Record reflects Poteat testified that he saw Defendant holding a gun and saw the gun discharge. Turner testified to seeing Defendant firing a gun. Another witness, Warren Mongo, stated he saw a gun in Defendant's hand immediately after hearing multiple shots fired. Further, the evidence reflected Russell was shot and died from a gunshot wound. Likewise, the evidence tended to show a bullet entered Turner's residence. Defendant concedes there was reason to believe, given the time of day the shooting occurred, that Turner's residence might be occupied. Thus, there is sufficient evidence from which the jury could infer Defendant was the shooter and that bullets from the gun he fired hit

Russell, as well as Turner's house. The remaining question as Defendant poses it—whether Defendant fired "at" anyone or anything—is a question of fact for the jury. *See U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977) ("[I]n a jury trial the primary finders of fact are the jurors.").

Thus, the evidence, taken in the light most favorable to the State, was sufficient to submit the charges of AWDWIK and Firing Into an Occupied Dwelling to the Jury. Therefore, the trial court did not err in denying Defendant's Motions to Dismiss and submitting these charges to the jury.

B. *Discharging a Firearm Within a Motor Vehicle*

Our statutes provide: "Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm within any occupied building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to incite fear in another shall be punished as a Class F felon." N.C. Gen. Stat. § 14-34.10 (2023). The elements of this offense are thus (1) willfully or wantonly discharging; (2) a firearm; (3) within a motor vehicle; (4) with the intent to incite fear in another person.

Defendant contends there was insufficient evidence as to the third element—that he discharged the firearm *within* the car. He argues the use of the word "within" as used in the statute requires a showing that the requisite conduct occurred inside a single structure—that it "encompasses an event occurring inside the covered conveyance rather than emanating from it." He argues the language of the statute is clear and unambiguous, and that the Legislature's intent is additionally evidenced by its use of different language in related statutes. The evidence, taken in the light most favorable to the State, tended to show Defendant had fired from a vehicle into Kalen Turner's house. Defendant argues the act of firing from a vehicle into another structure is more appropriately described by language contained in other provisions, including Section 14-34.1 of our General Statutes which criminalizes discharging a firearm *into* a building or structure, or Section 14-34.9, which criminalizes discharging a firearm "*from within* any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person not within that enclosure[,]"and the existence of these statutes indicates the Legislature did not intend Section 14-34.10 to govern the conduct at issue in this case.

This Court recently addressed this question in *State v. Jenkins*, 300 N.C. App. 168, 920 S.E.2d 524 (2025). In that case, the defendant discharged a firearm from a vehicle into another vehicle, injuring the driver. *Id.* at 170, 920 S.E.2d at 527. Like Defendant, he was convicted under Section 14-34.10. *Id.* at 176, 920 S.E.2d at 530. We upheld that conviction, holding that because the defendant was within an enclosure when he discharged the firearm his conduct was contemplated by the statute, regardless of whether the victim was within that same enclosure. *Id.* "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's argument is foreclosed by our precedent. The evidence at trial therefore supported a jury instruction regarding Discharging a Firearm Within a Motor Vehicle and the trial court did not err by denying the Motion to Dismiss and so instructing the jury.

III. Defendant's *Batson* Objection

[3] Defendant also argues the trial court erred by denying his *Batson* challenge. The State exercised a peremptory challenge as to Eric M, a Black man, and Defendant objected to this challenge under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors." *Batson v. Kentucky*, 476 U.S. at 79. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 578 U.S. 488, 499, 197 L. Ed. 2d 1 (2016). Article I, Section 26 of the North Carolina Constitution likewise prohibits the State from using peremptory challenges for racially discriminatory reasons. *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 521 (2005).

"When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson v. Kentucky*." *State v. Hobbs*, 374 N.C. 345, 349-50, 841 S.E.2d 492, 497 (2020).

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial

> court must decide whether the defendant has proved purposeful discrimination.

State v. Taylor, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008) (citations omitted).

Here, Defendant noted the State had challenged the only Black prospective juror on the panel and the trial court accordingly concluded he had made a prima facie showing of discrimination. The State then offered facially race-neutral explanations for exercising the challenge: that Eric M appeared "uninterested" and "not attentive," that he "seemed to have been annoyed to be here and that he appeared . . . to not be listening." We now address *Batson*'s third step and determine if the trial court erred in determining Defendant has not shown purposeful discrimination.

"When reviewing a trial court's *Batson* analysis, 'a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.' " *State v. Cuthbertson*, 288 N.C. App. 388, 396, 886 S.E.2d 882, 888-89 (2023) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 170 L. Ed. 2d 175 (2008)). Clear error exists when "on the entire evidence, the Court is left with the definite and firm conviction that a mistake has been committed." *Id.* This deferential standard reflects an understanding that trial courts are "in the best position to assess the prosecutor's credibility." *Id.*

In the third step of the *Batson* analysis, trial courts determine whether the prosecutor's proffered reasons are pretextual: "[t]he ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499 (citations omitted). Trial courts use an open-ended list of factors to determine whether the defendant has met the burden of proving purposeful discrimination, including:

> Statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in the case;
>
> Evidence of a prosecutor's disparate questioning and investigation of Black and white prospective jurors who were not struck in the case
>
> Side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not struck in the case

> A prosecutor's misrepresentation of the record when defending the strikes during the *Batson* hearing
>
> The susceptibility of the case to racial discrimination
>
> Relevant history of the State's peremptory strikes in past cases; or
>
> Other relevant circumstances that bear upon the issue of racial discrimination.

Cuthbertson, 288 N.C. App. at 403, 886 S.E.2d at 893.

The trial court must "consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge." *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502. It must "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges[,]" including engaging in a "comparative juror analysis of the prospective juror's voir dire responses." *Id.* at 360, 841 S.E.2d at 503.

In this case, the State removed the only Black juror who had yet participated in voir dire. This statistical evidence may favor a finding of purposeful discrimination, but we note that "bare statistics" do not carry as much weight as other factors, particularly as a small sample size can skew strike and acceptance rate data. *Cuthbertson*, 288 N.C. App. at 404-05, 886 S.E.2d at 893 (citing *Miller-El v. Dretke*, 545 U.S. 231, 241, 162 L. Ed. 2d 196 (2005)).

Several of the enumerated factors do not support a finding of purposeful discrimination in this case. The trial court found the prosecutor had not misrepresented the record in defending the peremptory strike. There was no evidence the case was particularly susceptible to racial discrimination: in making this determination, we focus on the "race of the defendant, the victims, and the key witnesses" and "whether the case crosses racial lines among those key figures." *State v. Bennett*, 282 N.C. App. 585, 621, 871 S.E.2d 831, 856 (2022) (citation omitted). The Defendant in this case is Black, but at the time of the *Batson* hearing there was no indication of the race of the victim or key witnesses. There was no indication of disparate questioning of jurors. Defendant does not argue, at trial or on appeal, that these factors support a finding of purposeful discrimination.

The sole factor Defendant raises in support of a finding of purposeful discrimination is a comparison between Eric M and Nathan J, a white juror who was not struck. During the *Batson* hearing, the State explained its strike by describing Eric M's demeanor:

> Ms. Burnick was tasked with observing the reactions of the jurors as I asked questions as I was taking notes on their answers and such. And what she observed about it was that [Eric M] was uninterested. That she observed matters of his body language that showed he was not attentive. That he seemed to have been annoyed to be here and that he appeared to her to be not listening.

In response, Defendant identified behavior exhibited by Nathan J:

> I submit to Your Honor that Juror No. 5, [Nathan J], gave nothing but one word answers the entire time with every question that he was asked. . . . And subjectively someone could say, oh, well, he looks like he doesn't want to be here. He's giving these one word answers and not very communicative, if you will, with his body language.

We note that explanations based on demeanor "are particularly susceptible to the kind of abuse prohibited by *Batson*." *United States v. Diaz*, 26 F.3d 1533, 1543 (1994). However, "[t]he trial judge [is] in the best position to resolve this issue" because the trial court can observe the prospective juror's "facial expressions, tone of voice, reactions, and other nuances that are not subject to translation when reviewing a cold record on appeal." *State v. McClain*, 169 N.C. App. 657, 669, 610 S.E.2d 783, 791 (2005). In this case, the trial court found the prosecutor's explanation credible.

Nathan J's behavior as identified by Defendant is not directly analogous to that of Eric M. Defendant identifies only Nathan J's "one word answers" and body language as indicating "he doesn't want to be here." The State's concern regarding Eric M was not only that he was "annoyed to be here" but that he was "uninterested," "not attentive," and "appeared . . . to be not listening." A prospective juror's "general lack of attention" is a valid reason for the State to exercise a peremptory challenge. *State v. Caporasso*, 128 N.C. App. 236, 244, 495 S.E.2d 157, 162 (1998). Defendant has not shown this reason to be pretextual, and the trial court did not clearly err in finding the proffered explanation credible.

After reviewing all of the relevant facts and circumstances, we determine that the trial court did not commit clear error in concluding the peremptory strike of Eric M was not motivated in substantial part by discriminatory intent. *Clegg*, 380 N.C. at 144, 867 S.E.2d at 900. We are not "left with the definite and firm conviction that a mistake has been committed." *Bennett*, 282 N.C. App. at 600, 871 S.E.2d at 844. Therefore, the trial court did not err in denying Defendant's *Batson* objection.

Conclusion

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

NO ERROR.

Chief Judge DILLON concurs by separate opinion.

Judge HAMPSON concurs in result only by separate opinion.

Judge GRIFFIN concurs.

DILLON, Chief Judge, concurring.

I concur. Defendant argues the language of G.S. 14-34.10 does not cover his actions, firing a weapon "from within" a vehicle at targets outside the vehicle, as shown by the evidence, where the language of the statute merely proscribes firing a weapon "within" a vehicle. *See State v. Hinton*, 361 N.C. 207, 211–12 (2007) (under the "rule of lenity" ambiguous statutes are to be strictly construed against the State). We are bound, though, by our Court's recent holding in *State v. Jenkins* that G.S. 14-34.10 is not ambiguous, that our General Assembly also intended to proscribe the firing of a weapon *from* within a vehicle at a target outside the vehicle.

Defendant further argues the lack of evidence that he committed *any* of the predicate felonies submitted to the jury. I agree, though, with the majority opinion that the evidence was sufficient to submit the predicate felonies to the jury.

I write separately to express my view that G.S. 14-34.10 should not have been submitted to the jury, but for a reason not argued by Defendant either at trial or on appeal. While based on *Jenkins* I am compelled to disagree with Defendant's argument that there was insufficient evidence he violated G.S. 14-34.10, I conclude the circumstances surrounding his violation of that felony were not sufficient to bring those actions within the purview of our felony murder statute, as Defendant's presence in a car when he fired the fatal shot did not add any risk of harm, as explained below.

Under our felony murder statute, a defendant is guilty of *first-degree* murder if his commission of "arson, rape or a sex offense, robbery, kidnapping, burglary, *or any other felony committed or attempted with the use of a deadly weapon*" is a cause of a bystander's death. N.C.G.S. § 14-17 (2023) (emphasis added). The italicized language (hereinafter the "deadly weapon provision") was added in 1977.

Our Supreme Court has construed "other felony" within the deadly weapon provision to "refer to any felony which 'creates any substantial foreseeable human risk and actually results in the loss of life.' " *State v. Wall*, 304 N.C. 609, 614 (quoting *State v. Thompso*n, 280 N.C. 202, 211 (1972)). In *Wall*, the Court held that a different assault-type felony—specifically the firing of a weapon into an occupied vehicle—*could* serve as the predicate felony in a felony murder conviction. *Id.* at 615. However, I do not believe the Court intended for the felony murder statute to apply in *every* case where a defendant has violated that statute, for instance where the defendant fires at his target while his target is sitting in a parked car. The felony murder statute was triggered in *Wall* in my view because, in that case, the vehicle which the defendant fired into *was in motion*, which created additional "substantial foreseeable human risk" beyond the firing of the weapon.

There may be situations where evidence of a violation G.S. 14-34.10 could support a felony murder conviction based on *Wall*. For instance, evidence that a defendant in a car fires a gun indiscriminately at others within the same car, where the car is locked and potential victims cannot easily escape, may support a felony murder conviction, as the confined space of both the victim and the shooter creates an additional risk beyond the assault itself. However, the evidence in this case, the fact Defendant was in a car when he fired his weapon outside his vehicle *did not add* any risk to human life beyond the assault itself. Rather, based on the evidence in the light most favorable to the State, the only risk to human life in his commission of G.S. 14-34.10 was his firing of the gun.

With that said, I write further to express my doubts our General Assembly intended for G.S. 14-34.10 or similar assault-type felonies to ever serve as predicate felonies. That body has already prescribed a series of crimes to punish fatal assaults, the levels of which are differentiated by the shooter's intent. *See Lutz v. Gaston County*, 282 N.C. 208, 219 (1972) ("Statutes dealing with the same subject matter must be construed *in para materia*, and harmonized, if possible, to give effect to each." (italics added) (citation omitted)). Since the main gist of G.S.

14-34.10 is the firing of the weapon itself, Defendant should be convicted based on his intent when he fired the weapon.

For instance, under G.S. 14-17(a), if the jury finds a defendant who fatally shoots another from a car with the specific intent to kill *and* that intent is formed after premeditation and deliberation, he would be guilty of first-degree murder.

Under that same statute, if it had been found he intentionally fatally shoots the victim with malice, but it is not shown he had the specific intent *to kill* her, he would be guilty only of second-degree murder.

And under G.S. 14-18, if he fatally shoots a victim in the heat of passion—even with the specific intent to kill—he would merely be guilty of voluntary manslaughter. *See State v. Huggins*, 338 N.C. 494, 497-98 (1994) (holding that a level of provocation can "negate[] malice and reduce[] murder to voluntary manslaughter"); *State v. Misenheimer*, 304 N.C. 108, 114 (1981) ("If, however, the killing was the product of a specific intent to kill formed under the influence of [intense, sudden] provocation[,] then there would be no deliberation and hence no murder in the first degree.").

Also, he would only be guilty of voluntary manslaughter under G.S. 14-18 if he fatally shoots his victim, even with the intent to kill, but acted in "imperfect self-defense." *State v. Lyons*, 340 N.C. 646, 661 (1995) (a defendant is guilty of voluntary manslaughter if found to be otherwise justified in the shooting except *either* that he "was the aggressor in bringing on the affray *or* used excessive force").

Under this same section, if he fatally shoots his victim accidentally, but acts with culpable negligence, he is guilty only of involuntary manslaughter. *See, e.g.*, *State v. Fritsch*, 351 N.C. 373, 380 (2000).

Finally, if he fatally shoots, even with the specific intent to kill, but has acted in perfect self-defense, he would not be guilty of any crime. *See State v. Harvey*, 372 N.C. 304, 307–08 (2019).

So, for the situation where both a shooter and his victim are in the same confined vehicle but where the shooter was merely being reckless in firing his weapon, perhaps the appropriate crime is second-degree murder. Or if he gets in a car and discovers his wife in the back seat of the car with a paramour and shoots his wife, perhaps the appropriate crime is voluntary manslaughter.

Application of *ejusdem generis* is appropriate for construing the deadly weapon provision. *Ejusdem generis* is a canon of statutory construction which provides "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to the specific classes that precede it." *Fischer v. United States*, 603 U.S. 480, 487 (2024) (cleaned up) (citations omitted). Earlier this year, our Supreme Court applied this canon to hold the phrase "claims for loss" under the federal PREP Act did not include state constitutional claims, illustrating the canon as follows:

> [A] football league might adopt a rule that players must not "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player." If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind.

Happel v. Guilford Cnty. BOE, 387 N.C. 186, 209 (2025) (quoting *Fischer*, 603 U.S. at 488). The Court explained that application of the canon in that case "track[s] the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Id.* (citation omitted).

Our Supreme Court also applied *ejusdem generis* in construing "other officer" in a statute only to include county officers where the phrase followed a list of job titles, each of which was a county-level officer. *Wynn v. Frederick*, 385 N.C. 576, 582–83 (2023). The Court cited other opinions where it applied *ejusdem generis* to discern our General Assembly's intent. *See Meyer v. Walls*, 347 N.C. 97, 106 (1997) ("Where words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated."); *Turner v. Bd. of Educ.*, 250 N.C. 456, 463 (1959) (same); *State v. Lee*, 277 N.C. 242, 244 (1970) ("[G]eneral words [that] follow a designation of particular subjects or things . . . includ[e] only things of the same kind, character and nature as those specifically enumerated."); *State v. Fenner*, 263 N.C. 694, 697-98 (1965) (same).

It is clear our General Assembly intended to elevate an arson, rape, sex offenses, robbery, burglary, or kidnapping which result in a death to *first-degree* murder, irrespective of whether a deadly weapon was used. These crimes clearly each involve an act beyond carrying out the desire to physically harm someone. Arson involves burning a dwelling house; rape and sex offenses involve committing an unwanted sex act; robbery involves stealing from someone by force; burglary involves breaking into someone's home at night; and kidnapping involves confining, restraining or removing someone for some felonious purpose. And I believe by enacting the deadly weapon provision our General Assembly intended to elevate similar-type, but lesser felonies—those involving some other risky component besides or in addition to an assault—where the defendant uses a deadly weapon to carry it out; for instance, felony burning of a non-dwelling (in addition to arson), felony indecent liberties (in addition to rape and sexual offense), felony breaking and entering (in addition to burglary), felonious restraint (in addition to kidnapping), felony larceny (in addition to robbery), and the like, which result in a death to first-degree murder, but only where the defendant uses a firearm.

In that vein, I believe there is a strong argument that it was not appropriate to submit the crime of assault with a deadly weapon with the intent to kill ("AWDWIK") as a predicate felony, notwithstanding the sufficiency of the evidence that Defendant committed this crime. That is, I have doubts that AWDWIK should ever serve as an underlying felony for a felony murder conviction, based on the doctrine of transferred intent.

For well over a century and as late as 2020 (well before and well after our General Assembly added the deadly weapon provision in 1977), our Supreme Court has instructed that a shooter is "guilty or innocent *exactly as though the fatal act had caused the death of the person intended to be killed*. The intent is transferred to the person whose death has been caused." *State v. Greenfield*, 375 N.C. 434, 441 (2020) (quoting *State v. Dalton*, 178 N.C. 779, 781 (1919)) (emphasis added). That is, the shooter's intent "follows the bullet":

> It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, *his act shall be interpreted with reference to his intent and conduct towards his adversary*. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as if the fatal act had caused the death of his adversary. It has been aptly stated that the malice or intent follows the bullet.

State v. Davis, 349 N.C. 1, 37 (1998) (cleaned up) (emphasis added).

Under these holdings, if one shoots at another with the specific intent to kill formed after premeditation and deliberation, but inadvertently kills a bystander, the shooter is still guilty of first-degree murder, even though he had no intent to kill the bystander. If, however, he shoots at another in perfect self-defense, but inadvertently kills a third party, the shooter would entitled to an instruction on perfect self-defense to avoid any criminal culpability. *Id.*

As explained by our Supreme Court, if one intends to shoot another with malice without the specific intent to kill, but inadvertently kills a bystander, he would be guilty of second-degree murder; or if he shoots at another intending to kill in the heat of passion, but hits a third party, he would only be guilty of manslaughter:

> if the killing of the intended victim would have been reduced by the circumstances to murder in the second [] degree, or to manslaughter in any of the degrees, then the unintended and accidental killing of the bystander resulting from any act designed to take effect upon the intended victim would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed.

Dalton, 178 N.C. at 782. *See also State v. Locklear*, 331 N.C. 239, 245 (1992) (explaining that a defendant's criminal liability for the shooting death of an unintended victim is determined as if he had killed his intended victim).

Our Supreme Court, however, on occasion has held that AWDWIK may serve as a predicate felony where someone other than the defendant's intended target is killed. *State v. Abraham*, 338 N.C. 315, 332 (1994) (holding felony assault with a deadly weapon which results in the death of a bystanding supports conviction of first-degree felony murder). This appears to be true even if the shooter only had the "intent to inflict serious injury" on the intended target but kills a bystander. *State v. Jones*, 353 N.C. 159, 168 (2000).

The Court in *Abraham* reasoned it was not reversible error *not* to give a "transferred intent" instruction in that case since the jury necessarily found anyway that the defendant specifically intended to kill someone when he inadvertently killed a bystander. *Abraham*, 338 N.C. at 332. While this reasoning may have been sound based on the facts of that case, I do not believe it is not sound in every AWDWIK case, as "malice" is *not* an element of AWDWIK. *See State v. Hall*, 59 N.C. App. 567, 573 (1982). Consider a classic example of voluntary manslaughter where a husband, coming back from hunting, as he is carrying his gun to his garage, sees his wife in their bed with another man. If the jury finds the husband, in the heat of passion, fatally shoots his wife with the specific intent to kill her, he is guilty of voluntary manslaughter. However, if the husband misses his wife and kills her paramour, it seems logical under the greater weight of Supreme Court precedent he would still be guilty of only voluntary manslaughter, based on transferred intent. But, under *Abraham*, it seems he could be held criminally liable for first-degree murder because he killed his paramour while committing the crime of AWDWIK against his wife, though without malice. I believe, however, it is more appropriate to convict a defendant who kills a bystander while committing AWDWIK based on transferred intent where there is evidence of a lack of malice rather than for first-degree murder.

HAMPSON, Judge, concurring *dubitante*.

Although we are bound by the previous decision of this Court in *State v. Jenkins*, 300 N.C. App. 168, 920 S.E.2d 524 (2025),[1] I believe that opinion incorrectly interpreted the statute at issue and was wrongly decided. The panel in *Jenkins* eschewed a plain text analysis of N.C. Gen. Stat. § 14-34.10 (2023) and discarded the clear legislative intent. Instead, that panel rewrote the statute to reach the conclusion the term "within" actually meant "without."

Let's start at the beginning—with the actual text of the statute. The text of Section 14-34.10, entitled "Discharge Firearm Within Enclosure to Incite Fear," reads:

> Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm within any occupied building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to incite fear in another shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-34.10 (2023). Thus, the elements of this offense are: (1) willfully or wantonly discharging; (2) a firearm; (3) within a motor vehicle; (4) with the intent to incite fear in another person. *See id.*

As Defendant notes, the critical word in this statutory provision is "within." Although we are without caselaw defining "within" for the purposes of statutory construction, other relevant sources define it as "inside the limits of," Black's Law Dictionary 1602 (6th ed. 1990), or "in or into the interior" and "a function word to indicate enclosure

1. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

or containment." MERRIAM-WEBSTER'S DICTIONARY (2025). Thus, giving the term "within" its plain meaning, Section 14-34.10 refers to an incident occurring inside a covered conveyance—not merely emanating from it. The plain text of Section 14-34.10 criminalizes discharging a firearm *within* an enclosure, not firing from one enclosure into another.

Indeed, the legislative history and contrast with the companion statute make this clear. The intent of the Legislature is additionally clearly indicated by its use of different, more specific language in provisions within the same Article which criminalize discharging a firearm *into* an occupied enclosure (N.C. Gen. Stat. § 14-34.1) or *from within* an enclosure (N.C. Gen. Stat. § 14-34.9).

"The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (citing *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005)). "Therefore, we must construe the statute while mindful of the criminal conduct that the legislature intends to prohibit." *Id.* (citing *In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978)). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018) (quoting *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). Although certain forms of legislative history are disfavored in this State, *see N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) ("[T]his Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." (citation omitted)) and *State ex rel. N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (explaining courts may not consider "[t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and . . . construction[.]"), other sources may be more reliable. For example, statutory history—changes the General Assembly has made to a statutory text over time—has been noted as a more reliable source of legislative intent. *Wynn v. Frederick*, 385 N.C. 576, 582, 895 S.E.2d 371, 377 (2023) ("[T]he legislature's intent may be revealed from the legislative history of the statute in question, as changes the legislature makes to a statute's text over time provide evidence of the statute's meaning." (citation omitted)), *reh'g denied*, 896 S.E.2d 254 (N.C. 2024).

Compare the instant statute with the statute immediately preceding it. That provision, titled "Discharging a Firearm From Within an Enclosure," states: "[A]ny person who willfully or wantonly discharges or attempts to discharge a firearm, as a part of criminal gang activity, *from within* any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person or persons *not within* that enclosure shall be punished as a Class E felon." N.C. Gen. Stat. § 14-34.9 (2023) (emphasis added). There are two significant differences between the statutes that underscore our interpretation. First, the present statute refers to "discharg[ing] a firearm *within*" a vehicle, while the previous section addresses "discharg[ing] a firearm . . . *from within*" a vehicle. This distinction signals an intention to address two different incidents, with the present statute concerning the dangers of discharging a weapon inside of an enclosed space while the second concerns "drive by" shootings and similar incidents. Further, Section 14-34.9 clearly identifies the contemplated victims: persons *not* inside the same structure as the shooter (". . . toward a person or persons not within that enclosure[.]") (emphasis added). In contrast, the present section's only reference to potential victims is its reference to the discharge of a firearm "within any *occupied* building, structure, motor vehicle, or other conveyance[.]" N.C. Gen. Stat. § 14-34.10 (2023) (emphasis added). Thus, the only victims contemplated are other persons within the same enclosure as the shooter.

The differences between these two otherwise similar statutes underscore the General Assembly's intent to criminalize two distinct incidents: one in which a defendant fires a weapon from one enclosure into another, and one in which a defendant fires a weapon within an enclosed space. Further, although the plain text is sufficient to support our interpretation, it bears mention that in the process of passing the bill to enact Section 14-34.10, the Judiciary Committee proposed a substitute bill, which the Senate adopted, changing the name of the bill from "An Act to Make it a Criminal Offense to Discharge a Firearm *From Within* an Enclosure With the Intent to do Harm or Incite Fear" to "An Act to Make it a Criminal Offense to Discharge a Firearm *Within* an Enclosure With the Intent to Incite Fear." N.C. Sen. J., 2013 1st Sess. No. 41 (emphasis added). This change indicates the General Assembly's choice to limit the present section to "within" as opposed to "from within" was considered and intentional. Although this is not identical to a situation where the General Assembly adopts changes to a previously enacted statute, it is similarly a change the legislature clearly agreed to and enacted, as opposed to the "internal deliberations" of a legislative proceeding. *See N.C. Dep't of Corr.*, 363 N.C. at 202, 675 S.E.2d at 650.

We have previously distinguished the conduct required to support a conviction under Section 14-34.10 from other, similar conduct. In *State* *v. McLean*, for example, the defendant was charged with Discharging a Firearm Within an Enclosure to Incite Fear. 251 N.C. App. 850, 796 S.E.2d 804 (2017). However, the indictment alleged the defendant "did discharge a handgun, a firearm, *into* an occupied structure with the intent to incite fear in others." 251 N.C. App. at 854, 796 S.E.2d at 807. We held the indictment did not sufficiently charge the defendant with discharging a firearm within an enclosure to incite fear, and noted the conduct was better described under Section 14-34.1, "Discharging Certain Barreled Weapons or a Firearm into Occupied Property." *Id.* While in this case the evidence tends to show Defendant fired into one enclosure from another, as in *McLean* it is clear the Legislature did not intend Section 14-34.10 to describe that conduct because other, related statutes govern firing from within or into an enclosure.

Thus, correctly interpreted, Section 14-34.10 refers exclusively to the discharging of a firearm inside of an enclosed structure, not the discharge of a firearm emanating from an enclosed structure. Here, the Record evidence, taken in the light most favorable to the State, reflects the shots fired in this incident were from a vehicle rather than within one. The only testimony directly regarding the position of the gun at the time of the shooting was Thompson's testimony at multiple points that he saw the gun in Defendant's hand "[a]s it was poking out the window" and that he saw Defendant "place his hand out the window and that's when I [saw] the gun." That the State points to this testimony in support of its position reflects an understanding of the statute at odds with its plain meaning. Although this might reflect that the firearm was partially within the car, this testimony does not support an inference the gun was fired entirely within an enclosed space; in fact, it clearly suggests the gun was at least partially *outside* the car and firing toward another structure—which is precisely the conduct an entirely different statute—Section 14-34.9—contemplates.

Further, the State points to Turner's testimony the windows of the car were "cracked" at the time of the shooting. But the State itself writes in briefing this testimony could reasonably support an inference "that the gun was fired *from within* the car." The evidence in the Record does not support an inference Defendant discharged a weapon inside the enclosed vehicle under N.C. Gen. Stat. § 14-34.10 as properly interpreted. Thus, even viewed in the light most favorable to the State, under this understanding of the statute there was not substantial evidence Defendant committed the offense. Under this interpretation, the trial court should have allowed Defendant's Motion to Dismiss as to this charge and declined to submit the offense as a predicate felony for Felony Murder.

Still, "[t]he defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) (citing *State v. Billups*, 301 N.C. 607, 613, 272 S.E.2d 842, 847 (1981)). Because Defendant's objection to the jury instruction was preserved, we apply harmless error review. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). Here, the trial court instructed the jury that, while it had to be unanimous in finding Defendant committed or attempted to commit one of the three predicate felonies submitted, it need not be unanimous as to which offense Defendant committed or attempted to commit. The verdict form did not require the jury to specify which predicate felony or felonies it found in support of the conviction for Felony Murder, nor was the jury asked at any point which predicate felony or felonies it found. Absent that information, we cannot say definitively that no juror found Discharging a Firearm Within an Occupied Vehicle as the only predicate felony. Had that occurred, because this charge was impermissibly submitted to the jury, the result would be a verdict that was not unanimous.

"The United States Supreme Court has long recognized that a conviction cannot stand merely because it could have been supported by one theory submitted to the jury if another, invalid theory also was submitted and the jury's general verdict of guilty does not specify the theory upon which the jury based its verdict." *State v. Belton*, 318 N.C. 141, 164, 347 S.E.2d 755, 769 (1986), *overruled on other grounds*, *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997). In *State v. Petersilie* our Supreme Court considered a case in which it determined one of the two theories of guilt on which the jury was instructed was erroneous. 334 N.C. 169, 432 S.E.2d 832 (1993). There, the Court concluded: "Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its verdict, we must assume the jury based its verdict on the theory for which it received an improper instruction." *Id.* at 193, 432 S.E.2d at 846 (citations omitted).

Likewise, our Supreme Court reached the same conclusion in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987). In that case, the defendant was charged with felony murder and the State alleged two different predicate felonies: felony breaking or entering and armed robbery. *Id.* at 567, 356 S.E.2d at 322. The Court determined breaking or entering, as alleged in that case, could not serve as a predicate felony for felony murder. *Id.* at 573, 356 S.E.2d at 326. Our Supreme Court then concluded "Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant." *Id.* at 574, 356 S.E.2d at 326 (citing *Belton*, 318 N.C. at 162, 347 S.E.2d at 768). An erroneous instruction, however, does not warrant automatic reversal; rather, a showing of prejudice is still required. *Malachi*, 371 N.C. at 736, 821 S.E.2d at 420. Importantly, "the history of this Court's decisions in cases involving the submission of similar erroneous instructions and out consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure there is *no 'reasonable possibility'* that the jury convicted the defendant on the basis of such an unsupported legal theory." *Id.* "However, in the event that the State present exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonably jury would elect to convict the defendant on the basis of an unsupported legal theory." *Id.*

The State's evidence is not so exceedingly strong here. Although Assault with a Deadly Weapon with Intent to Kill and Firing Into an Occupied Dwelling were properly submitted the jury, Discharging a Firearm Within an Occupied Vehicle, under a plain reading of that statute, was not. We cannot discern upon which theory or theories the jury based its verdict. Moreover, the State's evidence in this case is certainly in dispute. First, with respect to the AWDWIK charge, while there is sufficient evidence to submit the charge to the jury, it would not be unreasonable for a jury to find Defendant lacked the requisite specific intent for that offense. Several witnesses testified to seeing Defendant shooting from the car; however, no witness testified Defendant aimed in a particular direction. Although a jury could infer Defendant intended to shoot someone in the group, it would be just as reasonable to infer Defendant did not intend to hit anyone in particular and thus lacked the specific intent necessary for AWDWIK.

Likewise, there is no evidence beyond the bullet hole in the house that Defendant intentionally shot at or aimed for the Turner's house. While a jury would be entitled to infer intent from the fact of a bullet entering the house, it would just as well be entitled to conclude Defendant lacked the requisite intent without more specific evidence to support the theory he meant to hit the house. Further, as Defendant argued in his Motion to Dismiss, the State's only evidence as to the age of the bullet hole in the house was Detective Snow's testimony stating "there's no pollen. There's no dirt. It's a very clean line like it had been freshly broken." Detective Snow also testified, however, that there were two other holes in the siding of the house. The lack of dirt or pollen was the only thing Detective Snow cited as differentiating the three holes. Further, there was no testimony from the homeowner or any other witness establishing any of the holes in the house had not been there prior to the incident in this case. To be clear, although there is sufficient evidence to submit the AWDWIK and Firing Into an Occupied Dwelling charges to the jury, there is also enough uncertainty, evidentiary disputes, and room for disparate inferences that reasonable jurors may have concluded Defendant lacked the intent required for either of those offenses and thus relied solely upon the impermissible charge.

I encourage the Supreme Court of North Carolina to review Section 14-34.10 and determine if it criminalizes the conduct at issue in this case: firing a weapon from one enclosure into another. If it does not, I would remand this case for a new trial in which the State may not submit Discharging a Firearm Within an Occupied Vehicle as a predicate felony for Felony Murder.

STATE OF NORTH CAROLINA
v.
RONTRELL HOOKS, Defendant

No. COA24-217

Filed 1 October 2025

1. Sentencing—notice of aggravating factors—interfering with an electronic monitoring device—post-release supervision—waiver of notice

In a prosecution for interfering with an electronic monitoring device (which defendant wore as a condition of his post-release supervision), while the State's written notice to defendant of its intent to prove an aggravating factor—as required by N.C.G.S. § 15A-1340.16(a6)—was not timely, having been filed 28 rather than 30 days before trial, defendant waived his right to 30 days notice. Defendant made no objection to the introduction at trial of a prior judgment entered upon revocation of probation—which supported the aggravating factor that, within the previous ten years, defendant had willfully committed a probation violation—or when the notice of aggravating factors was discussed during the charge conference. Moreover, defendant made no argument on appeal demonstrating any prejudice resulting from his lack of two additional days of notice.

2. Constitutional Law—effective assistance of counsel—failure to object—use of aggravating factor for sentencing—no prejudice shown

In a prosecution for interfering with an electronic monitoring device (which defendant wore as a condition of his post-release supervision), where the State's written notice of its intent to prove an aggravating factor—as required by N.C.G.S. § 15A-1340.16(a6)—was not timely, having been filed 28 rather than 30 days before trial, defendant could not show that he received ineffective assistance of counsel because, even assuming that his counsel's failure to object to the trial court's use of the aggravating factor in sentencing constituted deficient performance, there was no reasonable probability that, but for the error, the jury's finding of the aggravating factor, or the resulting sentence, would have been different.

Appeal by defendant from judgment entered 16 March 2023 by Judge Marvin K. Blount III in Superior Court, Pitt County. Heard in the Court of Appeals 8 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Carolyn McLain, for the State.

Kimberly P. Hoppin for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment entered upon a jury's verdict finding him guilty of interfering with an electronic monitoring device and having attained habitual felon status. On appeal, Defendant argues that (1) the trial court erred in sentencing him in the aggravated range when the State failed to provide sufficient notice of its intent to prove the aggravating factor and (2) he received ineffective assistance of counsel because his counsel failed to object to the trial court's use of the aggravating factor during sentencing. We conclude that Defendant received a fair trial, free of prejudicial error.

I. Factual Background and Procedural History

On 14 October 2020, Defendant was convicted of possession with intent to manufacture, sell, and deliver a schedule II controlled substance. From this charge, in June 2021, Defendant was placed on electronic monitoring as a condition of post-release supervision. He was indicted on 7 March 2022 for interference with the electronic monitoring device and on 12 December 2022 for attaining habitual felon status.

On 15 February 2023, the State served Defendant with a notice of intent to prove an aggravating factor ("Notice of Aggravating Factor"). Box 12a on the notice was checked, which stated that the State intended to prove:

> The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

Defendant's trial began on 15 March 2023. The following day, a jury found him guilty of feloniously interfering with an electronic monitoring device.

After the jury's verdict, the State presented evidence of Defendant having attained habitual felon status and the existence of the aggravating factor, as alleged by the Notice of Aggravating Factor. In support of the aggravating factor, the State presented Defendant's judgment and commitment upon the revocation of his probation from 15 July 2015. The same jury found Defendant guilty of being a habitual felon and found the aggravating factor existed. Defendant timely gave oral notice of appeal.

II. Notice of Aggravating Factors

[1] Defendant argues that the trial court erred in sentencing him to an aggravated sentence when the State did not provide sufficient written notice before trial of its intent to prove an aggravating factor.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted). North Carolina General Statute Section 15A-1340.16(a6) sets forth the requirements for proper notice of an aggravating factor:

> The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior

> record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2023). Thus, unless a defendant waives the right to receive such notice, the State must provide a defendant with written notice of its intent to prove an aggravating factor at least thirty days before trial. *See id.* "Thereafter, [t]he defendant may admit to the existence of [the] aggravating factor. However, [i]f the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense[,] which the State will bear the burden of proving beyond a reasonable doubt[.]" *State v. Hinton*, 263 N.C. App. 532, 535, 823 S.E.2d 667, 670 (2019) (internal citations and internal quotation marks omitted).

Here, the State filed a written Notice of Aggravating Factors on 15 February 2023. Defendant's trial began on 15 March 2023. Thus, the State gave Defendant this notice twenty-eight days before trial. Because North Carolina General Statute Section 15A-1340.16(a6) requires at least thirty days' notice, we must conclude that the State failed to give Defendant timely written notice.

We next consider whether Defendant waived his right to notice. "Waiver is the intentional relinquishment of a known right, and as such, knowledge of the right and an intent to waive it must be made plainly to appear." *State v. Wright*, 265 N.C. App. 354, 357-58, 826 S.E.2d 833, 836 (2019) (citation omitted). When assessing waiver, this Court looks at "the inquiry and responses made at the sentencing hearing." *State v. Scott*, 287 N.C. App. 600, 610, 883 S.E.2d 505, 513 (2023).

This Court has previously discussed waiver of notice in *Wright* and *Scott*. First, in *Wright*, the State provided twenty days' notice of its intent to prove an aggravating factor. 265 N.C. App. at 361, 826 S.E.2d at 838. Following the jury verdicts, the trial court specifically asked about notice and engaged in a colloquy directly with the defendant about the aggravating factor. *Id.* The defendant affirmatively waived the right to have a jury determine the aggravating factor and stipulated to the factor's existence. *Id.* at 358-60, 826 S.E.2d at 836-37. This Court held that these circumstances were sufficient to indicate that the defendant waived notice of the State's intent to use the aggravating factor. *Id.* at 361, 826 S.E.2d at 838.

Second, in *Scott*, the State did not provide proper written notice to the defendant. 287 N.C. App. at 609, 883 S.E.2d at 513. When assessing whether the defendant waived his right to notice, this Court noted that the trial court did not directly question the defendant about his intent to waive notice as in *Wright*. *Id.* at 610, 883 S.E.2d at 513. Even so, the "defense counsel's stipulation and affirmation on behalf of his client was sufficient to constitute waiver of the notice requirement." *Id.*

But here, even though the trial court did not directly question Defendant regarding waiver, the circumstances indicate Defendant had waived the right to have thirty days' notice instead of twenty-eight days. Defendant did have sufficient information in the Notice of Aggravating Factors that he was informed of the factor the State intended to prove. *See*, *e.g.*, *Scott*, 287 N.C. App. at 610, 883 S.E.2d at 513 ("Even though the State had not technically given 'proper notice' because the additional file numbers were added to the notice only twenty days before trial instead of thirty days, [the] defendant and his counsel had sufficient information to give an 'intentional relinquishment of a known right.' " (citations omitted)).

The aggravating factor which the State intended to prove was that Defendant, during the ten-year period before the charge of interfering with his electronic monitoring device, was found in willful violation of his probation conditions. The State introduced Defendant's judgment and commitment upon the revocation of his probation from 15 July 2015. The judgment form indicated that Defendant *admitted* he had violated a condition of his probation. Defendant had no objection to the admission of this evidence, even after the trial court inquired if Defendant had an objection.

During the charge conference, the trial court and counsel for both the State and Defendant discussed the proposed jury instructions for the aggravating factor of the probation violation. Defendant stated he had no objection to the instruction, even after the State specifically referenced the Notice of Aggravating Factors. In fact, during the charge conference, the State's counsel raised a question regarding the wording of the jury instruction for the aggravating factor based specifically on "sheet with the notice of the aggravating factor," clarifying that he was referring to "the actual notice that was filed, notice of aggravating factors, number 12(a)."[1] In response to the State's question, the trial court

1. The Notice of Aggravating Factors was on Form AOC-CR-614, Rev. 1/23. The form has 20 different preprinted options with check boxes. Only one item was indicated on Defendant's notice, No. 12(a), which states: "The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation

read the proposed jury instruction's revised language and Defendant had "no objection" to the revised instruction:

> THE COURT: That the Defendant has during the ten-year period prior to the commission of the offense of interfering with an electronic monitoring device in file number 22 CRS 50185 been found by a Court of this state in willful violation of a condition of probation imposed pursuant to a suspended sentence in file number 13 CRS 05955.
>
> [THE STATE]: I think that clears it up, Judge. I think it makes it more clear.
>
> [DEFENSE COUNSEL]: No objection.

After the jury found the existence of the aggravating factor, the trial court heard from Defendant during sentencing. The State asked for Defendant to be sentenced at the top of the aggravated range; Defendant asked the trial court to consider several mitigating factors.

Therefore, Defendant had sufficient information about the aggravating factor of the probation violation, even if the Notice of Aggravating Factors was technically deficient by being served 28 days before trial instead of 30 days. Defendant raised no objection to the admission of the evidence of his prior probation violation in File No. 13 CRS 05955 and he had no objection to the jury instructions addressing this aggravating factor, even after the colloquy about the jury instruction based on the Notice of Aggravating Factors.

Where a notice of aggravating factors has been served on a defendant but the service is technically defective in some way, the better practice may be for the trial court to inquire specifically to clarify if the defendant has waived the right to notice. But North Carolina General Statute Section 15A-1340.16(a6) does not mandate a specific inquiry or procedure where this issue is being submitted to a jury trial, as it does for purposes of entry of plea of guilty or no contest in North Carolina General Statute Section 15A-1022 or for purposes of admission of the existence of an aggravating factor under North Carolina General Statute Section 15A-1022.1. *See* N.C. Gen. Stat. § 15A-1340.16(a6) (2023); N.C. Gen. Stat. § 15A-1022 (2023); N.C. Gen. Stat. § 15A-1022.1(b) (2023).

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imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration. (Applies to offenses committed on or after December 1, 2008.)"

Where a defendant admits to the existence of an aggravating factor, the trial court is required to:

> address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under [North Carolina General Statute Section] 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

N.C. Gen. Stat. § 15A-1022.1(b).

Here, Defendant did not enter a guilty plea and did not admit to the aggravating factor. Instead, he was afforded his right to have a jury determine the existence of an aggravating factor and he also had the opportunity to advocate for mitigating factors. In cases of entry of a guilty or no contest plea or admission of an aggravating factor, the trial court must determine whether the State has provided proper notice or whether the defendant has waived that notice. However, in the present case, under Section 15A-1340.16(a6), there is no specific requirement for the trial court to make such a determination and no specific procedure mandated for the trial court to follow. *See* N.C. Gen. Stat. § 15A-1340.16(a6). Defendant had sufficient information about the aggravating factor, as the Notice of Aggravating Factors was served on him, albeit a bit late. At trial, Defendant did not object to evidence of the aggravating factor and did not object to jury instructions on this specific factor, although he could have raised an objection to the evidence and the instruction based on the deficient notice. Under these facts, Defendant has waived the right to receive thirty days' notice under Section 15A-1340.16(a6).

We also note Defendant has failed to demonstrate that the State's failure to provide proper notice prejudiced him. *See State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014) (assessing whether the error was prejudicial after holding that the trial court failed to determine whether the statutory requirements of Section 15A-1340.16(a6) were met); *see also State v. Joyner*, 167 N.C. App. 635, 637, 606 S.E.2d 196, 198 (2004) ("[E]ven where an appellant shows error, 'relief ordinarily will not be granted absent a showing of prejudice.' " (citation omitted)).

Defendant argues that he was prejudiced because if the trial court had not erroneously considered the aggravating factor, he would have received a lesser sentence. Yet Defendant did not object to the State's evidence of the aggravating factor, and he did not object to the trial court's jury instructions on the aggravating factor. Likewise, Defendant does not argue that, if he had had two additional days of notice, the jury's verdict on the aggravating factor and the resulting sentence would have been different. Defendant, instead, merely challenges his failure to receive proper notice.

From this evidence, there is nothing in the record to suggest that Defendant did not violate the conditions of his probation in 2015. The judgment and commitment form clearly indicates that Defendant admitted this probation violation. Moreover, even though the State's notice fell two days short of the statutorily mandated period, additional time would be inconsequential to the outcome. Defendant could not challenge the existence of the aggravating factor when the factor was satisfied by undisputable evidence. Thus, Defendant failed to demonstrate that, had the State provided proper notice, the jury's finding of the aggravating factor and his sentencing would have been different. Defendant has failed to demonstrate prejudicial error.

III. Ineffective Assistance of Counsel

[2] Defendant next argues he received ineffective assistance of counsel because his counsel failed to object to the trial court's use of the aggravating factor in sentencing.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both: (1) that "counsel's performance was deficient[;]" and (2) that "the deficient performance prejudiced the defense." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). Performance is deemed deficient when "counsel's conduct f[alls] below an objective standard of reasonableness." *State v. Moore*, 286 N.C. App. 341, 344, 880 S.E.2d 710, 713 (2022) (citation omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Covington*, 248 N.C. App. 698, 706, 788 S.E.2d 671, 677 (2016) (citation omitted). "Both prongs of this test must be met to prevail on an ineffective assistance of counsel claim." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citation omitted).

As discussed *supra*, Defendant has failed to establish prejudicial error. He has not shown that, had the State provided proper notice, the jury's finding of the aggravated factor or the resulting sentence would have been different. Therefore, Defendant cannot satisfy the second prong of the ineffective assistance of counsel test. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249 ("[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient."). Accordingly, Defendant's ineffective assistance of counsel claim is without merit.

IV. Conclusion

Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges STADING and MURRY concur.

STATE OF NORTH CAROLINA
v.
KENNETH WAYNE LAMM, Defendant

No. COA24-982

Filed 1 October 2025

1. Criminal Law—second murder trial—prosecutor's references to charges dismissed in first trial—no collateral estoppel

In defendant's retrial for first-degree murder, the trial court did not abuse its discretion by overruling defendant's objections to remarks by the State (during jury selection, opening statements, and closing arguments) that defendant had raped, kidnapped, and sexually assaulted the victim; the State's comments did not violate defendant's right to be free from double jeopardy, even though charges of first-degree rape and first-degree kidnapping were dismissed in defendant's first trial for lack of sufficient evidence. The State was not collaterally estopped from introducing or arguing the truth of evidence that defendant committed those acts where the references were made to explain the context, motive, or chain of events giving rise to the murder charge and because the State had wide latitude to argue all inferences that may reasonably be drawn from the evidence.

2. Criminal Law—murder trial—prosecutor's closing argument—defendant's inconsistent statements—no mistrial required

In a retrial for first-degree murder, the trial court did not abuse its discretion by failing to declare a mistrial after defendant objected to a portion of the State's closing argument, in which one of defendant's interrogation videos was played for the jury and the prosecutor asked, "Was that a lie or did you just forget it?" The State's comment did not constitute an improper comment on defendant's constitutional right not to testify but, rather, emphasized inconsistencies in defendant's statements during the police investigation and defendant's failure to provide exculpatory evidence regarding those discrepancies.

Appeal by Defendant from judgments entered 3 October 2023 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 11 August 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kristin J. Uicker, for the State.

Attorney Drew Nelson for Defendant–Appellant.

MURRY, Judge.

Kenneth W. Lamm (Defendant) appeals the trial court's decision to allow the State to proceed under a felony-murder theory of first-degree murder at his trial. He also appeals the trial court's treatment of the State's comments during jury selection, opening statement, and closing argument. He argues that the trial court erred by allowing collaterally estopped arguments, by permitting an alleged comment on Defendant's refusal to testify, and by failing to declare a mistrial after the State's closing argument. For the following reasons, this Court disagrees with Defendant and holds that the trial court did not err.

I. Background

Defendant's prosecution arises out of the disappearance and murder of Kathy Thomas (victim), who was last seen on 23 November 2018 and reported missing one week later. Investigators unsuccessfully tried to "ping" the victim's phone, suggesting it had been turned off or removed from cellular data. The victim's subpoenaed phone records revealed about 200 text messages between the victim and Defendant that began three days before her disappearance and ceased "four, five days later."

On 11 December 2018, police interviewed Defendant about the victim's disappearance. Defendant stated that he last saw her "around the 24th of November," after they had consensual sex at her home. He stated that the victim never entered his car and that he did not see her again after that point. That same day, police searched Defendant's car and noticed an "overwhelming" smell of bleach. They also searched Defendant's outdoor garbage bin, where they found bleach-stained clothes, bleach-soaked latex gloves, and a pair of boots. When they interviewed Defendant again the next day, he claimed that he and the victim had sex. He afterwards drove the victim to his girlfriend's house and stayed the night with her. He stated that he had not seen the victim since driving her back home the next day. Later that day, Defendant told his girlfriend that he "had to cover . . . up" the fact that the victim had drowned at his girlfriend's house.

Shortly thereafter, police arrived at Defendant's girlfriend's house with cadaver dogs. Defendant waived his *Miranda* rights and gave police a third statement upon his immediate arrest, at which point he admitted to handcuffing the victim's hands behind her back while they had sex. Defendant also admitted to discovering the victim deceased in the bathtub, wrapping her body in a blanket, placing it in the back of his vehicle, and burying her in his girlfriend's backyard. He decided to bury the body there instead of calling the police because he knew "how it would look" given his status as a sex offender. He also admitted to scrubbing his car with bleach to remove any blood, disposing of the victim's cell phone by throwing it along the highway, and discarding the bloody bedding by tossing it in a dumpster. The police recorded all three of Defendant's police interviews and the State played them for the jury at trial.

On 13 December 2018, police discovered the victim's body partially decomposed and buried face-down in Defendant's girlfriend's backyard. The examiner found Defendant's DNA inside the victim's vagina. When police searched the victim's house the next day, they noticed a strong smell of bleach and found a blood-stained "cleaning tool." On 14 January 2019, a grand jury indicted Defendant for first-degree murder. On 15 March 2021, it then indicted Defendant for obtaining habitual felon status.

A. First Trial

This matter came on for trial on 12 September 2022. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court dismissed Defendant's first-degree rape and first-degree kidnapping charges, finding that the State had failed to offer sufficient evidence of each element of the charges. But the trial court denied the motion as to Defendant's first-degree murder charge and submitted it to the jury, which ultimately resulted in a hung jury. The trial court then declared a mistrial as to this latter charge.

B. Second Trial

Defendant's first-degree murder charge came on for retrial on 11 September 2023. During pretrial proceedings, the State informed the trial court that it would proceed under two first-degree murder theories: (1) premeditation and deliberation, and (2) felony-murder with the underlying felonies of rape and kidnapping. The State explained its intention to introduce evidence regarding those charges at trial as "circumstantial evidence that the sexual encounter was not consensual" and thus resulted in the victim's death. Over Defendant's objection, the trial court ruled that the State could inform the jury of the rape and kidnapping during jury selection and opening statement.

The State informed and reiterated to the potential jurors during jury selection and substitutions that "the evidence w[ould] show . . . there was a violent sexual assault committed against" the victim during her murder. During opening statement, the State argued that Defendant had "violently raped, sexually assaulted, and murdered" the victim. The State noted that Defendant "[r]aped, murdered, [and] buried her in his backyard" (again, over Defendant's objection). The State offered as evidence to show Defendant that committed the rape:

> (1) That Defendant and the victim had engaged in vaginal sex, (2) the age difference between the victim and Defendant, (3) the absence of any vaginal lubricant in the victim's vagina, (4) that blood was discovered on the "cleaning tool" found in the victim's home, (5) that there was evidence that bleach had been used at the victim's home and in Defendant's car, and (6) that Defendant had access to handcuffs and shackles.

(Brackets omitted.) Defendant did not testify or present evidence in his own defense.

At the charge conference, the trial court ruled against submitting to the jury the first-degree murder charge based on felony murder due to Defendant's prior acquittals of rape and kidnapping. During closing arguments, Defendant repeatedly objected to the State's mentions of his rape or sexual assault of the victim. The State played one of Defendant's interrogation videos for the jury and asked, "Was that a lie or did you just forget it?" The trial court sustained Defendant's objection to this comment and instructed the State not to address Defendant. Defendant contemporaneously moved for a mistrial on the grounds that this question was a "highly improper . . . attack on" his "right to remain silent," which the trial court denied.

On 2 October 2023, the jury convicted Defendant of second-degree murder. The next day, the jury convicted Defendant of obtaining habitual felon status. The trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction over Defendant's appeal of a final judgment of the trial court under N.C.G.S. §§ 7A-27 and 15A-1444. *See* N.C.G.S. § 7A-27(b) (2023) (final judgment of a trial court); *id.* § 15A-1444(a) (pled not guilty but found guilty).

III. Analysis

On appeal, Defendant argues that the trial court prejudicially erred (1) by allowing the State to argue that he kidnapped and raped the victim at trial; and (2) by denying his motion for a mistrial after the State's closing argument.[1] In the alternative, Defendant argues that this Court should vacate his convictions because these cumulative errors deprived him "of his due[-]process right to a trial free of prejudicial error." For the reasons below, this Court disagrees with Defendant and holds that the trial court did not err at any point in the proceedings.

A. State Commentary

[1] First, Defendant argues that the trial court prejudicially erred by overruling his objection to the State's remarks during jury selection, opening arguments, and closing arguments. He claims that the doctrine of double-jeopardy collateral estoppel barred the State from arguing that he "raped, kidnapped, and sexually assaulted" the victim. More specifically, Defendant asserts that the trial court erred (1) during jury selection by overruling his objection to the State's comment that "the

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1. Defendant also argues the trial court erred by allowing the State to proceed under a felony-murder theory at trial. Despite his failure to "set forth any . . . citation to authority to support this contention," *State v. Evans*, 251 N.C. App. 610, 625 (2017) (citing N.C. R. App. P. 28(a)), Defendant believes that "North Carolina law prohibit[s] the [S]tate from advancing" an argument for felony murder. But the trial court dismissed Defendant's felony-murder charge and submitted the first-degree murder charge *only* on the theory of premeditation and deliberation. The jury did not consider, much less convict, Defendant under the felony-murder rule.

evidence will show in this case there was a violent sexual assault," (2) during opening statements by overruling his objection to the State's comment that Defendant "violently raped, sexually assaulted [the victim,] and murdered her," and (3) during closing arguments by overruling his objection to the State's remark that Defendant "raped or sexually assaulted" the victim.[2] After reviewing these disparate arguments solely for an abuse of discretion, this Court disagrees and holds that collateral estoppel does not bar any of the State's comments. *See State v. Lee*, 335 N.C. 244, 268 (1994) (reviewing jury selection); *State v. Paige*, 316 N.C. 630, 648 (1986) (reviewing opening statements); *State v. Braxton*, 352 N.C. 158, 202 (2000) (reviewing closing arguments).

1. Double-Jeopardy Collateral Estoppel

As a threshold matter, Defendant's argument misinterprets the doctrine of collateral estoppel in the double-jeopardy context. Whether collateral estoppel bars an issue is a "[q]uestion[ ] of law . . . reviewed *de novo*." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678 (2008). Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re K.S.*, 380 N.C. 60, 64 (2022).

a. Generally

The Double Jeopardy Clause forbids the prosecution of any person more than once for "the same offen[s]e." U.S. Const. amend. V; *see Benton v. Maryland*, 395 U.S. 784, 794 (1969) (articulating constitutional right). A defendant is protected from double jeopardy only if the original jeopardy is terminated by a specific event—*e.g.*, his acquittal. *Richardson v. United States*, 468 U.S. 317, 325 (1984). An acquittal includes "any ruling that the [State's] proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318 (2013). But a hung-jury mistrial does not "terminate[ ] original jeopardy," *State v. Courtney*, 259 N.C. App. 635, 643 (2018) (quoting *Richardson*, 468 U.S. at 326), in which case the defendant may be retried for the same offense, *see State v. Simpson*, 303 N.C. 439, 447 (1981). *See generally* N.C.G.S. § 15A-1063(2) (2023) (authorizing mistrial absent "reasonable probability of the jury's agreement upon a verdict").

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2. Defendant purportedly objects to the State's "improper allegations" for the first time on appeal. These errors could have been reviewed for plain error; however, Defendant does not assert plain error in his brief and waives appellate review as a result. *See* N.C. R. App. P. 10(a)(1).

In this context, collateral estoppel is a part of the constitutional and statutory guarantee against double jeopardy. *See Ashe v. Swenson*, 397 U.S. 436, 443–44 (1970); N.C.G.S. § 15A-954(a)(7) (codifying common-law principle of collateral estoppel to criminal cases). As an issue-specific doctrine, collateral estoppel applies "only if a jury could not rationally" base its verdict in a second trial "on an[y] *issue* other than" one adjudicated in the first trial. *State v. Edwards*, 310 N.C. 142, 145 (1984). This "demanding" test for collateral estoppel, *Currier v. Virginia*, 585 U.S. 493, 499 (2018), mandates dismissal of a criminal charge where "an issue of fact or law essential to a successful prosecution" was *necessarily* determined by a previous acquittal, *State v. Spargo*, 187 N.C. App. 115, 119–20 (2007). But the mere "possibility" of a "necessar[y] determin[ation]" at a prior trial "does not prevent [its] re-examination" per se. *Edwards*, 310 N.C. at 145 (quotation omitted). Rather, an initial acquittal collaterally estops the State from a subsequent prosecution only if a jury would be "irrational . . . in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Currier*, 585 U.S. at 500 (quotation omitted); *see*, *e.g.*, *State v. Alston*, 323 N.C. 614, 616–17 (1988) (no collateral estoppel where the defendant's prior acquittal of firearm possession at 3:30 a.m. did not necessarily determine whether he had firearm at 12:00 a.m. for armed robbery in second trial).

b. Another Purpose

Collateral estoppel does not apply where the "same evidence could . . . be introduced at the second trial for an entirely different purpose than . . . [in] the earlier trial." *Edwards*, 310 N.C. at 146 (quotation omitted). One purpose includes evidence "pertaining to the chain of events explaining the context, motive[,] and set-up of the crime . . . if necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548 (1990); *see State v. Jenerette*, 281 N.C. 81, 89 (1972) (evidence admissible to establish "chain of circumstances"). Defendant concedes the evidentiary chain of circumstances surrounding the first-degree murder but asserts that it collaterally estops the State's arguments based thereon. In doing so, Defendant contradicts both common sense and established precedent.

In *Edwards*, a jury acquitted the defendant of a larceny charge and hung on a charge of breaking and entering with the *intent* to commit larceny (B&E). *Edwards*, 310 N.C. at 144. The State subsequently re-prosecuted the defendant for B&E and ultimately secured a conviction materially based on "evidence . . . concerning his alleged participation in the larceny of the [original] jewelry store." *Id.* Our Supreme Court considered whether the first larceny acquittal collaterally estopped the State from relitigating the hung B&E charge in a subsequent trial using facts found amidst the first trial. *Id.* at 145. The *Edwards* Court held that the State could do so, reasoning that the first adjudication would collaterally estop the second only if "th[at] second jury f[ou]nd against [him] on an *issue*" "absolutely necessary" to his original larceny acquittal. *Id.* Similarly, Defendant's rape and kidnapping acquittals do not collaterally estop the State from introducing or arguing the truth of evidence tending to show that he committed a certain crime in service of his ultimate murder of the victim. Thus, this Court holds that the trial court did not err by overruling Defendant's objections.

2. Abuse of Discretion

Because collateral estoppel did not bar the State's arguments, the trial court had discretion to allow them. A trial court abuses its discretion only by ruling in a manner "manifestly unsupported by reason." *Patton v. Vogel*, 267 N.C. App. 254 (2019). We do not disturb "the trial court's discretion unless the impropriety of the argument made is extreme and clearly calculated to prejudice the jury in its deliberations." *Smith v. Hamrick*, 159 N.C. App. 696, 698–99 (quotation omitted). We collectively address Defendant's assignments of erroneous jury selection, opening statements, and closing arguments to avoid unnecessary repetition. In all three cases, Defendant must show prejudice to merit our reversal or vacation on appeal. *See Lee*, 335 N.C. at 266 (jury selection); *Paige*, 316 N.C. at 648 (opening statements); *Braxton*, 352 N.C. at 201–02 (closing arguments).

Generally, an attorney may "argue any position or conclusion with respect to a matter in issue" "on the basis of his analysis of the evidence." N.C.G.S. § 15A-1230(a). For jury trials in particular, "the whole case as well as the law of fact may be argued." *Id.* § 7A-97. The State has "wide latitude in the scope" of its arguments. *State v. Walls*, 342 N.C. 1, 48 (1995) (quotation omitted). It may argue "all the facts in evidence as well as any reasonable inferences that may be drawn from those facts," *State v. Riley*, 137 N.C. App. 403, 413 (2000), so long as it does so in a manner that accords "with the record" and avoids "the fields of conjecture or personal opinion," *State v. Syriani*, 333 N.C. 350 (1993).

We cannot create a new rule limiting the reasonable inferences a party may argue from admitted evidence because the State may assert *all* reasonable inferences from admissible evidence. Whether permitted by collateral estoppel or by Defendant's own concession, the State's evidence shows the admissibility of Defendant's prior-acquitted crime. As a result, the State may argue all inferences reasonably drawn from that evidence. Because the jury could reasonably infer that Defendant sexually assaulted the victim around the time of her murder, the State properly argued that Defendant sexually assaulted her. In fact, Defendant admits this evidence was "necessary to complete the story of the crime for the jury" because it

> speaks to a sexual relationship between [Defendant] and [Victim] (the fact that they engaged in vaginal sex and the availability of handcuffs and shackles), concerns the [S]tate's murder allegation (the blood discovered on the "cleaning tool," the use of bleach, and the availability of handcuffs and shackles), or [is] largely irrelevant (the age difference and the absence of vaginal lubricant). This evidence, therefore, was admissible in [Defendant's] second trial.

(Quotation omitted.) Defendant's argument collapses under its own weight. Here, the trial court did not abuse its discretion by overruling Defendant's objection to the State's "allegations." Thus, this Court holds no error.

B. Failure to Declare a Mistrial

[2] Second, Defendant argues that the trial court erred "by failing to declare a mistrial after the [S]tate's improper closing argument" when it played one of Defendant's interrogation videos for the jury and asked, "Was that a lie or did you just forget it?"[3] He asserts that the State's comment "violat[ed] . . . [his] constitutional right not to testify against himself." Defendant's timely objection to the closing argument subjects the trial court's subsequent denial to an abuse-of-discretion standard. *See State v. King*, 343 N.C. 29, 45 (1996). For the following reasons, this Court disagrees with Defendant and holds that the trial court did not abuse its discretion when it did not declare a mistrial.

A criminal defendant has the constitutional right to refuse to testify at trial. U.S. Const. amend. V, cl. 3; N.C. Const. art. I, § 23, cl. 4; *accord* N.C.G.S. § 8-54 ("[No] person . . . charged with the commission of a criminal offense" may be "compel[ed] to answer any question tending to

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3. Defendant attempts to make additional arguments unpreserved in the record, which we do not address. His brief challenges three portions of the State's closing arguments. But Defendant's motion for a mistrial included only one. Because Defendant did not include the other two arguments in support of his motion and failed to receive a ruling on them, he waived appellate review on those grounds. *See* N.C. R. App. P. 10(a)(1).

criminate himself."). Prosecutorial commentary on a defendant's refusal to so testify is the sort of mistrial-worthy impropriety that "result[s] in substantial and irreparable prejudice to the defendant's case." *Id.* § 15A-1061; *see State v. Baymon*, 336 N.C. 748, 758 (1994) (granting new trial after State impliedly accused defendant of "hiding behind his right not to take the stand").

But we also afford a trial court "great deference since [it] is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. Hurst*, 360 N.C. 181, 188 (2006) (quotation omitted). A mistrial is a "drastic remedy[ ] warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 318 N.C. 437, 441 (1987). Although the State may comment "on a defendant's failure to produce witnesses or exculpatory evidence," *State v. Reid*, 334 N.C. 551, 555 (1993), it runs afoul of constitutional protections "if the jury would naturally and necessarily understand the statement to be a comment on [his] failure . . . to testify." *State v. Mitchell*, 353 N.C. 309, 326 (2001). We assess challenged remarks "in the overall context in which they were made and in view of the overall factual circumstances to which they stand." *State v. Penland*, 343 N.C. 634, 662 (1996).

We do not view the State's closing argument as improper commentary on Defendant's constitutionally protected right not to testify. Here, the State's comment merely highlighted Defendant's prior inconsistent statements and subsequent failure to produce exculpatory evidence regarding the discrepancies between his various statements to police. The State's commentary here "does not allege or even address" Defendant's refusal to testify. *State v. Paker*, 185 N.C. App. 437, 445 (2007). Nor does it make "an extended reference to defendant's exercise of his right not to testify." *State v. Gregory*, 348 N.C. 203, 211 (1988); *see State v. Miller*, 357 N.C. 583, 588 (2003) (holding that State's comment of "still waiting for defendant to deny" the allegations was not improper). The trial court thoughtfully and deliberately exercised its discretion by finding that this comment did not "irreparably and substantially" prejudice Defendant's case. Thus, this Court holds that the trial court did not abuse its discretion by declining to declare a mistrial.

C. Cumulative Error

Finally, Defendant claims that these purported errors cumulatively violated his right to a fair trial. We disagree. "Cumulative error leads to reversal when taken as a whole [the errors] deprived the defendant of his due process right to a fair trial free from prejudicial error." *State* *v. Wilkerson*, 363 N.C. 382, 426 (2009) (quotation omitted). A finding of cumulative error requires "*multiple* significant errors" at trial for us to "conclude that a defendant has met the high bar of demonstrating that he has been wholly deprived . . . of his due process right to a fair trial free from prejudicial error." *State v. Gillard*, 386 N.C. 797, 852 (2024) (citation modified). Here, the trial court did not err in any respect. Thus, this Court necessarily holds that the trial court did not cumulatively err.

IV. Conclusion

For the reasons discussed above, this Court holds that the trial court did not err (1) by allowing the State to argue that Defendant kidnapped and raped the victim during its jury selection, opening statement, and closing argument; and (2) by denying Defendant's motion for a mistrial after the State's closing argument. As a result, neither did the trial court cumulatively err in any respect.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
MARCUS ALLEN McCLINTON, Defendant

No. COA24-1096

Filed 1 October 2025

1. Constitutional Law—Confrontation Clause—right to cross-examine—impeachment of witness—limitation by trial court—harmless error analysis

In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, the trial court did not violate defendant's rights under the Confrontation Clause of the Sixth Amendment when it prevented him from cross-examining one of the State's main witnesses about whether that witness might attain habitual felon status if convicted of certain criminal charges. Defendant was still able to effectively impeach the witness for potential bias by eliciting testimony about the witness's pending charges and the witness's hope that, in return for helping the State in this case, the prosecutor—who had also been assigned to prosecute the witness's pending charges—might give him a better outcome in his own criminal cases. The trial court, then, acted properly within its discretion to preclude repetitive testimony when it limited defendant's cross-examination of the witness. In any event, any perceived error was harmless in light of the ample circumstantial evidence incriminating defendant for the murder.

2. Constitutional Law—right to speedy trial—three-year delay —Barker factors

In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, the trial court properly denied defendant's motion to dismiss for lack of a speedy trial in light of the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). Despite the three-year delay between when defendant was charged and when the trial occurred, and although defendant filed multiple speedy trial motions (both pro se and through counsel), defendant's right to a speedy trial was not violated where there were valid reasons for the delay, including that: defendant served an 18-month prison sentence for a probation violation; defendant had four different attorneys, each of whom needed time to "get up to speed" on the case; and one of the detectives was called for military duty during the time leading up to trial. Further, the delay did not prejudice defendant's ability to gather evidence or otherwise prepare a defense.

3. Appeal and Error—Rule 2 review—unpreserved constitutional argument

In an appeal from convictions for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, the Court of Appeals declined to suspend the Rules of Appellate Procedure by invoking Appellate Rule 2 to review defendant's unpreserved argument that N.C.G.S. § 14-415.1(a) is unconstitutional (both facially and as applied to his case), since defendant failed to show any manifest injustice or demonstrate that his argument was significant to the public interest.

4. Constitutional Law—effective assistance of counsel—murder trial—omission of evidence—no prejudice shown

In a prosecution for first-degree murder and related charges arising from an altercation at a gentlemen's club that ended in a fatal shooting, defendant did not receive ineffective assistance of counsel when his defense attorney chose not to play a video to the jury that would have shown inconsistencies in a key eyewitness's testimony about whether defendant or the victim made a derogatory remark before shots were fired. The totality of the evidence—including text messages between defendant and the victim, eyewitness testimony describing the altercation, and cell phone location data placing defendant near the club at the time of the shooting—supported a finding of defendant's guilt regardless of who had made the derogatory statement; thus, there was no reasonable possibility that, even if defense counsel had introduced the video, the result of the proceeding would have been different.

Appeal by defendant from judgment entered 30 April 2024 by Judge Robert A. Broadie in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2025.

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

Sarah Holladay for defendant-appellant.

GORE, Judge.

Defendant, Marcus Allen McClinton, appeals his convictions for first-degree murder, discharging a weapon into occupied property, and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without the possibility of parole to run concurrently with 38 to 58 months' and 19 to 32 months' imprisonment. Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444. Upon review of the record and the briefs, we discern no error and deny the Motion for Appropriate Relief.

I.

On 27 November 2020, a shooting took place at Cheetah's Club in Greensboro. Brandon Crawford sustained multiple gunshot wounds and later died from the injuries. Multiple shell casings were recovered at the parking lot, multiple bullets struck a parked vehicle and the Club building, and a casing was found inside of the building. Brittany Marshall was standing outside of the Club at the time of the incident and testified at trial. Additionally, the body camera footage of her interview with one law enforcement officer was admitted into evidence.

Marshall testified she saw a man outside of the Club arguing with someone on his phone. Soon after, an SUV style vehicle, either a Jeep or Volkswagen, pulled into the parking lot. Marshall testified a man climbed out and spoke with the man who had been on the phone. The man walked back to his car, turned around, and yelled, "I'm not a p*ssy" and started shooting at Crawford. Marshall described the shooter as a light-skinned black male who drove an SUV that was a Jeep or Volkswagen Tiguan. Marshall was not able to identify the shooter beyond his skin tone, and the type of vehicle he drove. Crawford was identified as the man on the phone who later died from the gunshot wounds.

While investigating between the time of the shooting and defendant's arrest, police gathered evidence tending to incriminate defendant. Text messages between defendant and Crawford along with cell phone tower location data placed defendant traveling to the Club before the shooting, in the vicinity of the Club around the time of the shooting, and away from the Club shortly after the shooting. Defendant and Crawford exchanged five phone calls within the hour of the shooting. Defendant and Crawford sent the following texts leading up to the shooting:

> CRAWFORD (12:08 AM): That's what's up bro
>
> MCCLINTON (12:27 AM): Dawg I'm with my family g…I got nieces and nephews I take care of u acting like I owe u or something
>
> MCCLINTON (12:27 AM): That is what's up
>
> CRAWFORD (12:31 AM): Hold bro u don't owe me sh*t sense it's like that make sure my bro get his sh*t
>
> CRAWFORD (12:33 AM): We good just make sure that bud good or I'll be at your door let's play like that I'm a beast
>
> MCCLINTON (12:34 AM): U can pull up anytime dawg
>
> MCCLINTON (12:36 AM): Matter of fact u can pull up tonight or I can don't matter n*gga f*ck u talking
>
> MCCLINTON (12:40 AM): Send me a addy
>
> MCCLINTON (12:42 AM): Send me a addy or pull up n*gga
>
> CRAWFORD (12:46 AM): We at cheaters
>
> MCCLINTON (12:46 AM): Pull up u talking that big boy sh*t like I owe u n*gga
>
> MCCLINTON (12:47 AM): Cash that check
>
> CRAWFORD (1:05 AM): U p*ssy keep hanging up

Video footage from a body shop across the street from the Club captured an SUV drive into the Club's parking lot.

Police learned Inocencio Gonzalez was at the Club with Crawford the night of the shooting, and upon interviewing Gonzalez, law enforcement officers learned defendant had sent Gonzalez a screenshot of the text messages between defendant and Crawford, along with a text that stated, “Yo n*gga gonna get smoked playing with me dawg.” Gonzalez testified defendant came to his house the day after the shooting to repay a $3,000 debt defendant owed, and “apologized that it happened (referring to Crawford’s death), and sent his condolences.” Gonzalez also testified defendant met with him a few days after the shooting and accused him of sharing the text messages with Crawford’s family while tapping him on the forehead with a gun. Law enforcement officers discovered defendant had borrowed a Volkswagen Tiguan SUV from his friend, Mitchell Peele, during the weekend of the shooting.

Defendant presented evidence that a detective had interviewed the Club’s bouncer, Michael Gary, the night of the shooting and learned he had overheard Crawford talking on his phone. According to the interview, Crawford was arguing with a man because Crawford had brought the man’s wife to the Club. Gary heard defendant tell the man, “Ain’t no p*ssy” and “we in the same religion.” Crawford was wearing a Muslim head covering the night of the shooting. Defendant is neither Muslim nor married. The fact Crawford had brought another man’s wife to the Club was corroborated by Gonzalez. Defense counsel argued this evidence created doubt and further challenged the cell phone evidence based upon Marshall’s testimony of the driver getting out of the SUV paired with the time stamps of calls between defendant and Crawford. However, at trial, Gary did not comply with his subpoena, and the jury did not hear his direct testimony.

On 19 April 2021, defendant was indicted for first-degree murder, discharging a weapon into occupied property, and possession of a firearm by a felon. Defendant’s trial did not occur until April 2024. During that time frame, defendant had four different attorneys for various reasons not associated with defendant. Also during that time frame, defendant’s federal probation violation was activated, and he served an 18-month sentence. Defendant incurred additional charges of assault on a government official and two counts of resisting a public officer for an altercation while in transport to a hearing and was later indicted on these charges.

Further, the lead detective on the murder case was summoned for active military duty and did not return until October 2023. Defendant filed multiple *pro se* speedy trial motions, as did his attorney, Bryson. Bryson filed a motion to withdraw because defendant alleged Bryson was providing ineffective assistance of counsel, but the court denied this motion to withdraw. Defense counsel also filed a Motion to Dismiss for Speedy Trial. The case came for trial on 22 April 2024, and after hearing the motion to dismiss on lack of speedy trial grounds, the trial court denied the motion.

During trial, Marshall testified to her eyewitness account and the State admitted the body camera footage of her interview with Officer Bodemer but did not admit the additional video interview with Officer Stark. Defense counsel chose not to have the additional video admitted because he believed Marshall gave a more detailed description of the shooter that better matched defendant in that video. During Gonzalez's testimony, defense counsel cross-examined Gonzalez about his prior convictions and his pending charges to impeach him. The trial court allowed cross-examination of the pending charges and prior convictions within the 10-year scope. The trial court did not allow defense counsel to question Gonzalez about the possibility of attaining habitual felon status if convicted of the pending charges.

The jury returned guilty verdicts for each charge. The trial court entered a judgment sentencing defendant to life imprisonment without the possibility of parole on the first-degree murder charge, to run concurrently with 38 to 58 months' for discharging a weapon into occupied property and 19 to 32 months' for possession of a firearm by a felon. Defendant timely appealed.

II.

Defendant appeals the following issues: (1) whether the trial court violated defendant's rights under the Confrontation Clause by limiting defendant's cross-examination of Gonzalez; (2) whether the trial court erred in denying defendant's motion to dismiss for lack of a speedy trial; (3) whether defendant's conviction of possession of a firearm by a felon was unconstitutional on its face and as applied to him; and, (4) whether defense counsel provided ineffective assistance of counsel by failing to present evidence that would contradict one of the State's key witnesses.

A.

[1] Defendant argues the trial court violated his 6th Amendment right to adequately cross-examine Gonzalez. "Cross-examination guaranteed by the Confrontation Clause is subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." *State v. McNeil*, 350 N.C. 657, 677 (1999) (cleaned up). "The constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless-error analysis." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (cleaned up).

> Whether such an error is harmless . . . depends upon a host of factors, . . . [such as] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

Defendant argues the trial court violated his Confrontation rights by not allowing him to cross-examine Gonzalez about a potential habitual felon status should he be convicted of the pending felony charges. Although generally, "a defendant may not cross-examine a witness" about pending charges, this rule is excepted when a "defendant seeks to show bias or undue influence by the State because of the pending charges." *State v. Bowman*, 372 N.C. 439, 444 (2019) (cleaned up). There is a "potential bias or influence . . . present when a witness faces pending charges in the same jurisdiction [in which] he testifies." *Id.*

Our Courts have decided in varying degrees how much a trial court may limit cross-examination. It is reversible error when the trial court denies any cross-examination of the witness's pending charges. *See State v. Prevatte*, 346 N.C. 162, 163–64 (1997). It is prejudicial error to allow the defendant to cross-examine the witness about pending charges, but to "significantly" limit the defendant's ability to cross-examine the witness about the expectation of any favorable outcome on those charges through their cooperation, when there is no other evidence or essential witnesses linking a defendant to the crime. *Bowman*, 372 N.C. at 446–48. In *State v. Hoffman*, it was error to limit cross-examination, but the error was harmless because the defendant "was not denied the right of effective cross-examination." 349 N.C. 167, 180 (1998). The Court explained the State presented other substantial evidence of the defendant's guilt apart from the witness, the witness was of "minimal importance," and despite not discussing the witness's pending charges he was "thoroughly impeached" in other ways. *Id.* at 180–81.

In the present case, defendant was allowed to cross-examine Gonzalez regarding his pending charges. The court allowed the following cross-examination:

> Q: Okay. And you do have the assault on a female conviction; is that right?
>
> A: Yes.

Q: All right. You also have a possession with intent to sell and deliver marijuana conviction; is that right?

A: Yeah.

Q: Okay. Now, you also currently have pending cases, is that right?

A: Yes.

Q: All right. And you are currently charged with possession with intent to sell and deliver marijuana?

A: Yeah.

Q: Carrying a concealed gun?

A: Yes.

Q: Maintaining a dwelling for the purposes of storing controlled substances?

A: Yes.

Q: Actually, that's maintaining a vehicle, my apologies. Is that correct?

A: Yes.

Q: And two counts of possession of a firearm by a felon; is that right?

A: Yes.

Q: And one count of possession of a stolen firearm?

A: Yes.

Q: All right. And those are all pending cases for you right now in Guilford County; right?

A: Yes.

Q: All right. And, in fact, Mr. Jones is assigned as the prosecutor for your cases; isn't that right?

A: Yes.

Q: All right. And so he is in a position to help you on those cases--

MR. JONES: Objection, Your Honor, to the phrasing of that question.

THE COURT: Overruled.

> Q: He is in a position to help you on your cases; isn't that right?
>
> A: Yes.
>
> Q: All right. Now you have no agreement with him here today; is that right?
>
> A: Yes.
>
> Q: All right. But you are hoping that if you help him, he will help you; is that right?
>
> A: Yes.

The trial court denied defendant's attempt to cross-examine the witness about the possibility of attaining habitual felon status if convicted of the pending charges. The trial court did not err in this limitation. Defendant was able to elicit the witness's pending charges and his hope that by helping the State in this case, the same State attorney might give him a better outcome with his own pending charges. This limitation falls within the bounds of the Confrontation Clause's requirement that a defendant may effectively cross-examine the witnesses against him, while maintaining the trial court's discretion to "preclude repetitive" testimony. *McNeil*, 350 N.C. at 677.

Further, any perceived error was harmless. Defendant was able to impeach Gonzalez on any bias or undue influence through the cross-examination that did take place. Gonzalez was a key witness in the State's case, but his testimony was not the only evidence admitted. The State admitted text messages and cell phone location data between defendant and Crawford that disclosed they were near one another and in an argument leading up to the shooting. Marshall's eyewitness account provided further evidence of the shooting along with the type of vehicle driven by the shooter. The ability to impeach Gonzalez further with a potential habitual felon status does not overcome the weight of the circumstantial evidence that incriminated defendant for the murder of Crawford. Accordingly, the trial court did not err by limiting the cross-examination, and any perceived error was harmless.

B.

[2] Next, defendant argues the trial court erred by denying his motion to dismiss for lack of speedy trial. "The denial of a motion to dismiss on speedy trial grounds presents a constitutional question of law subject to de novo review." *State v. Farook*, 381 N.C. 170, 178 (2022). Defendants are afforded the "fundamental" right to a speedy trial within the Sixth

Amendment of the United States Constitution applied to the States through the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

> To prove a speedy trial violation, a criminal defendant must first show that the length of the delay in his case is so presumptively prejudicial that it warrants a full constitutional review of his claim under *Barker*. The length of the delay is considered a triggering mechanism that either instigates or obviates the need to conduct the full *Barker* analysis. If the rest of the inquiry is triggered, the length of delay functions independently as a factor to be weighed alongside the remaining three factors.
>
> The length of delay is not per se determinative of whether a defendant has been deprived of his right to a speedy trial. Although there is no specific duration that constitutes a delay of constitutional dimension, delays that exceed one year have been considered presumptively prejudicial, signaling the point at which courts deem the delay unreasonable enough to trigger the *Barker* calculus. When the accused makes this showing, the burden of proof to rebut and offer explanations for the delay shifts to the State.

Farook, 381 N.C. at 178–79.

In the present case, defendant was charged in 2021, and his trial did not occur until 2024, approximately three years later. This delay is beyond one year and triggers the *Barker* factors. The Supreme Court of the United States identified the following four factors a trial court must balance when the length of the delay triggers the prejudicial presumption: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530.

The Supreme Court expounded on how to consider each factor. "[T]he length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. . . . [T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 530–31. The second factor, the government's reason for the delay depends on whether it was deliberate, neutral, or valid. *Id.* at 531. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily[.]" *Id.* at 531. "A valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.*

The third factor, "defendant's assertion of his speedy trial right," requires the defendant to assert this right and the assertion or failure to do so is consideration for the extent to which the defendant faced deprivation of this right. *Id.* at 531, 528. The fourth factor, prejudice to the defendant, requires consideration of the following as the purpose behind the right to a speedy trial: "(1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired." *State v. Webster*, 337 N.C. 674, 681 (1994) (cleaned up).

In the present case, the trial court found the length of delay was due to valid reasons, such as defendant's federal supervised release violation of which he served eighteen months of incarceration, that defendant had a total of four attorneys and each attorney needed time to "get up to speed" on the case, and the trial court found the government's delay was not "neglectful or willfully done." The State also communicated that one of the detectives was called for military duty during the time frame leading up to trial. Additionally, defendant was charged with first-degree murder and that is no "ordinary street crime." *Barker*, 407 U.S. at 531. These findings are sufficient to support the trial court's determination that the government's delay, although long, was not willfully done nor neglectful.

As to the third and fourth factors, defendant readily asserted his right to a speedy trial through pro se means and through counsel. As to the fourth factor, defendant argued his incarceration for three years amounted to prejudice against him. Three years is a long time, but there are valid reasons for this length of time, and defendant does not suggest his ability to prepare a defense, or his evidence was affected by this delay. Accordingly, having considered each factor in turn and the arguments made by both parties, we determine the trial court did not err by denying defendant's motion to dismiss for lack of a speedy trial.

C.

[3] Next, defendant seeks Rule 2 review of an unpreserved constitutional argument. Defendant argues N.C.G.S. § 14-415.1(a) is facially unconstitutional pursuant to the Second and Fourteenth Amendments of the United States Constitution and Article I, Section 30 of the North Carolina Constitution. He also argues section 14-415.1(a) is unconstitutional as applied to his case.

When a defendant fails to raise a constitutional argument at the trial court level, it is unpreserved for appellate review pursuant to the North Carolina Rules of Appellate Procedure 10. *See* N.C. R. App. P. 10;

State v. Davis, 364 N.C. 297, 301 (2010) (cleaned up) ("Constitutional issues not raised and passed on by the trial court will not ordinarily be considered on appeal."). Rule 2 allows us to set aside Rule 10, and consider this argument "*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*." *State v. Campbell*, 369 N.C. 599, 602 (2017). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603.

In the present case, defendant has failed to demonstrate his unpreserved constitutional argument is a manifest injustice or that it is significant to the public interest. Accordingly, in the exercise of our discretion, we decline invocation of Rule 2, and do not consider defendant's unpreserved issue.

D.

[4] Lastly, defendant argues he received ineffective assistance of counsel. Defendant simultaneously submitted a motion for appropriate relief ("MAR") to this Court alongside his brief to support appellate review or remand to address his MAR should the record lack sufficient evidence to address it. Having reviewed the record, there is sufficient evidence for appellate review without remand for further proceedings. *See State v. Mills*, 205 N.C. App. 577, 586 (2010) ("[A] defendant's ineffective assistance of counsel claim brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without . . . appointment of investigators or an evidentiary hearing.").

Defendant argues defense counsel showed a second video of Marshall's interview to refresh her memory during cross examination, but he did not show this video to the jury. This particular video was Officer Stark's additional interview with Marshall in which she said Crawford said "If you think I'm p*ssy n*gger, then . . . If you gonna do something, then do it n*gger," rather than defendant making a statement about not being a p*ssy before shooting Crawford. According to defendant, had the jury viewed this video they would have heard inconsistencies in Marshall's testimony and defense counsel's failure to admit the video to the jury violated defendant's right to effective assistance as counsel. We disagree.

A defendant is guaranteed the right to effective assistance of counsel at trial pursuant to the Constitution of the United States and the

North Carolina Constitution. *See Strickland v. Washington*, 466 U.S. 668, 685–86 (1984); *State v. Braswell*, 312 N.C. 553, 562 (1985). Defendant must show that "his counsel's conduct fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561–62. He must demonstrate "counsel's performance was deficient, . . . that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment." *Id.* at 562 (citation omitted). Next, defendant must demonstrate this "deficient performance prejudiced the defense." *Id.* (citation omitted).

This same test is utilized to discern whether a defendant received ineffective assistance of counsel under Article I, sections 19 and 23 of the North Carolina Constitution. *Id.* If a defendant demonstrates, through the "totality of the evidence" that but for defense counsel's error, "there would have been a different result in the proceedings," then we must reverse. *Id.* at 563. But, if we "determine at the outset that there is no reasonable possibility that in the absence of counsel's alleged errors the result of the proceeding would have been different," then it is unnecessary for us to consider any deficiency in counsel's performance. *Id.*

In the present case, despite defense counsel's decision to not show the jury the additional Marshall interview with Officer Stark, there is "no reasonable possibility . . . the result of the proceeding would have been different." *Id.* Independent of who made the statement, the evidence before the jury included texts between defendant and Crawford, eyewitness testimony the person who shot Crawford came from the SUV and was a light skinned black male, cell phone location services showing defendant's location near the Club at the time of the shooting, and defendant's interactions with Gonzalez as well as his text to Gonzalez, "Yo n*gga gonna get smoked playing with me dawg." This evidence in totality is not overcome by inconsistencies of who made one statement prior to the shooting. Accordingly, defendant's argument is overruled.

III.

For the foregoing reasons, defendant's constitutional rights were not violated, and the trial court did not err by denying his motion to dismiss for lack of speedy trial.

NO ERROR.

Judges TYSON and MURRY concur.

STATE OF NORTH CAROLINA
v.
JOSE FELIX PARDO, Defendant

No. COA24-1036

Filed 1 October 2025

1. Appeal and Error—preservation of issues—denial of motion to suppress—appeal from final judgment not taken—petition for certiorari

In a prosecution for multiple drug-related charges, including trafficking in methamphetamine, defendant failed to preserve his right to appeal the denial of his motion to suppress where his attorney noticed appeal from the order denying defendant's motion but not from the final judgments entered in the case (as required under N.C.G.S. § 15A-979(b)). However, defendant's petition for a writ of certiorari was allowed where his main argument—that, despite leaving a bag unattended for forty minutes at an electronics store kiosk, he retained a reasonable expectation of privacy in it—had merit absent clarification on the law from the appellate court. Further, defendant showed extraordinary circumstances justifying the writ's issuance, including that defendant had lost his right of appeal through no fault of his own and that the State had apparently operated from the same initial misapprehension that defendant had properly preserved his argument for appellate review.

2. Search and Seizure—reasonable expectation of privacy—bag containing narcotics—left in public area upon noticing police—intent to abandon

In a prosecution for multiple drug-related crimes, where defendant accompanied a woman to a local electronics store where they were both suspected of committing a prior theft, after which defendant, upon being confronted by police about the theft, left a black handbag containing narcotics and $65,000 unattended at a kiosk for forty minutes until police discovered it, the trial court did not err by denying defendant's motion to suppress evidence from the bag. The court's findings of fact—which were supported by competent evidence—showed that defendant never mentioned the bag or attempted to retrieve it during that forty-minute period, even though it would have taken him "mere seconds" to return to the kiosk where it sat unattended, and only admitted ownership when questioned by police about it. In turn, these findings supported a conclusion that defendant relinquished his reasonable expectation of privacy in the bag and intended to abandon it.

Appeal by Defendant from judgments entered 11 April 2024 by Judge Clint D. Rowe in Carteret County Superior Court. Heard in the Court of Appeals 20 May 2025.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

CARPENTER, Judge.

Jose Felix Pardo ("Defendant") appeals from judgments entered after the trial court denied his motion to suppress and he pleaded guilty to: (1) two counts of trafficking methamphetamine; (2) one count of possession with intent to manufacture, sell, or deliver marijuana; and (3) one count of manufacturing marijuana. Defendant challenges the trial court's denial of his motion to suppress. After allowing Defendant's petition for writ of certiorari ("PWC"), we affirm.

I. Factual & Procedural Background

On 13 March 2023, a Carteret County grand jury indicted Defendant for: (1) two counts of trafficking methamphetamine; (2) one count of possession with intent to manufacture, sell, or deliver marijuana; and (3) one count of manufacturing marijuana. On 7 March 2024, Defendant filed a motion to suppress, and the trial court conducted a hearing on 8 April 2024. The evidence presented at the hearing tended to show the following.

On 10 July 2021, an officer with the Morehead City Police Department responded to a call from a local Best Buy regarding a potential theft. The theft involved an unidentified man and a woman, who had left the store by the time the officer arrived. Officers reviewed Best Buy's security camera footage of the incident and filed a report.

On 13 July 2021, at 6:42 p.m., Defendant and Lawrence arrived at Best Buy. Defendant was carrying a fountain drink and black bag. After entering the store, Defendant began browsing available cell phones. While Defendant looked at cell phones, Best Buy's loss-prevention Officer Scarlett Cannon-Vilchez reported to Carteret Emergency

Communications that Defendant and Lawrence were the man and woman suspected of the 10 July theft and were back in the store.

After browsing available cell phones, Defendant went to a kiosk, located toward the center of the store, to purchase a cell phone. The kiosk consisted of a register with a computer, a small table, and two customer chairs located on the opposite side of the table as the register. A Best Buy sales associate was at the register across the table from Defendant. While the sales associate assisted Defendant at the kiosk, Defendant placed his bag in a customer chair and his fountain drink on the table in front of the chair. Once placed in the chair, Defendant's bag was below the top of the table and out of the sales associate's view from his position behind the register.

At 6:57 p.m., the sales associate briefly went to another part of the store, leaving Defendant alone at the kiosk. While the sales associate was away from the kiosk, Defendant unzipped his bag and removed approximately $1,300 in cash. Defendant then zipped his bag and checked the zippers to verify that the bag was closed. Defendant stepped away from the kiosk for approximately two minutes, leaving his bag in the chair, and returned with Lawrence.

At 6:59 p.m., Defendant and Lawrence were standing at the kiosk. Lawrence placed her drink on the table in front of the customer chair next to Defendant's drink. From their position at the kiosk, Defendant and Lawrence observed Officers Charles Millea and Cassidy Clark, both with the Morehead City Police Department, enter the store. Following the officers' arrival, Lawrence nonchalantly walked away from the kiosk towards the entrance. According to Lawrence, she left the kiosk because, after observing the officers, Defendant informed her that he had a gun in the waistband of his pants. Knowing Defendant was a felon, Lawrence placed Defendant's gun in her purse and left the kiosk to take the gun to Defendant's vehicle.

After Lawrence walked away, Defendant remained at the kiosk until the sales associate returned. Defendant handed the sales associate $1,300 to pay for his phone. The sales associate counted the cash multiple times and contacted another employee to request a counterfeit detection pen. Around this time, Officer Clark stopped and detained Lawrence after Lawrence exited the store from the entrance. While the sales associate stood with Defendant's cash, Defendant abruptly walked away without speaking to the sales associate after observing officers detain Lawrence. Defendant also left his bag on the customer chair at the kiosk.

As Defendant walked towards the entrance, Officer Millea stopped and detained Defendant based on the reported theft from 10 July. Officer Millea took Defendant to Best Buy's loss-prevention office while Officer Clark interviewed Lawrence directly outside the office. During this time, Officer Charles Lewis, also with the Morehead Police Department, arrived on scene. Defendant and Lawrence denied stealing from Best Buy on 10 July, even after Officer Millea showed Defendant the security footage of him placing items in his pockets at the store. After searching Defendant and Lawrence, officers discovered the illegally-concealed handgun in Lawrence's purse. But officers did not find stolen merchandise or other contraband on Defendant and Lawrence.

Although the loss-prevention officer initially agreed to not press charges if Defendant paid for the items stolen on 10 July, the store manager wanted to press charges. Officer Millea asked Defendant if he would pay for the items as restitution, and Defendant agreed. Officers did not place Defendant and Lawrence under arrest at that time, stating that only citations would be issued for the concealed handgun and 10 July theft. Officers told Defendant that he would be allowed to leave the store after paying for the stolen items and his phone.

Thereafter, Officer Millea told Defendant to go pay for his phone and the stolen items at a register. Defendant walked unescorted by officers to the front registers. At this point, officers were primarily focused on Lawrence and the concealed handgun near the front of the store. Defendant made no attempt to walk to the kiosk where his bag and approximately $1,300 remained. According to Officer Lewis, it would have taken "mere seconds" for Defendant to return to the kiosk to retrieve his bag. At the front registers, Defendant removed his wallet and paid for the items stolen on 10 July and his phone.

At 7:44 p.m., as Defendant completed his transactions at the front register, Officer Millea wrote citations for Defendant and Lawrence in his squad car. While Officer Millea wrote the citations, the Best Buy manager handed Officer Clark a bag and advised that Defendant and Lawrence left the bag "near where they were purchasing a phone, prior to law enforcement arrival." When Officer Clark said she wanted to search the bag, Defendant gave a "very wide-eyed look towards" Lawrence, and Lawrence whispered something in Defendant's ear. Officer Clark asked Defendant if there was anything "in there that is going to poke, prod, or stab me or anything?" Defendant answered, "no, hell no, not that I know of."

Officer Clark searched the bag and discovered narcotics and approximately $65,000 in cash. During the search, Defendant admitted the bag was his and that its contents belonged to him. During the approximately 40 minutes Defendant's bag sat unattended in the customer chair at the kiosk, Defendant never mentioned his bag to officers or store employees. Based on the contents of the bag, officers arrested Defendant and Lawrence.

During the motion-to-suppress hearing, the State stipulated that officers did not have a warrant or Defendant's consent to search his bag. On 25 April 2024, the trial court issued a written order denying the motion to suppress, concluding that Defendant intended to abandon his bag and relinquished his reasonable expectation of privacy in the bag. Defendant entered oral notice of appeal from the denial of his motion to suppress. Thereafter, Defendant pleaded guilty to his charged offenses. Prior to the entry of the guilty plea, the State stated that Defendant preserved his right to appeal the denial of his motion. In Defendant's transcript of plea, Defendant and the State agreed that his right to appeal the denial of his motion was preserved. Defendant did not appeal from the trial court's final judgments.

II. Jurisdiction

[1] "An order finally denying a motion to suppress evidence may be reviewed upon an appeal *from a judgment of conviction*, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A–979(b) (2023) (emphasis added). Defendant concedes that his notice of appeal was defective because his trial counsel only appealed from the trial court's denial of his motion to suppress, without giving notice of appeal from the trial court's final judgments. Consequently, Defendant filed a PWC and the State filed a motion to dismiss Defendant's appeal for lack of jurisdiction. *See* N.C. R. App. P. 4; *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) ("Our Supreme Court has said that a jurisdictional default, such as a failure to comply with Rule 4, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

A PWC is a "prerogative writ[]" which we may issue to aid our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023). Issuing a PWC, however, is an extraordinary measure. *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). Accordingly, a petitioner must satisfy a two-part test before we will issue a PWC. *Id.* at 572, 887 S.E.2d at 851. "First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Id.* at 572, 887 S.E.2d at 851 (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d

835, 839 (2021)). "Second, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Id.* at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982)). "We require extraordinary circumstances because a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839).

Defendant argues the trial court erred by denying his motion to suppress. Specifically, Defendant contends the trial court erroneously concluded that he "intended to abandon the camera bag containing contraband" and "relinquished his reasonable expectation of privacy in the bag." In essence, Defendant argues that despite leaving his bag at the kiosk, he: (1) retained a reasonable expectation of privacy in the bag, and (2) did not voluntarily abandon the bag. Defendant's argument requires this Court to determine whether a defendant, who leaves behind their personal property in the face of a police investigation, retains a reasonable expectation of privacy regarding that property for purposes of abandonment. Absent clarification by this Court, we conclude Defendant's contentions have merit. *See id.* at 572, 887 S.E.2d at 851.

Defendant also demonstrated extraordinary circumstances. Despite failing to enter notice of appeal from the trial court's judgments, Defendant's counsel appealed from the trial court's denial of Defendant's motion to suppress. Furthermore, the State appears to have operated under the same initial misapprehension that Defendant properly preserved his right to appeal the trial court's denial of his motion to suppress. Thus, "it is readily apparent that [D]efendant has lost his appeal through no fault of his own" and "failure to issue a writ of certiorari would be manifestly unjust[.]" *See Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823.

Because Defendant demonstrated merit and extraordinary circumstances, we exercise our discretion and allow Defendant's PWC. *See Cryan*, 384 N.C. at 572, 887 S.E.2d at 851. We, therefore, also deny the State's motion to dismiss Defendant's appeal.

III. Issue

[2] The issue is whether the trial court erred by denying Defendant's motion to suppress.

IV. Analysis

In challenging the trial court's denial of his motion to suppress, Defendant argues that certain findings of fact are unsupported by the evidence and the findings of fact do not support the trial court's conclusion that Defendant intended to abandon his bag and relinquished his reasonable expectation of privacy in the bag. We disagree.

" 'The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.' " *State v. McCrary*, 237 N.C. App. 48, 51–52, 764 S.E.2d 477, 479 (2014) (quoting *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011)). With de novo review, " '[this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

A. Findings of Fact

First, Defendant argues findings of fact 4, 12, 15, 20, 21, 22, 23, and 26 are not supported by competent evidence.

1. Finding of Fact 4

Defendant challenges the portion of finding of fact 4 stating: "The bag in the chair sat below the top of the desk and out of the view of the associate in the kiosk."

The unchallenged, and therefore binding, portion of finding of fact 4 explains that officers

> were dispatched and were on their way as a Best Buy sales associate assisted [Defendant] with purchasing and activating a cell phone at a kiosk with a register, a small desk and two (2) chairs for customers. While the sales associate assisted [Defendant] with that purchase, [Defendant] sat his black handbag in one of the chairs at the cell phone kiosk and put his fountain drink on the table in front of the chair.

Surveillance footage depicts that the seat of the chair was below the top of the table on the opposite side of the sales associate's location behind the register.

Notably, finding of fact 4 describes the instance at which Defendant *initially sat* his bag in the kiosk chair outside the sales associate's view while the sales associate assisted Defendant from the kiosk behind the register. The fact that the sales associate *later* stood next to Defendant on the customer-side of the kiosk, thereby putting the bag in the store associate's view, is immaterial. Accordingly, competent evidence supports finding of fact 4. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

2. Finding of Fact 12

Defendant challenges the following portion of finding of fact 12: "[Defendant] was in the loss prevention office for approximately 30 minutes with [Officer] Millea and [Officer] Cannon-Vilchez." Defendant did not dispute the State's stipulation at the motion-to-suppress hearing that Defendant "was in the loss prevention office . . . for approximately . . . 30 minutes." Finding of fact 12, therefore, is supported by competent evidence. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

3. Findings of Fact 15, 20, 21, and 22

Defendant also challenges findings of fact 15, 20, 21, and 22. Finding of fact 15 provides:

> Officer Millea tells [Defendant] to head right over there for his purchases and [Defendant] walks away toward the front registers unescorted by law enforcement. [Defendant] is free to go about the store and complete his phone purchase. [Defendant] makes no attempt to go toward the kiosk where his bag is still sitting and where he had already given that clerk money for the phone purchase early [t]hat evening. To go to the register where his bag was left would have taken "mere seconds" according to Officer Lewis. [Defendant] instead goes to the front registers and is seen standing alone, looking back at Lawrence and the officer talking to her.

According to finding of fact 20: "Regarding the bag, during this 40-minute period, [Defendant] never returned to it, never evidenced any intention to return to it, nor did he ever mention its presence or existence to the officers." Finding of fact 21 states: "There is no evidence nor is there any allegation by [Defendant] that he had forgotten his bag or that he had any intention to retrieve the bag from the kiosk while the officers were present." Finally, finding of fact 22 explains:

> [Defendant] had the clear ability to retrieve his bag when he was instructed by Officer Millea to "go pay," but made a conscious decision not to do so. [Defendant] also could,

> at any time, have informed either store personnel or the officers about the bag, but made a conscious decision not to do so.

Officer testimony, surveillance footage, and body camera footage reflects that Defendant left his bag unattended in the customer chair of the kiosk for a 40-minute period while officers detained and questioned him about the 10 July incident. Furthermore, the evidence demonstrates that Officer Millea told Defendant he could pay for the items stolen on 10 July as restitution, along with the cell phone. Officer Millea also informed Defendant that he would be allowed to leave the store after he completed his transactions. Defendant agreed, Officer Millea directed Defendant to pay at the front registers, and Defendant walked away from officers unescorted to the front registers. Defendant never returned to his bag at the kiosk, mentioned his bag to officers, or informed anyone that he forgot his bag and wanted to retrieve it from the kiosk. In addition, Officer Lewis testified that it would have taken Defendant "mere seconds" to return to the kiosk. Surveillance footage reflects that Defendant went to the front register and stood alone, looking back towards Lawrence while she remained with officers near the loss prevention office. Accordingly, competent evidence supports findings of fact 15, 20, 21, and 22. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

4. Finding of Fact 23

Additionally, Defendant challenges finding of fact 23, which provides that "[Defendant] made no request of the store clerk at the kiosk to either 'safekeep,' hold or secure the bag for him before walking away from it as the officers came into the store . . . ."

Surveillance footage depicts that after officers entered the store and stopped Lawrence, Defendant walked away from the kiosk where the sales associate was holding Defendant's $1,300. Defendant walked away from the kiosk without speaking to the sales associate. Accordingly, competent evidence supports finding of fact 23. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

5. Finding of Fact 26

Finally, Defendant challenges finding of fact 26. Finding of 26 provides:

> The Court finds that [Defendant] relinquished any "reasonable expectation of privacy" in the bag based upon the foregoing. The Court finds that the following specific facts and circumstances, demonstrate that [Defendant]'s intent to abandon the bag containing contraband:

A) The court finds that it would be unreasonable for [Defendant], an indigent defendant, to simply "forget" that he left a bag containing $65,000 in cash unattended in a public place where store employees and customers had access to it;

B) [Defendant] knew the bag contained large amounts of contraband and left the bag, never to return to it, shortly after law enforcement arrived;

C) Shortly before abandoning the bag, [Defendant] disposed of concealable contraband by having [ ] Lawrence discretely remove the gun he possessed from his waistband and conceal it in her purse and remove it from the store, because he knew he was a convicted felon, and he would face legal consequences if he was found in possession of a gun;

D) [Defendant] never returned to the bag, never evidenced any intention to return to it, nor did he ever mention its presence or existence to officers;

E) [Defendant] made no request of the store clerk at the kiosk to either "safekeep," hold or secure the bag for him before walking away from it as the officers came into the store;

F) [Defendant] made no attempt to retrieve the bag, which he could have done on his way to pay for his items at the front register when he was free to "go pay for his phone;" and,

G) [Defendant] never alleged, testified to or articulated an intent to retrieve the bag prior to it being seized.

Given the reasons stated above with the previous challenged findings, and considering the unchallenged findings that are binding on appeal, competent evidence supports finding of fact 26. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

B. Conclusion of Law

Finally, Defendant argues the trial court erroneously concluded that he intended to abandon his bag and relinquished his reasonable expectation of privacy in the bag. Defendant asserts that despite leaving his bag at the kiosk, the findings show he: (1) had a reasonable expectation of privacy in the bag, and (2) did not voluntarily abandon his bag.

The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment applies to the States through the Fourteenth Amendment. *See State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005). "[T]he touchstone of [Fourth] Amendment analysis has been . . . whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *Oliver v. U.S.*, 466 U.S. 170, 177, 104 S. Ct. 1735, 1740–41, 80 L. Ed. 2d 214, 223 (1984) (quoting *Katz v. U.S.*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587 (1967) (Harlan, J., concurring)).

An individual has a reasonable expectation of privacy when: (1) they exhibit a subjective expectation of privacy; and (2) "society is willing to recognize that expectation as reasonable." *Kyllo v. U.S.*, 533 U.S. 27, 33, 121 S. Ct. 2038, 2042–43, 150 L. Ed. 2d 94, 101 (2001). In determining whether an individual retains a reasonable expectation of privacy:

> No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given great weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.

State v. Phillips, 132 N.C. App. 765, 770, 513 S.E.2d 568, 572 (1999) (cleaned up). In considering whether abandonment occurred under this analysis, "what is abandoned is not necessarily the defendant's property . . . but his reasonable expectation of privacy therein." *State v. Cromartie*, 55 N.C. App. 221, 224, 284 S.E.2d 728, 730 (1981).

In *Cromartie*, this Court analyzed the issue of abandonment in a public area, relying on *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W.2d 365 (1975). 55 N.C. App. at 223–24, 284 S.E.2d at 730. In *Vaughn*, following a traffic stop, the defendant "got out of his automobile and ran into a nearby business. An officer followed and observed defendant put something underneath a counter. The officer retrieved the item, an eyeglass case, and found it to contain drug paraphernalia." *Cromartie*, 55 N.C. App. at 223–24, 284 S.E.2d at 730. The seizure of the eyeglass case was upheld in *Vaughn* because when "the presence of the police is lawful . . . and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property . . . the property will be deemed abandoned for purposes of search and seizure." *Id.* at 224, 284 S.E.2d at 730 (cleaned up). As such, *Vaughn* concluded that the defendant abandoned his eyeglass case and had no reasonable expectation of privacy in its contents. *See id.* at 224, 284 S.E.2d at 730.

Cromartie reached the same conclusion as *Vaughn*. In *Cromartie*, the defendant tossed an aspirin box containing illegal narcotics three to four feet away from himself as officers were about to search his person. 55 N.C. App. at 222, 284 S.E.2d at 729. Because the officers' presence was lawful and the defendant voluntarily tossed the aspirin box in a public area, this Court concluded that the defendant abandoned his aspirin box and lost his reasonable expectation of privacy therein. *Id.* at 225, 284 S.E.2d at 730–31.

Here, the findings demonstrate that Defendant left his bag in a customer chair at the kiosk and walked to the entrance of the store after observing officers arrive on scene. Officers were lawfully present in the store to investigate the reported 10 July theft involving Defendant. After observing officers, Defendant left his bag, which could be easily unzipped and opened, in a public area specifically intended for customer use. Defendant did so with the knowledge that other customers were in the store, and that his bag contained a significant sum of money and narcotics. Similar to *Cromartie* and *Vaughn*, Defendant voluntarily left his personal property in an open, public area in response to the presence of law enforcement. *See id.* at 222–23, 284 S.E.2d at 729–30. Moreover, Defendant never mentioned his bag to employees or officers, or attempted to retrieve his bag during the 40-minute period in which he was questioned by officers and completed his transactions at the front register—despite knowing that he would be able to leave the store after he completed the transactions.

It was only when an employee brought Defendant's bag to officers, and officers questioned Defendant about the bag, that Defendant gave a "very wide-eyed look towards" Lawrence and admitted the bag was his. Because Defendant did not disclaim ownership of the bag in this instance, Defendant argues that he demonstrated a reasonable expectation of privacy in the bag. But we must look to more than the fact that Defendant acknowledged the bag was his when confronted by officers as "no single factor" is dispositive to a Fourth Amendment analysis. *See Phillips*, 132 N.C. App. at 770, 513 S.E.2d at 572.

Moreover, Defendant did not demonstrate a reasonable expectation of privacy by merely claiming the bag was his because "what is abandoned is not necessarily the defendant's property . . . but his reasonable expectation of privacy therein." *See Cromartie*, 55 N.C. App. at 224, 284 S.E.2d at 730. Indeed, Defendant, after observing the officers' lawful presence, left his bag "in a public place where [he] [could not] reasonably have any continued expectancy of privacy" in the bag. *See id.* at 224, 284 S.E.2d at 730 (cleaned up). In other words, Defendant did not demonstrate "a subjective expectation of privacy" in his bag that society would "recognize . . . as reasonable." *See State v. Lane*, 280 N.C. App. 264, 268, 866 S.E.2d 912, 916 (cleaned up). Accordingly, the trial court did not err by concluding that Defendant intended to abandon his bag and relinquished his reasonable expectation of privacy in the bag. *See State v. Gillard*, 386 N.C. 797, 832, 909 S.E.2d 226, 258 (2024) (explaining intent "is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence" and "must ordinarily be proven by circumstantial evidence").

V. Conclusion

Because competent evidence supports the trial court's findings, which in turn support the trial court's conclusion that Defendant intended to abandon his bag and relinquish his reasonable expectation of privacy in the bag, we affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED.

Judges ZACHARY and WOOD concur.

STATE OF NORTH CAROLINA
v.
JOHNATHAN ANDRE RAMSEY, Defendant

No. COA25-145

Filed 1 October 2025

1. Evidence—authentication—cell phone video—illustrative purposes

In a prosecution arising from the victim's death after having been physically beaten by defendant during a fight—defendant was ultimately convicted of voluntary manslaughter—the trial court did not err by admitting cell phone video evidence for illustrative purposes only, with a limiting instruction, where the State laid a proper foundation through a witness's testimony stating that the video fairly and accurately represented the fight as she saw it.

2. Criminal Law—jury instructions—short form murder indictment—simple assault precluded

In a prosecution arising from the victim's death after having been physically beaten by defendant during a fight, the trial court properly denied defendant's motion for additional instructions on simple assault after the jury had been instructed on second-degree murder and voluntary manslaughter and had begun its deliberations (defendant was ultimately convicted of voluntary manslaughter). The short form murder indictment charging defendant with second-degree murder, despite not specifying a murder by assault, precluded the lesser offense of simple assault.

Judge HAMPSON concurring in result only.

Appeal by defendant from judgment entered 30 October 2023 by Judge Sarah E. Kirby-Turner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 August 2025.

Reid Cater, for defendant-appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lisa T. Pakela and Special Deputy Attorney General Christopher R. McLennan, for the State.

FLOOD, Judge.

Defendant appeals from the trial court's judgment finding him guilty of voluntary manslaughter. On appeal, Defendant argues the trial court erred by first, admitting video evidence without proper authentication, and second, denying Defendant's motion for additional jury instructions on simple assault. Upon review, we conclude the trial court did not err in admitting the video evidence for illustrative purposes where a witness testified the video fairly and accurately represented the situation, and we further conclude the trial court did not err in denying Defendant's motion where a short form indictment on murder precludes the lesser offense of simple assault.

I. Factual and Procedural Background

On 22 August 2020, Defendant and his wife, Antiqua Coleman, went to visit Coleman's uncle, to whom they referred as "Juicy," to discuss an ongoing family dispute between Juicy and Juicy's nephew, Billy McKay, Jr. McKay and Juicy lived together at Juicy's apartment. McKay's girlfriend at the time, Athenna Avery, testified McKay and Juicy had recently fought, and Juicy was threatening to kick McKay out of the apartment. In response to this threat, Avery created a t-shirt that referenced the fight between the two men, and shared pictures of the t-shirt on Facebook.

According to Avery, upon arrival at Juicy and McKay's apartment, Defendant and Coleman met with McKay and Avery. Defendant told McKay that he was "here to talk to [McKay] about the [t]-shirt" and "here to protect [his] wife[.]" Avery claimed McKay responded: "This has nothing to do with your wife." Avery testified that at some point after this discussion, the t-shirt went missing; she believed Defendant had taken the t-shirt, which led to a dispute between Defendant and McKay regarding compensation for it.

According to Avery, McKay told Defendant, "you owed me for my shirt or you have to give me my [t-]shirt back[,]" but Defendant responded he would not get "paid until Wednesday." Avery explained that shortly thereafter, Defendant and McKay discussed McKay's gun Defendant had taken, resulting in Defendant returning the gun to McKay and then leaving.

Avery further testified that later that evening, McKay and Avery returned from a trip to the grocery store and saw Defendant in the driveway of the apartment. As Avery unloaded groceries from the vehicle, Defendant "asked [McKay] to get in [Defendant's] car" to give McKay money for the t-shirt. According to Avery, the two men stood in the driveway having a discussion about the payment when Defendant struck McKay in "the face[,]" "beg[an] to beat on him[,]" and continued to strike McKay after he fell. Avery then took her young daughter inside. Defendant followed her inside, "threatened [her] with a gun[,]" told her "don't come out here or I'll do the same thing to you[,]" and left soon after she shut herself in one of the rooms of the apartment.

Avery testified that after Defendant walked out of the apartment, she "walked out of the room" and saw McKay "walking in" the apartment. McKay "sat down in [a] chair," "pulled his phone out[,]" and when she tried to talk to him, she noticed "[h]is mouth was moving but nothing was coming out." Avery called 911 as McKay "passed out[.]" McKay was taken by medics to the hospital and died a short time later. Defendant was subsequently charged with second degree murder by a short form indictment.

On 23 October 2023, this matter came on for trial. The State presented evidence including the above testimony from Avery as well as testimony from medical examiner Dr. Johnathan Privette, Officer Samatha Dowell, Officer Keywana Darden, and Detective John Koukopoulos.

Dr. Privette testified McKay had died of "acute blood loss" from a spleen injury, but he could not say whether Defendant had caused the injuries to McKay's spleen. Dr. Privette explained "[f]ighting is another common cause of spleen injury[,]" and that McKay "did have some blunt force injuries on the outside of his body and some resuscitation injuries." He further noted McKay's underlying diseases—heart disease and kidney disease—made him "more vulnerable to an injury that caused his death."

Officer Dowell, the responding officer to the scene, testified that, upon her arrival to the apartment, she "did not see any signs of trauma on [McKay's] body, . . . [but she] could tell he was in pain[.]" Officer Dowell further testified that during her search of the scene, she found a cell phone near the driveway.

Officer Darden, who took pictures of McKay's body at the hospital after he died, testified that the photographs she took showed "suspected injuries, [and a] suspected bruise to the left side of [McKay's] torso."

The State also introduced Exhibit 37, a twenty-second video of the fight from the cell phone found by Officer Dowell, which was admitted into evidence for illustrative purposes only and over Defendant's objection regarding a lack of foundation. Detective Koukopoulos, who was tendered and received as an expert in digital forensics, analyzed the contents of the cell phone. Before the prosecutor began directly examining Detective Koukopoulos as to the evidence found on the cell phone, the trial court asked the jury to leave and conducted a *voir dire* regarding the evidence. During this *voir dire*, Detective Koukopoulos testified he received the cell phone from the "property control" building, brought it to the lab to analyze it, and observed that the original collection seal was unbroken from when the phone had been collected from the scene.

Based on this testimony, the trial court admitted the evidence from the cell phone, while "recogniz[ing] that there may be some missing links in the chain" of custody. The trial court further explained that any missing links would go "to the weight" of the evidence.

The trial court brought the jury back in, and the State again presented the above testimony from Detective Koukopoulos. The State did not present any evidence asserting who had filmed the video itself; however, Avery testified that the video "fairly and accurately illustrate[d] the fight as [she] saw it[.]"

On 27 October 2023, at the close of all evidence and arguments, the jury began its deliberation after receiving instructions on second degree murder and voluntary manslaughter. That afternoon, the jury requested clarification on legal termination, and asked to again see the cell phone video, body camera footage, and photos of the body. The trial court played, in relevant part, the cell phone video for the jury after giving limiting instructions as to the video being admitted and used only for illustrative purposes. On the following deliberation day, the jury sent a note to the trial judge stating they were at an impasse. After receiving an *Allen*[1] charge, the jury again requested to review several pieces of evidence, including the cell phone video, asking: "Is it possible to start and stop the video? Or could we watch it multiple times?" When the jury was brought in to review the evidence, the foreperson explained, regarding the video: "It's so short[,] I wonder if you all agree to just watch it multiple times." After viewing the video three times, the jury returned to their deliberations and reached their verdict nearly twenty minutes later, finding Defendant guilty of the lesser charge of voluntary manslaughter.

While the jury had been deliberating early on the second day, Defendant filed, and the trial court heard, a motion for an additional instruction on the lesser-included offense of simple assault. In response to the motion, the State asserted that, because the short form

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1. "The term 'Allen charge' is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court." *State v. Gordon*, 278 N.C. App. 119, 122 (2021) (citation omitted).

indictment was used instead of a long form indictment, simple assault could not be considered a lesser-included offense. The trial court subsequently denied Defendant's motion, and the jury did not receive the lesser-included instruction.

Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear an appeal from the final judgment of a superior court pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant argues the trial court erred by (A) admitting the cell phone video evidence without proper authentication, and (B) denying Defendant's motion for additional jury instructions on simple assault. We address each argument, in turn.

A. Video Evidence

[1] Defendant first argues the trial court erred by admitting the cell phone video evidence without proper authentication. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Hicks*, 243 N.C. App. 628, 638 (2015) (citation omitted) (cleaned up). "Under a de novo review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 639 (citation omitted) (cleaned up). If a videotape is admitted in error, the error "must be material and prejudicial." *State v. Mason*, 144 N.C. App. 20, 27 (2001). "An error is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *Id.* at 27–28 (citation and internal quotation marks omitted). "Where it does not appear[, however,] that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Id.* at 28.

This Court has stated "when a videotape depicts conduct of a defendant in a criminal case, its potential impact requires the trial judge to inquire carefully into its authenticity, relevancy, and competency." *Id.* at 25 (citation omitted). The standard for the admission of a videotape was articulated in *State v. Cannon*, 92 N.C. App. 246 (1988), *rev'd on other grounds*, 326 N.C. 37 (1990), in which this Court stated:

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape;" (3) testimony that 'the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing' (substantive purposes); or (4) 'testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.'

92 N.C. App. at 254 (internal citations omitted) (cleaned up).

Defendant relies on *Mason* to argue there was insufficient evidence to lay a proper foundation for the video. In *Mason*, the defendant was charged with armed robbery of a store, and at trial, "the store surveillance tape was admitted for substantive purposes." 144 N.C. App. at 25. By analyzing three areas of inquiry—(1) whether the recording system in question was "properly maintained" and operated, (2) whether the videotape "accurately present[ed]" the events depicted, and (3) "whether there was an unbroken chain of custody"—we held that "the evidence was deficient in each of these areas." *Id.* at 26. After concluding the surveillance video had been admitted in error, we held, however, that this error was not prejudicial as "there was substantial evidence of the defendant's guilt[,]" including two eyewitness testimonies "confidently identif[ying] the defendant as one of the men who had robbed" the store. *Id.* at 28.

Unlike the video evidence in *Mason*, which was admitted for substantive purposes, the video here was admitted for illustrative purposes only, with a limiting instruction. The State laid a proper foundation for the video by presenting Avery's testimony that the video fairly and accurately illustrated the fight as she saw it. *See Cannon*, 92 N.C. App. at 254. Accordingly, we hold the trial court did not err in admitting the cell phone video evidence for illustrative purposes.

B. Jury Instructions

[2] Defendant next argues the trial court erred by denying Defendant's motion for additional jury instructions on simple assault. Specifically, Defendant contends our Supreme Court's recent decision in *State v. Singleton* compels a different result. 386 N.C. 183 (2024). We disagree.

Both parties contend in their briefs that, under *State v. Edwards*, a trial court's decision on allowing additional jury instructions after the jury has retired for deliberations is reviewed solely for abuse of discretion. 239 N.C. App. 391, 392 (2015). In *Edwards*, we explained the "proper standard of review depends upon the nature of a defendant's request for a jury instruction." *Id.* at 392. We noted "a trial court's decision to grant or deny the *jury's* request for additional instruction" is reviewed for an abuse of discretion, but we explained that "[w]hether evidence is sufficient to warrant an instruction . . . is a question of law; therefore, the applicable standard of review is de novo." *Id.* at 393 (citation omitted) (emphasis added). Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Clapp*, 235 N.C. App. 351, 359–60 (2014) (citation and internal quotation marks omitted).

"It is settled in this jurisdiction that if a specifically requested jury instruction is proper and is supported by the evidence, the trial court must give the instruction, at least in substance." *State v. Jenkins*, 35 N.C. App. 758, 760 (1978). "The question then arises as to whether the requested instruction was proper under the evidence of this case[,]" and "is for the trial judge since he can more accurately determine those instances when the instruction would be appropriate[,]" such that we then review this decision for an abuse of discretion. *Id.* at 760 (citation and internal quotation marks omitted).

Even if this Court finds the trial court committed instructional error, we reverse and remand for a new trial only upon a defendant's demonstration of prejudice, whereby he must show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Dilworth*, 274 N.C. App. 57, 61 (2020) (citation and internal quotation marks omitted).

In *State v. Collins* and *State v. Whiteside*, our Supreme Court affirmed the trial court's denial of lesser-included assault jury instructions where the defendant was charged with a short form indictment. *See State v. Collins*, 334 N.C. 54, 63 (1993); *State v. Whiteside*, 325 N.C. 389, 403 (1989). Our Supreme Court explained that

> an indictment charging 'that [the] defendant unlawfully, willfully and feloniously and of malice aforethought did kill and murder the victim is insufficient to support a verdict of guilty of assault, assault inflicting serious injury

> or assault with intent to kill' because such murder indictment does not specify a murder accomplished by assault.

Collins, 334 N.C. at 63 (quoting *Whiteside*, 325 N.C. at 403) (cleaned up).

Defendant acknowledges this binding precedent, but requests that we reconsider in light of our Supreme Court's recent decision in *Singleton*, which held that a short form indictment was sufficient for charging second degree rape despite it lacking the knowledge element. 386 N.C. at 213 ("[W]hile there is a knowledge element necessary to sustain a conviction at trial, that element is not required to be alleged in the indictment."). The Court explained while "[c]ertainly, such knowledge is an element of the offense and must be proven at trial, . . . the purpose of short-form indictments is to relieve the State of the common law requirement that every element of the offense be alleged[,]" and reasoned that, despite the missing element,"[i]t cannot [] be said that this indictment deprived [the] defendant of notice of the charge such that he could not prepare a defense, or that the court could not enter judgment." *Id.* at 213 (citation omitted).

In light of *Singleton*, Defendant contends: "The interest of justice requires that the same reasoning would apply to the situation in this case and that [Defendant] should not have been denied a proper juror instruction on a lesser included offense because of the *technical* style of the indictment that the State chose to use." (emphasis added).

Defendant's reliance on *Singleton*, asking that we overturn *Collins* and *Whiteside*, is misplaced. The Court in *Singleton* reasoned the short form allowed the State to charge offenses and maintain jurisdiction without noting "every element of the offense be alleged[,]" even though those elements "must be proven at trial." *Id.* at 213. *Singleton* did not, however, discuss or create any holdings regarding lesser-included offenses within short form indictments; rather, *Singleton* specified only what elements a short form indictment requires.

Accordingly, we conclude the trial court did not err in denying Defendant's motion for additional jury instructions on simple assault because the short form indictment here did not specify a murder by assault. *See Collins*, 334 N.C. at 63; *Whiteside*, 325 N.C. at 403. Because no error occurred, we need not consider the issue of prejudice. *See Dilworth*, 274 N.C. App. at 61; *Singleton*, 386 N.C. at 214.

IV. Conclusion

Upon review, we conclude the trial court did not err in admitting the video evidence for illustrative purposes, where an eyewitness testified the video fairly and accurately represented the situation. We further conclude the trial court did not err in denying Defendant's motion where a short form indictment on murder precludes the lesser offense of simple assault.

NO ERROR.

Judge TYSON concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
ANGELA MARINA SANTANA

No. COA24-946

Filed 1 October 2025

1. Judgments—drug prosecution—costs and fines imposed—erroneously docketed as civil judgments—no determination of default

After defendant was convicted of multiple drug offenses and the trial court entered judgment imposing costs and a $250,000 fine, the trial court erred by immediately docketing the costs and fine as civil judgments without first determining that defendant had defaulted in payment as required by N.C.G.S. § 15A-1365; therefore, the court's civil judgments were vacated. The criminal judgment was remanded to the trial court to determine whether defendant had defaulted in payment or, if not, to clarify that the costs and fine were to be imposed in the criminal judgment.

2. Judgments—criminal—clerical error—wrong felony class listed

Where the trial court committed a clerical error on defendant's criminal judgment by listing the offense of trafficking fentanyl by possession as a Class C felony rather than a Class E felony, the criminal judgment was remanded for correction.

Appeal by Defendant from judgment entered 28 February 2024 by Judge Carla Archie in Burke County Superior Court. Heard in the Court of Appeals 13 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Lisa R. Atwater, for the State-Appellee.

Sean P. Vitrano for Defendant-Appellant.

COLLINS, Judge.

This case addresses when costs and fines imposed in a criminal case can be docketed as civil judgments. Defendant Angela Marina Santana appeals from the trial court's criminal judgment imposing costs and a $250,000 fine and ordering that they be docketed as civil judgments. Defendant petitions this Court for a writ of certiorari, which we grant, to address the civil judgments docketed as directed by the criminal judgment. Defendant argues that the trial court erred by immediately docketing the costs and fine as civil judgments. Because N.C. Gen. Stat. § 15A-1365 authorizes costs and fines to be docketed as civil judgments "[w]hen a defendant has defaulted in payment," and the trial court here had not determined that Defendant had defaulted in payment, the trial court erred by docketing Defendant's costs and fine as civil judgments. The trial court also committed a clerical error in the criminal judgment by listing trafficking fentanyl by possession on the judgment as a Class C felony as opposed to a Class E felony. We therefore vacate the civil judgments for costs and the fine. We remand the criminal judgment to the trial court to determine whether Defendant has defaulted in payment or to clarify that the costs and fine are imposed in the criminal judgment, and to correct the clerical error.

I. Background

Defendant was charged on 5 June 2023 with trafficking methamphetamine by possession, possession with intent to sell and deliver methamphetamine, trafficking fentanyl by possession, and possession with intent to sell and deliver fentanyl. She was tried before a jury, and the jury found Defendant guilty of trafficking methamphetamine by possession, felony possession of methamphetamine, trafficking fentanyl by possession, and felony possession of fentanyl.

The trial court arrested judgment on the two possession counts. The trial court consolidated both trafficking offenses for judgment and sentenced Defendant to a term of 225-282 months' imprisonment. The trial court further orally ordered "a fine of $250,000 in the form of a civil judgment," and "cost and attorney's fees of $1,615, also in a civil judgment." The corresponding written criminal judgment stated, "Enter civil judgment for costs + CAA fees of $1,615 + $250,000 fine." (original in all capital letters). Three separate civil judgments—one for costs, one for attorney's fees,[1] and one for the fine—were entered by the clerk of superior court on that same day. Defendant gave notice of appeal in open court.

II. Jurisdiction

Defendant filed a petition for writ of certiorari, acknowledging that her oral notice of appeal given in open court was insufficient to appeal the civil judgments because it was not in writing as required by N.C. R. App. P. 3(a).

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). "When contemplating whether to issue a writ of certiorari, our state's appellate courts must consider a two-factor test." *Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 570 (2023). "That test examines (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ." *Id.*; *see State v. Corpening*, 276 N.C. App. 41, 43-44 (2021) (affirming that a criminal defendant may file a petition for writ of certiorari to appeal a civil judgment, so long as the defendant's application for certiorari shows "diligence in prosecuting the appeal" and "merit, or that probable error was committed below") (citations omitted).

Here, Defendant diligently attempted to notice appeal and Defendant's petition shows merit. In our discretion, we grant Defendant's petition and review the merits of her appeal.

III. Discussion

A. Costs and Fine as Civil Judgments

[1] Defendant first argues that the trial court erred by immediately docketing her costs and fine as civil judgments because N.C. Gen. Stat. § 15A-1365 does not authorize costs and fines to be docketed from the outset as civil judgments.

Questions of statutory interpretation are to be reviewed de novo by this Court. *State v. Rieger*, 267 N.C. App. 647, 649 (2019). Under de novo review, this Court "considers the matter anew and freely substitutes its

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1. The civil judgment for attorney's fees is not at issue in the appeal.

own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33 (2008) (quotation marks and citation omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160 (2010) (citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *State v. Morgan*, 372 N.C. 609, 614 (2019) (citations omitted).

"We are further guided . . . by the canon of statutory construction that a statute may not be interpreted 'in a manner which would render any of its words superfluous.' " *Id.* (citation omitted). Our courts have repeatedly held that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Id.* (citation omitted).

A defendant who is convicted of a crime shall be assessed costs as enumerated in N.C. Gen. Stat. § 7A-304 unless the trial court specifically makes written findings of just cause to waive or reduce those costs. N.C. Gen. Stat. § 7A-304(a) (2023). "The court may allow a defendant owing monetary obligations under [section 7A-304] to either make payment in full when costs are assessed or make payment on an installment plan arranged with the court." *Id.* § 7A-304(f) (2023).

A defendant convicted of trafficking in more than 400 grams of methamphetamine must be sentenced to an active prison term "and shall be fined at least two hundred fifty thousand dollars ($250,000)." *Id.* § 90-95(h)(3b)(c) (2023). A criminal fine "is payable forthwith" unless the court provides "for the payment to be made within a specified period of time or in specified installments." *Id.* § 15A-1362(b) (2023). "When a defendant is ordered, other than as a condition of probation, to pay a fine, costs, or both, the court may impose at the same time a sentence to be served in the event that the fine is not paid." *Id.* § 15A-1362(c) (2023). The court also may impose a "conditional show cause order" – "an order that the defendant appear, if he fails to make the required payment, at a specified time to show cause why he should not be imprisoned." *Id.*; N.C. Gen. Stat. § 15A-1364(a) (2023).

> When a defendant who has been required to pay a fine or costs or both defaults in payment or in any installment, the court, upon the motion of the prosecutor or upon its

> own motion, may require the defendant to appear and show cause why he should not be imprisoned or may rely upon a conditional show cause order entered under [N.C. Gen. Stat. §] 15A-1362(c).

Id. § 15A-1364(a). Furthermore, "[w]hen a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien on the real estate of the defendant in the same manner as do judgments in civil actions." *Id.* § 15A-1365 (2023).

Neither N.C. Gen. Stat. § 90-95 nor N.C. Gen. Stat. § 7A-304 address procedures for collecting unpaid fees or fines and, accordingly, neither statute specifically authorizes or prohibits entry of costs or a fine as a civil judgment at the time of sentencing. On the other hand, N.C. Gen. Stat. § 15A-1365 directly addresses procedures for collecting unpaid fees and fines and specifically authorizes a judge to docket costs or a fine as a civil judgment "[w]hen a defendant has defaulted in payment." *Id.* Interpreting N.C. Gen. Stat. § 90-95 or N.C. Gen. Stat. § 7A-304 to authorize a judge to immediately docket a fine or costs as a civil judgment would render useless section 15A-1365's provision that a civil judgment may be docketed "[w]hen a defendant has defaulted in payment of a fine or costs." *Id.*

Furthermore, had the General Assembly intended to authorize costs and fines to be immediately docketed as civil judgments, it could have done so as it did with attorney's fees. *See id.* § 7A-455(b) (2023) ("In all cases the court shall direct that a judgment be entered . . . for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, plus any sums allowed for other necessary expenses of representing the indigent person. . . ."); *see also State v. Jacobs*, 172 N.C. App. 220, 235 (2005) (affirming that under N.C. Gen. Stat. § 7A-455(b), "the trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney").[2]

Here, the State argues that section 15A-1365's permissive language—"when a defendant has defaulted in payment of a fine or costs, the judge *may* order that the judgment be docketed"—"makes clear that

2. Although Defendant did not argue this on appeal, we note that in the instant case, the trial court did not err by docketing the monies Defendant owed in attorney's fees as a civil judgment.

the judgment need not be docketed until default." (emphasis in original). We disagree. This permissive language allows, but does not require, a judge to docket costs or fines as a civil judgment "[w]hen a defendant has defaulted in payment." N.C. Gen. Stat. § 15A-1365. The permissive language does not relate to a judge's authority to do so at the outset.

The trial court consolidated both trafficking offenses for judgment and imposed the mandatory sentence for trafficking in methamphetamine by possession: a term of 225-282 months' imprisonment along with a $250,000 fine. *Id.* § 90-95(h)(3b)(c). The trial court also imposed court costs on Defendant. In its judgment, the trial court did not indicate whether the costs were to be paid in full immediately or were to be paid pursuant to an installment plan. *See id.* § 7A-304(f). The judgment also did not provide for the fine to be paid within a specific period of time or in specified installments; the fine thus was due in full immediately. *See id.* § 15A-1362(b). However, without first determining that Defendant had defaulted in payment of the costs or fine, the trial court ordered that the costs and fine be docketed as a civil judgment, and corresponding civil judgments were entered. The trial court had no statutory authority to docket Defendant's court costs and fine as a civil judgment without first determining that Defendant had defaulted in payment.

Furthermore, entry of the $250,000 fine as a civil judgment prejudiced Defendant. Our general statutes do not authorize the recovery of interest on a criminal fine; however, a money judgment bears interest from the date of entry. *Id.* § 24-5(b) (2023) ("Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under [N.C. Gen. Stat. §] 1A-1, Rule 58, until the judgment is satisfied."). Here, the impact on Defendant, who is both indigent and serving an active sentence, of a money judgment of this size bearing interest is substantial. As of 8 January 2025, $17,260.27 in interest had accrued on the civil judgment for Defendant's $250,000 criminal fine.

We therefore vacate the civil judgments for costs and the fine and remand the criminal judgment to the trial court.

We recognize that it may be common practice for courts in criminal cases to immediately docket court costs and fines as civil judgments without first determining that the defendant has defaulted in payment. Amending our general statutes to reflect this practice lies within the purview of the Legislature and not the courts.

B. Clerical Error

[2] Defendant next argues, and the State agrees, that the notation on the judgment listing trafficking fentanyl by possession as a class C felony is a clerical error that should be corrected on remand. Upon review, we agree.

"[A]n error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing." *State v. Gillespie*, 240 N.C. App. 238, 245-46 (2015) (citations omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845 (2008) (quotation marks and citation omitted).

Here, the trial court consolidated both trafficking offenses for judgment and imposed the mandatory sentence for trafficking in methamphetamine by possession. The trial court's judgment erroneously listed the offense of trafficking in fentanyl as a class C felony. The offense for which Defendant was convicted is a class E felony. N.C. Gen. Stat. § 90-95(h)(4)(b) (2023). However, because the trial court imposed the mandatory sentence for trafficking in methamphetamine by possession, and not for trafficking in fentanyl, this error did not affect the sentence imposed. Accordingly, we remand the matter to the trial court so it may correct this clerical error identified by the parties.

IV. Conclusion

The trial court erred by ordering that the costs and fine imposed on Defendant be docketed as civil judgments. The trial court made a clerical error by listing trafficking fentanyl by possession on the judgment as a Class C felony. Accordingly, we vacate the civil judgments for court costs and the fine. We remand the criminal judgment to the trial court to determine whether Defendant has defaulted in payment, at which point the trial court may enter new civil judgments, or to clarify that the costs and fine are imposed in the criminal judgment, and to correct the clerical error.

VACATED IN PART AND REMANDED.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
REBECCA ANN VERDI, Defendant

No. COA24-1014

Filed 1 October 2025

1. Drugs—constructive possession—sufficiency of circumstantial evidence—no exclusive possession of place where contraband was found

In a prosecution for charges including possession of methamphetamine and possession of drug paraphernalia, both of which arose after law enforcement discovered the illegal items inside a house where defendant and three others were present, the trial court properly denied defendant's motion to dismiss both charges where there was sufficient circumstantial evidence indicating that defendant constructively possessed the items. Specifically, defendant—accompanied by her co-defendant in the case—was seen walking out of the bedroom where police later found the drugs and drug paraphernalia; suspiciously, defendant and her co-defendant left the bedroom as soon as law enforcement arrived; police also found some of defendant's personal items inside the bedroom, including her driver's license; and both of the illegal items were left out in plain view.

2. Drugs—possession—pattern jury instruction—portion defining constructive possession omitted—plain error analysis

In a prosecution for charges including possession of methamphetamine and possession of drug paraphernalia, both of which arose after law enforcement discovered the illegal items inside a house where defendant and three others were present, the trial court erred when giving the pattern jury instruction for actual and constructive possession (N.C.P.I. - Crim. 104.41) where the court omitted the portion formally defining constructive possession. Nevertheless, the court's error did not amount to plain error where it still adequately explained the concept of constructive possession, stating that if the jury found defendant had exercised control over the premises where the drugs were found—regardless of whether or not she owned the house—it could infer that she was aware of the drugs' presence and had the power and intent to control its disposition and use. Additionally, the court used similar language, illustrative of constructive possession, when instructing the jury on possession of methamphetamine.

3. Sentencing—drug-related charges—trial court's failure to consider conditional discharge—remand

After defendant was convicted of possession of methamphetamine and possession of drug paraphernalia, the trial court's judgment imposing a suspended sentence and supervised probation was vacated and the matter was remanded for resentencing, where the court did not follow the mandate in N.C.G.S. § 90-96 requiring trial judges to consider conditional discharge for eligible first-time offenders (of which defendant was one). There was no indication in the record that conditional discharge was requested or considered, nor did the court enter a written finding that defendant was inappropriate for it. Importantly, defendant's consent was not required in order to trigger the court's duty under section 90-96 to consider conditional discharge.

Appeal by defendant from judgment entered 27 March 2024 by Judge Claire V. Hill in Stanly County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lewis W. Lamar, Jr., for the State-appellee.

Sherrill & Emehel, P.A., by Johneric C. Emehel, for defendant-appellant.

GORE, Judge.

Defendant Rebecca Ann Verdi appeals the judgment for possession of methamphetamine and possession of drug paraphernalia. Defendant was sentenced to 5 to 15 months' imprisonment suspended to 18 months' supervised probation. Defendant seeks review of the denied motion to dismiss the charges for insufficient evidence. She also argues the trial court plainly erred in the jury charge when instructing on constructive possession, and that it erred by imposing a suspended sentence and supervised probation rather than a conditional discharge pursuant to N.C.G.S. § 90-96. Upon review of the briefs and the record, we affirm in part, and vacate and remand in part for a new sentencing hearing.

I.

On 14 October 2021, law enforcement executed a search warrant for 114 West Andrews Street. Defendant was present in the home at the time of the search, along with Bailey Hatley, Beta Martinez, and Joe Nicastro. When law enforcement entered the home, they observed defendant and Nicastro exiting a bedroom. Upon searching the bedroom, law enforcement discovered what appeared to be a controlled substance in a pill bottle, butane torches, butane in a can, and a glass smoking pipe on an open shelf by the bed. They also found defendant's North Carolina driver's license, another membership-type card with defendant's name, and handwritten notes including Joe Nicastro's email address.

Defendant was arrested along with the other individuals and charged with possession of a controlled substance (later determined to be methamphetamine), possession of drug paraphernalia, and maintaining a dwelling for keeping and selling controlled substances. The State's request to try defendant with the codefendant, Joe Nicastro, was granted. At trial and after the State presented evidence, defendant and the codefendant moved to dismiss the charges for insufficient evidence. The trial court granted the codefendant's motion to dismiss all charges against him. The trial court granted defendant's motion to dismiss the charge for maintaining a dwelling for keeping and selling a controlled substance but denied defendant's motion for the remaining charges of possession of methamphetamine and possession of drug paraphernalia. Defendant renewed her motion to dismiss the remaining charges at the close of all the evidence and the trial court denied the motion.

The trial court stated it would recite the first two paragraphs of N.C.P.I.—CRIM. 104.41 for actual-constructive possession and the additional paragraph for constructive possession when the substance or article on a premises or in a place, is not in close proximity to the defendant. During the jury charge, the trial court excluded a portion of the first two paragraphs, but neither party objected to this exclusion. The jury returned guilty verdicts for the remaining charges. The trial court imposed a consolidated sentence of 5 to 15 months and suspended the sentence to 18 months' probation, with a TASC evaluation, and any further evaluation, counseling, treatment or recommended education. Neither party objected to the sentencing and there was no discussion of conditional discharge pursuant to section 90-96. Defendant timely appealed the judgment.

II.

Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a). Defendant seeks review of the following three issues:

(1) whether the trial court erred by denying her motion to dismiss the charges for insufficient evidence; (2) whether the trial court plainly erred by omitting portions of N.C.P.I.—CRIM. 104.41 when defining constructive possession during the jury charge; and (3) whether the trial court erred by failing to consider a conditional discharge pursuant to N.C.G.S. § 90-96(a). We review a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62 (2007). We review jury instructions challenged for the first time on appeal for plain error when the defendant "specifically and distinctly" contend[s] [the judicial action] "amount[s] to plain error." N.C. R. App. P. 10(a)(4) (2021). Challenges to a statutory mandate are preserved and reviewed de novo. *State v. Davis*, 364 N.C. 297, 301–02 (2010). We consider each argument in turn.

A.

[1] Defendant first argues the trial court erred by denying her motion to dismiss the charges for insufficient evidence. We disagree.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.
>
> Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 378–79 (2000) (cleaned up).

Defendant challenges the trial court's denial of her motion to dismiss the charges for possession of methamphetamine in violation of N.C.G.S. § 90-95(a)(3), and possession of drug paraphernalia in violation of

N.C.G.S. § 90-113.22(a). Specifically, defendant argues there is a lack of circumstantial evidence to demonstrate she possessed the methamphetamine and that she knowingly possessed the drug paraphernalia. The question of possession centers around whether defendant constructively possessed the methamphetamine and drug paraphernalia.

"A defendant constructively possesses contraband when she does not have actual possession of the contraband but has the intent and capability to maintain control and dominion over it. The defendant may have the power to control either alone or jointly with others." *State v. Chekanow*, 370 N.C. 488, 493 (2018) (cleaned up).

> If the defendant is not in exclusive possession of the place where contraband is found, to survive a motion to dismiss the State must show other incriminating circumstances linking the defendant to the contraband. Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of the Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband. No one factor controls, and courts must consider the totality of the circumstances.

Id. at 496 (cleaned up).

In the present case, law enforcement arrested defendant along with three others after law enforcement conducted a search of the house and discovered what appeared to be methamphetamine and drug paraphernalia. Defendant was seen walking out of the bedroom with Nicastro, where the controlled substance and drug paraphernalia were discovered. Law enforcement found a pill bottle with the controlled substance, butane torches, butane in a can, and a glass smoking pipe on an open shelf of a nightstand. Law enforcement also found the following in the bedroom: multiple cell phones on the nightstand, defendant's North Carolina driver's license, and a credit card or membership card with defendant's name. Although defendant argues the pill bottle and drug paraphernalia were not in plain view, the State's witness and illustrative exhibit contradict this claim.

The totality of the circumstances demonstrate defendant was seen in or leaving the bedroom where the controlled substance and drug paraphernalia were located. Her driver's license and another personal item of hers provided evidence linking her to the bedroom that was more than just her "mere presence." *State v. Ferguson*, 204 N.C. App. 451, 460 (2010) (citation omitted). This evidence is sufficient to support her occupation of the property, her proximity to the contraband, indicia of her control over the bedroom, her suspicious behavior of leaving the bedroom with the co-defendant upon law enforcement's arrival, and the fact that the contraband and drug paraphernalia were in plain view. *Chekanow*, 370 N.C. at 496. Accordingly, viewing the evidence in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss the charges because there was sufficient evidence to suggest she constructively possessed the illegal items.

B.

[2] Next, defendant argues the trial court plainly erred by failing to instruct the jury consistently with N.C.P.I.—CRIM. 104.41, Actual-Constructive Possession. Because defendant did not object to the trial court's instructions, defendant requests we consider whether the trial court committed plain error.

> Defendant must show that a fundamental error occurred at trial; that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict; and that the error is an exceptional case, that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158 (2024) (cleaned up).

> The purpose of a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict, including how the law should be applied to the evidence. As a result, the trial court has a duty to instruct the jury on all substantial features of a case raised by the evidence.

State v. Fletcher, 370 N.C. 313, 324–25 (2017) (cleaned up). "The court is not required to follow any particular form, as long as the instruction adequately explains each essential element of the offense." *Id.* at 325 (internal quotation marks and citations omitted).

In the present case, the trial court stated during the charge conference that it would use the first two paragraphs of N.C.P.I.—CRIM. 104.41 Actual-Constructive Possession instructions and the portion of the instruction for "constructive possession of a substance or article on premises in a place, not in close physical approximate to the defendant." It ultimately gave the following jury instructions for actual-constructive possession:

> Possession of a substance may be either actual or constructive. A person has actual possession of a substance if the person has it on the person, is aware of its presence, and has both the power and intent to control its disposition or use.
>
> If you find beyond a reasonable doubt that a substance was found in a certain premises or place and that the defendant exercised control over those premises or that place, whether or not the defendant owned them, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition and use.

The trial court erred by excluding the definition of constructive possession, however, the question before us is whether it amounted to plain error. Upon review, we determine the trial court's instruction does not amount to plain error. While the trial court failed to include the definition of constructive possession, it did include the portion of instruction for constructive possession that described defendant's control over the area where the substance was. That instruction provided an example for knowledge of the presence of the controlled substance and the power and intent to control the substance's use and disposition. Additionally, when instructing on the possession of methamphetamine charge, the trial court stated,

> A person possesses methamphetamine when the person is aware of its presence and has both the power and intent to control the disposition or use of that substance. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a controlled substance, it would be your duty to return a verdict of guilty.

While it was error to exclude the portion of instructions as stated, we cannot say such error was fundamental nor can we say it had a probable impact on the outcome. It is defendant's duty to prove plain error.

Reber, 386 N.C. at 158. Defendant has failed to carry her burden to demonstrate a fundamental error occurred or that the trial court's failure to follow a particular form probably impacted the jury's verdict. *Id.* at 159. Accordingly, we determine the trial court did not plainly err.

C.

[3] Defendant also argues the trial court erred by failing to consider defendant's eligibility for conditional discharge pursuant to N.C.G.S. § 90-96(a). We agree.

The relevant portion of section 90-96(a) states,

> (a) Whenever any person who has not previously been convicted of (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.22 or G.S. 90-113.22A or (ii) a felony under G.S. 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

N.C.G.S. § 90-96(a) (2023). In *State v. Dail* this Court stated, "where an eligible, first-time offender consents to sentencing under the conditional discharge program, the 'shall' language of N.C.G.S. § 90-96 constitutes a mandate to trial judges and . . . failure to comply with that mandate constitutes reversible error." 255 N.C. App. 645, 649 (2017). According to defendant, the mandatory language constitutes reversible error on the trial court's part.

Whereas the State argues that it is the "consent" of the defendant that triggers the court's mandate to consider the conditional discharge program. Consent is "a voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, especially given voluntarily by a competent person." *Consent*, *Black's Law Dictionary* (12th ed. 2024). This definition does not suggest initiation of a given action. Instead, the plain language within section 90-96(a) mandates the trial court to "defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require"; the phrase "without entering judgment of guilt and with the consent of the person" is bracketed by commas that grammatically signify it is additional information that is not essential to the sentence. The phrase is still important to the statute and additional information the trial court must follow, but its positioning within the sentence clarifies it is not what initiates consideration of conditional discharge. The only exception that relieves the trial court of its duty to consider conditional discharge is if the trial court "determines with a written finding, and with agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense." § 90-96(a).

In the present case, defendant was convicted by jury of violations of section 90-95(a)(3) and section 90-113.22(a). The record indicates defendant has no prior convictions, and therefore, should be eligible for consideration of a conditional discharge. There is no written finding that excepts the trial court from following this mandate. There is no indication in the record that defendant requested, nor that the trial court considered a conditional discharge. Accordingly, the trial court erred and the judgment must be vacated and remanded for a new sentencing hearing.

III.

The trial court did not err when it denied defendant's motion to dismiss for insufficient evidence, nor did it plainly err when it charged the jury regarding constructive possession. However, the trial court erred by failing to consider a conditional discharge for defendant pursuant to section 90-96(a). Accordingly, we affirm in part and vacate and remand in part for a new sentencing hearing consistent with this opinion.

AFFIRM IN PART, VACATE AND REMAND IN PART.

Judges ZACHARY and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
LEANDREN ANDRE WILSON, Defendant

No. COA24-799

Filed 1 October 2025

Evidence—Rule 408—admission of a compromise to settle—not applicable to criminal defendants—admission of letter proper

In a prosecution on charges including attempted first-degree murder, the trial court's admission of a letter defendant sent from jail to law enforcement—admitting to shooting "a gang banger" in the incident for which he was on trial and seeking to work undercover in exchange for having the charges against him dropped—the trial court properly overruled defendant's objection to the introduction of the letter on the basis that it was an inadmissible compromise to settle pursuant to Evidence Rule 408. In criminal cases, there is no policy in North Carolina favoring such compromises, and, hence, Rule 408 was not applicable to bar the admission of defendant's letter for consideration as substantive evidence of his guilt.

Appeal by defendant from judgments entered 25 May 2023 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 26 February 2025.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GORE, Judge.

Defendant Leandren Andre Wilson appeals the judgments entered for which he was sentenced to consecutive terms of 127 months' to 165 months' imprisonment, 111 months' to 146 months' imprisonment, 314 months' to 389 months' imprisonment, and 127 months' to 165 months' imprisonment. Specifically, defendant appeals the trial court's admission of defendant's letter from jail to law enforcement as an improper admission of a compromise to settle pursuant to Rule 408. Additionally, defendant seeks appellate Rule 2 review of a violation of his 2nd amendment right applied to the states through the 14th amendment. Upon review, we find no error in the trial court's ruling.

I.

In January 2019, defendant was charged with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm with the serial number removed, and possession of a firearm by a felon after an argument escalated at a Dollar General. In March 2019, defendant sent law enforcement a letter from jail that included his admission to "sho[oting] a gang banger" at the Dollar General ("jail letter"). Within the jail letter, defendant further requested his charges be dropped and stated in exchange he would work undercover with law enforcement to "get some meth dealers." After defendant's trial before a jury, the jury returned a guilty verdict for each charge and defendant pled guilty to having attained habitual felon status. Defendant timely appealed the judgment.

II.

Defendant appeals of right pursuant to N.C.G.S. § 7A-27(b)(1). Defendant seeks review of two issues: (1) whether the trial court erred by admitting defendant's jail letter pursuant to North Carolina Rules of Evidence 408; and (2) whether defendant's 2nd Amendment constitutional rights were violated by the statutory criminalization of his possession of a firearm as a felon. As stated below, we only consider defendant's preserved issue in accordance with our Rules of Appellate Procedure.

A.

Defendant argues the trial court erred when it overruled defendant's objection pursuant to Rule 408 for the admission of his jail letter. We disagree.

Rule 408 of the North Carolina Rules of Evidence makes "[ev]idence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, . . . [in]admissible to prove liability for or invalidity of the claim or its amount." N.C. R. Evid. 408. But, "in criminal cases there is no policy favoring compromises, hence no rule excluding offers of compromise. Thus the making of the offer to compromise may be considered as substantive evidence of guilt if the offer was made by the defendant." *State v. Brewington*, 58 N.C. App. 650, 652 (1982) (cleaned up), *aff'd*, 307 N.C. 462 (1983).

In the present case, defendant sent a letter to law enforcement that stated the following:

> I need to get out of here. Fast as I can. I'm willing to help you all get some meth addicts. I don't care . . . who I'll purchase from them, I need these charges gone. I shot a gang banger in Dollar General and I need that gone. In return I'll get as many meth dealers that you want. I can buy from any one of them. I just can't leave my daughter. She only 7 months and he threatened her. I'm not a gang banger at all. I'm really trying to cooperate, so please let me know. . . . My name is Leandren Wilson. . . . I'm ready and willing to do what I gotta do for my daughter. Thank you.

During trial, defendant objected to the admission of this letter on the grounds of Rule 408—that it was a compromise offer. The trial court overruled this objection and stated that Rule 408 was not applicable to the situation. Defendant cites no case law to support the application of Rule 408 in a criminal case.

Likewise, we are unaware of any North Carolina case law that applies Rule 408 in a criminal case (since its enactment) to prevent admission of substantive evidence of guilt. Because Rule 408 was nearly "identical to [Federal Rule] 408," prior to the 2006 amendment to Federal Rule 408, we look to the federal courts to glean insight on its interpretation of the intent of the rule. N.C. R. Evid. 408, official cmt. Prior to the amendment to the federal rule in 2006, the federal circuits were split on whether Rule 408 applied in criminal proceedings or only civil proceedings. *United States v. Davis*, 596 F.3d 852, 860 n.6 (D.C. Cir. 2010).

After the 2006 amendment, the federal courts of appeals agreed that the expanded language in Rule 408 made plain that this rule could be applied in both civil and criminal proceedings with some limitations. *See McAuliffe v. U.S.*, 514 F. App'x. 542, 549 (6th Cir.) ("A 2006 rule amendment . . . conclusively settled a circuit split in favor of applying Rule 408 in criminal cases[.]"), *cert. denied*, 569 U.S. 959 (2013); *Davis*, 596 F.3d at 860 ("The 2006 amendment . . . made clear that the rule applied to both civil and criminal proceedings[.]"). Despite the inclusion of Rule 408 in criminal proceedings, "a defendant's statements with government agencies may be admitted in a criminal case." *Davis*, 596 F.3d at 860 (cleaned up). Even with Federal Rule 408's expansive language, it still maintains a clear limitation of its use for statements made by criminal defendants to government officials. *See United States v. Paulus*, 894 F.3d 267, 280 (6th Cir. 2018).

In North Carolina jurisprudence, the General Assembly has not amended Rule 408 to include language demonstrating a clear intent to apply it in criminal proceedings in addition to civil matters. Therefore, the existing prior precedent, *Brewington*, is still applicable within our jurisprudence. There remains no policy favoring compromise in criminal cases. 58 N.C. App. at 652. Rule 408 was enacted by the General Assembly to encourage the "settling of disputes" in civil cases; it is not to be applied as a barrier to justice or as a legal loophole to suppress incriminating evidence. N.C. R. Evid. 408 advisory committee's note. Accordingly, we limit our holding to address the present context and hold Rule 408 is not applicable in criminal cases to exclude a defendant's statement of guilt made to state officials. Accordingly, the trial court properly overruled defendant's objection pursuant to Rule 408.

B.

Defendant concedes he failed to preserve his constitutional argument at trial for which he now seeks review. Therefore, defendant asks us to suspend the Rules of Appellate Procedure pursuant to Rule 2 to prevent "manifest injustice." N.C. R. App. P. 2. Because we determine this present issue does not trigger a Rule 2 application, we do not consider defendant's unpreserved constitutional argument pursuant to Rule 10(a)(1). N.C. R. App. P. 10(a)(1) (requiring preservation of issues through timely objection at the trial court level); *State v. Bursell*, 372 N.C. 196, 199 (2019) ("It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal.").

III.

For the foregoing reasons, we find no error and conclude that the trial court did not err by admitting defendant's jail letter; we do not review defendant's unpreserved constitutional argument as it does not fit within the "extraordinary circumstances" required for Rule 2 review.

NO ERROR.

Judges ZACHARY and COLLINS concur.

BIBIANA VILLAZON, Plaintiff
v.
SAMUEL ALAN OSBORNE and SAMANTHA HAMBY,
Defendants and Counterclaim Plaintiffs
v.
MICHAEL SKINNER, Third-Party Defendant

No. COA24-912

Filed 1 October 2025

1. Real Property—restrictive covenant—nuisance prohibition—void for vagueness

In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court properly granted plaintiff's motion to dismiss defendants' counterclaims to the extent they were based on the "Nuisance Covenant." The trial court did not err by determining that the Nuisance Covenant, which barred "noxious or offensive activity" and anything that might become "an annoyance or nuisance to the neighborhood," was void for vagueness, where the covenant's terms were subjective and not sufficiently clear and unambiguous as to be enforceable.

2. Real Property—restrictive covenant—prohibition on temporary residential structures—evidence of permanency

In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court did not err by partially granting plaintiff's amended motion for summary judgment regarding defendants' counterclaims to the extent those claims were based on the "Prohibited Residential Structures Covenant," which barred "structure[s] of a temporary character." Where the covenant contained a list of prohibited structures rather than construction materials, plaintiff's use of shipping containers to construct her residence did not, by itself, render that dwelling temporary, and the trial court's determination that aspects of the residence (including its block foundation, welded parts, and that it was constructed in compliance with a building permit and the county building code) rendered it a permanent structure was a reasonable interpretation of the plain and unambiguous language of the covenant.

3. Real Property—restrictive covenants—residential purpose limitation—parking considerations

In a dispute between neighbors in a lakefront community, in which plaintiff sought a declaratory judgment affirming that her use of one of her lots, on which she built a recreational area and a dock, was permitted under the community's restrictive covenants, and defendants asserted counterclaims for breach of four of those covenants, the trial court properly entered a directed verdict in favor of plaintiff regarding defendant's claims that plaintiff breached the "Residential Purpose Covenant," which required lots to be used for residential purposes only, and the "Parking Covenant," which prohibited obstruction of road traffic. Even when viewing the facts in the light most reasonable to defendants, there was no merit to defendants' argument that a "residential purpose" required habitation—thus, plaintiff's use of one lot for recreational purposes only was not in violation of the plain terms of that covenant—and, further, there was no evidence to support defendants' contention that plaintiff admitted she bought an adjacent lot to use solely for parking.

Appeal by defendants from order entered 13 December 2022 by Judge Richard S. Gottlieb, order entered 17 March 2023 by Judge Gregory R. Hayes, and judgment entered 3 January 2024 by Judge Nathaniel Poovey in Ashe County Superior Court. Heard in the Court of Appeals 8 April 2025.

No brief filed for plaintiff-appellee.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendants-appellants.

No brief filed for third-party defendant-appellee.

ZACHARY, Judge.

This case concerns a dispute between neighbors that generated protracted litigation, which ultimately resulted in a declaratory judgment in favor of Plaintiff Bibiana[1] Villazon "as to her use of [L]ot 177" and the dismissal or denial of all other claims and counterclaims raised by the various parties. Defendants Samuel Alan Osborne and Samantha Hamby appeal from two pretrial orders and the final judgment entered following a jury trial in this matter. Because Defendants are the only appellants, we address only those portions of these proceedings necessary to resolve their appeal.

First, Defendants appeal from the trial court's 13 December 2022 order granting Plaintiff's motion to dismiss two of Defendants' counterclaims. Defendants next appeal from the 17 March 2023 order, in which the court ruled upon various parties' competing motions for summary judgment. Last, Defendants appeal from the final judgment entered on 3 January 2024.

After careful review, we affirm the trial court's 13 December 2022 and 17 March 2023 orders. We also discern no error in the final judgment.

I. Background

In 2014, Plaintiff moved into the Ashe Lake community ("Ashe Lake") in West Jefferson, North Carolina. Ashe Lake is governed by a Restriction Agreement that contains a series of restrictive covenants (the "Restrictive Covenants"), which were agreed to and recorded in 1970, when the community was known as Blue Ridge Estates. Four of the Restrictive Covenants are at issue in this case.

- Paragraph #5, hereinafter "the Nuisance Covenant,"[2] provides: "No noxious or offensive activity shall be carried on upon any lot, nor [shall] anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood."
- Paragraph #6, hereinafter "the Prohibited Residential Structures Covenant," provides: "No structure of a temporary character, basement, tent, shack, garage, barn or other outbuilding [shall] be used on any lot any time as a residence, either temporary or permanent."

1. In the final judgment, Plaintiff's first name is spelled "Bibana." However, in the two other orders from which appeal is taken, Plaintiff's first name is spelled "Bibiana." This second spelling appears consistent with the majority of the record, including Plaintiff's complaint.

2. For clarity and readability, we have adopted descriptive titles for each of the four relevant Restrictive Covenants.

- Paragraph #1, hereinafter "the Residential Purpose Covenant," provides: "Lots shall be used only for residential purposes, except as designated by the Company."
- Paragraph #12, hereinafter "the Parking Covenant," provides: "Necessary parking area[s] shall be provided by each individual purchaser in a manner that will not obstruct road traffic."

Plaintiff purchased a series of lots in Ashe Lake upon which she erected a home constructed from shipping containers. She also planned to eventually purchase a lakefront lot in the community, where she would store her kayaks, "have a dock," and "maybe entertain, have a barbecue." In 2021, Plaintiff discovered that a lakefront lot ("Lot 177") was available. Plaintiff, who runs a business designing docks and other waterfront construction, submitted to the Ashe County Building Department a proposal for the dock that she wanted to build on Lot 177. She also sought approval of her dock project from the Ashe Lake Property Owners' Association, Inc. ("POA"), which approved her plans on 27 July 2021.[3] Based on the answers she received from the POA and the Ashe County Building Department, Plaintiff purchased Lot 177 on 9 August 2021.

Later that month, Plaintiff met Defendant Osborne, a neighboring property owner. Earlier in 2021, Defendants Osborne and Hamby jointly purchased lots located diagonally across the street from Lot 177. However, Defendants' interactions with Plaintiff and her boyfriend, Third-Party Defendant Michael Skinner, quickly grew contentious as Plaintiff built her dock and recreational area on Lot 177. The dispute escalated as, *inter alia*, the parties complained about various activities on their respective properties; exchanged derogatory remarks in public newsletters and on signs posted throughout Ashe Lake; and filmed their increasingly hostile conversations with each other. Among the many topics of contention, Defendants complained that Plaintiff's use of Lot 177 led to parked cars blocking neighborhood traffic. After a couple of months of Defendants' complaints, Plaintiff purchased Lot 50, a lot adjacent to Lot 177; she claimed that she did so "to alleviate the situation," while Defendants believed that the new lot was purchased to be a parking lot for Plaintiff's guests.

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3. Although the issue of the POA's authority to approve or disapprove proposed activities on the Ashe Lake lots was raised below, Defendants advance no such argument before this Court. Accordingly, we shall not address this issue on appeal. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

On 22 February 2022, Plaintiff filed a complaint against Defendants in Ashe County Superior Court. Plaintiff asserted a claim for private nuisance and requested both declaratory and injunctive relief. Specifically, Plaintiff sought a declaratory judgment affirming that her use of Lot 177 was permitted under the Restrictive Covenants and injunctive relief to prevent Defendants from, *inter alia*, "harassing, bullying, and stalking Plaintiff and her family and guests."

On 25 April 2022, Defendants filed their motions to dismiss, answer, and counterclaims, together with a third-party complaint. Against Plaintiff, Defendants asserted claims for libel per se and breach of the four Restrictive Covenants quoted above. Defendants also sought a declaratory judgment that Plaintiff's use of her Ashe Lake properties was in violation of the Restrictive Covenants. Defendants contended that Plaintiff's shipping-container home violated the Prohibited Residential Structures Covenant and that her use of Lot 177 as a recreational property violated the Residential Purpose, Nuisance, and Parking Covenants.[4]

Defendants also brought claims against Third-Party Defendant Skinner for stalking and libel per se, as well as a claim of breach of fiduciary duty against Third-Party Defendants Hollis Fedrick and Ann Marie Smith, directors of the POA.[5]

Third-Party Defendants Fedrick and Smith filed their answer on 24 June 2022. Plaintiff filed a reply to Defendants' counterclaims on 1 July 2022.

On 30 September 2022, Defendants filed a motion for injunctive relief against Plaintiff and Third-Party Defendant Skinner seeking relief "from having them or their guests harass, threaten, block access, peep with drones or otherwise interfere with . . . Defendants' peaceful use of their real property." That same day, Plaintiff filed a motion for a preliminary injunction against Defendants.

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4. In their counterclaims, Defendants initially mislabeled the Prohibited Residential Structures Covenant, erroneously referencing "Paragraph 5" of the Restrictive Covenants, rather than Paragraph 6. On 5 December 2022, Defendants filed a motion to amend their counterclaims to correct this error. The trial court granted this motion by an order entered 9 January 2023, and Defendants subsequently filed an amendment to the counterclaim that correctly referenced Paragraph 6, i.e., the Prohibited Residential Structures Covenant.

5. Ann Marie Smith was named incorrectly as "AnneMarie Smith" in the caption and body of this initial filing. As part of the 28 February 2023 order denying Third-Party Defendants Fedrick and Smith's motion for summary judgment, the trial court ordered "that the caption shall be changed to reflect the correct spelling of . . . Ann Marie Smith's name."

On 23 November 2022, Plaintiff filed a motion to dismiss Defendants' counterclaims for breach of the Restrictive Covenants to the extent that the claims relied upon the Nuisance Covenant. Plaintiff asserted that the Nuisance Covenant was unenforceable because it was void for vagueness. That same day, Third-Party Defendant Skinner filed a motion to dismiss Defendants' stalking claim against him.

In early December 2022, the trial court heard several motions, including: (1) Defendants' motion for injunctive relief; (2) Plaintiff's motion for preliminary injunction; (3) Plaintiff's motion to dismiss Defendants' counterclaims regarding breach of the Nuisance Covenant; and (4) Third-Party Defendant Skinner's motion to dismiss thestalking claim.

On 13 December 2022, the trial court entered orders, *inter alia*, denying the parties' respective motions for injunctive relief and granting Plaintiff's motion to dismiss Defendants' breach counterclaims "to the extent that they [we]re based on" the Nuisance Covenant. The court also granted Third-Party Defendant Skinner's motion to dismiss the stalking claim.

Plaintiff filed a motion for summary judgment on 28 December 2022. On 20 January 2023, Defendants filed a motion for partial summary judgment on their counterclaims that Plaintiff breached the Residential Purpose, Prohibited Residential Structures, and Parking Covenants. Plaintiff filed an amended motion for summary judgment that same day. On 23 January 2023, Third-Party Defendants Fedrick and Smith also filed a motion for summary judgment.

On 30 January 2023, a group of other Ashe Lake property owners ("the Intervenors") filed a motion to intervene. The Intervenors claimed that Plaintiff was violating the Restrictive Covenants, requested that the trial court reject her claims related to the Restrictive Covenants, and sought declaratory and injunctive relief to that effect. With the consent of the other parties, on 28 February, the trial court entered an order granting the Intervenors' motion to intervene.

That same day, the court also entered an order denying Third-Party Defendants Fedrick and Smith's motion for summary judgment. On 6 March 2023, Third-Party Defendants Fedrick and Smith filed a "motion to amend judgment and/or for relief from judgment" pursuant to N.C. R. Civ. P. 59 and 60(b)(6), seeking reconsideration of the court's denial of their motion for summary judgment.

On 16 March 2023, Plaintiff filed an answer to the Intervenors' claims, in which she, *inter alia*, raised counterclaims against the Intervenors for breach of the Restrictive Covenants and sought a declaratory judgment to that effect. Plaintiff also filed a third-party complaint against the POA, in which she raised claims for negligent and intentional misrepresentation, fraud, breach of fiduciary duty, and negligence.

On 17 March 2023, the trial court entered an order granting in part Plaintiff's amended motion for summary judgment as to the Prohibited Residential Structures Covenant but otherwise denying the parties' motions for summary judgment. On 24 March 2023, the court entered an order granting Third-Party Defendants Fedrick and Smith's motion under Rules 59 and 60(b)(6) and entered summary judgment in their favor.[6] On 10 July 2023, Plaintiff settled her claims against the POA.

After a mistrial, on 27 November 2023, this matter came on for an eight-day jury trial. On 30 November 2023, at the close of Plaintiff's evidence, Defendants made a motion for a directed verdict on the declaratory judgment action and the private-nuisance claim, which the trial court denied. The Intervenors also moved for directed verdict on Plaintiff's counterclaims against them; the trial court granted their motion in open court and by order entered on 4 December 2023. Also on 4 December, while the trial was ongoing, the Intervenors settled and voluntarily dismissed their claims against Plaintiff.

At the close of all evidence, the remaining parties renewed their respective motions for directed verdict, with significant arguments from Plaintiff and Defendants regarding the Residential Purpose and Parking Covenants. The court granted Plaintiff's directed-verdict motion as to Defendants' claims for breach of the Residential Purpose and Parking Covenants but otherwise denied the parties' motions.

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6. We note that the use of Rules 59 or 60(b) to reconsider an interlocutory, pretrial ruling denying Third-Party Defendants Fedrick and Smith's motion for summary judgment was improper. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 15, 848 S.E.2d 1, 6 (2020) ("Rule 59 is not an appropriate means of seeking reconsideration of interlocutory, pre-trial rulings of trial courts."); *Pratt v. Staton*, 147 N.C. App. 771, 775, 556 S.E.2d 621, 624 (2001) ("By its express terms, Rule 60(b) only applies to final judgments, orders, or proceedings; it has no application to interlocutory orders."). Rather, "in a case like this one involving partial summary judgment, the party seeking reconsideration can move for that relief under Rule 54(b)." *Doe*, 273 N.C. App. at 19, 848 S.E.2d at 8. Rule 54(b) provides, in pertinent part, that "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2023). However, this matter is not before us, as Defendants did not appeal from the 24 March 2023 order granting summary judgment in favor of Third-Party Defendants Fedrick and Smith.

Plaintiff's claim against Defendants for private nuisance and Defendants' libel claims against Plaintiff and Third-Party Defendant Skinner were submitted to the jury. On 6 December 2023, the jury issued unanimous verdicts denying all of these claims. On 3 January 2024, the trial court entered a final judgment memorializing its rulings on the parties' directed-verdict motions as well as the jury's verdicts.

Defendants timely moved for a new trial pursuant to Rule 59, which the trial court denied on 23 January 2024. Defendants then filed timely notice of appeal from (1) the 13 December 2022 order granting Plaintiff's motion to dismiss Defendants' counterclaims regarding breach of the Nuisance Covenant; (2) the 17 March 2023 order granting in part Plaintiff's amended motion for summary judgment as to the Prohibited Residential Structures Covenant but otherwise denying the parties' motions for summary judgment; and (3) the final judgment entered on 3 January 2024.

II. Discussion

Defendants raise four issues on appeal. First, they argue that the trial court erred by granting Plaintiff's motion to dismiss their counterclaims to the extent that the claims were based upon the Nuisance Covenant. They next contend that the court erred by denying their motion for summary judgment and by granting Plaintiff's amended motion for summary judgment in part as to Defendants' counterclaim alleging Plaintiff's violation of the Prohibited Residential Structures Covenant. Then, Defendants assert that the trial court erred by denying their motion for directed verdict and granting Plaintiff's motion for directed verdict in part as to Defendants' counterclaim alleging Plaintiff's Lot 177 violations of the Residential Purpose and Parking Covenants. Finally, based on these three issues, Defendants maintain that the court erred by entering the final judgment. We disagree.

A. Interpretation of the Restrictive Covenants

"Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006).

> Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the *original* intent of the parties; however, covenants are strictly construed in favor of the *free use of land*

> whenever strict construction does not contradict the plain and obvious purpose of the contracting parties.

Id. at 555, 633 S.E.2d at 85.

"The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *J. T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). "Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (citation omitted).

"As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports." *Erthal v. May*, 223 N.C. App. 373, 380, 736 S.E.2d 514, 518 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). "This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court." *Id.* at 380, 736 S.E.2d at 518–19 (citation omitted).

"In interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed ordinarily control, and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent." *Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) (cleaned up). Nevertheless, "it is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used." *Id.* (cleaned up).

B. The Nuisance Covenant

[1] Defendants first allege that the trial court erred by granting Plaintiff's motion to dismiss their counterclaims for breach of the Restrictive Covenants to the extent that they were based on the Nuisance Covenant. Specifically, Defendants contend that the trial court erred by determining that the Nuisance Covenant was void for vagueness. We disagree.

1. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "is a proper vehicle for dismissing a complaint when it fails to state a claim upon which relief can be granted." *Andresen v. E. Realty Co.*, 60 N.C. App. 418, 420, 298 S.E.2d 764, 765 (1983). "[T]he complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Id.* (citation omitted).

2. Analysis

By order entered 13 December 2022, the trial court granted Plaintiff's motion to dismiss Defendants' counterclaims to the extent that they were based upon the Nuisance Covenant.

It is well established that "courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court." *Steiner v. Windrow Ests. Home Owners Ass'n*, 213 N.C. App. 454, 458, 713 S.E.2d 518, 522 (2011) (citation omitted). "Covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous." *Id.* (citation and emphasis omitted).

In *Steiner*, this Court reviewed similar language in a restrictive covenant that proscribed "offensive or noxious activity . . . tending to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood." *Id.* at 465, 713 S.E.2d at 526. The *Steiner* Court recognized that "each of these words describes a subjective and personal experience or feeling. Just as beauty is in the eye of the beholder, each of these terms can be defined only from the perspective of the beholder." *Id.* at 466, 713 S.E.2d at 527 (footnote omitted). Consequently, we concluded that the challenged covenant was void for vagueness in that it did "not give sufficient guidance or definitions to the aforementioned terms to permit us to make any sort of legal determination as to what [it] mean[t] or should mean to the . . . neighborhood." *Id.* at 466–67, 713 S.E.2d at 527.

On appeal, Defendants attempt to distinguish *Steiner* on the grounds that the Nuisance Covenant "does not contain the other subjective words as the one[s] in the *Steiner* case and relies simply on two words": (1) "annoyance" and (2) "nuisance." Defendants posit that the term "nuisance" "cannot be void for vagueness as that is a recognized cause of action in North Carolina"; meanwhile, the "common definition" of the term "annoyance" is easily "ascertain[ed] and [was] utilized in the nuisance jury instruction." These assertions are meritless.

As the trial court aptly explained at the December 2022 hearing regarding Plaintiff's motion to dismiss:

> [P]art of the issue on the vagueness could be . . . when you talk about an annoyance or nuisance to a group; in other

> words, to the neighborhood. I'm not reading it independently. It's vague. We don't know what the neighborhood is other than perhaps all members of the parties to the [POA], and how do you determine on a broad level what's annoying to them . . . .

The court then illustrated why a private nuisance claim does not present the same vagueness concern:

> THE COURT: Well, I think the vagueness issue is potentially from the [c]ourt's perspective[:] how do we know what's annoying to a group? How does somebody -- if you have 100 homeowners, how do we know what's annoying to the entire group? We don't. That's why the Court of Appeals said that . . . a private nuisance action is one homeowner against another homeowner or neighboring property owners –
>
> [PLAINTIFF'S COUNSEL]: Correct.
>
> THE COURT: -- and whether or not it's the substantial and unreasonable interference as between those two property owners.

As in *Steiner*, the Nuisance Covenant at issue here "do[es] not provide sufficient guidance or definitions to permit . . . any sort of objective determination of who is right, and this is the essence of vagueness." *Id.* at 467, 713 S.E.2d at 527. This is so regardless of the existence of a private nuisance claim—which Defendants notably did not raise against Plaintiff in this case—because the dispositive issue here is not whether nuisance "is a recognized cause of action" but rather whether the phrase "an annoyance or nuisance to the neighborhood" as used in the Nuisance Covenant is "clear and unambiguous." *Id.* at 458, 713 S.E.2d at 522 (citation and emphasis omitted).

As the *Steiner* Court explained, we must construe the term "nuisance" in this context "using its 'ordinary meaning' and not a legal definition." *Id.* at 466 n.8, 713 S.E.2d at 527 n.8. For the reasons stated in *Steiner* and echoed by the trial court in the present case, the phrase "an annoyance or nuisance to the neighborhood" as used in the Nuisance Covenant is not "clear and unambiguous." *Id.* at 458, 713 S.E.2d at 522 (citation and emphasis omitted). Accordingly, the court did not err by granting Plaintiff's motion to dismiss Defendants' counterclaims for breach of the Restrictive Covenants to the extent that they were based upon the Nuisance Covenant, and Defendants' argument is overruled.

C. The Prohibited Residential Structures Covenant

[2] Defendants next appeal from the trial court's 17 March 2023 order. They assert that the trial court erred by denying their motion for summary judgment and partially granting Plaintiff's amended motion for summary judgment as to Defendants' counterclaim concerning the Prohibited Residential Structures Covenant.

We first note that "[t]he denial of a motion for summary judgment is an interlocutory order and is not appealable." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Further, "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Id.* Thus, to the extent that Defendants seek review of the denial of their motion for summary judgment on this issue, such review is unavailable.

Nevertheless, upon the entry of a final judgment, the trial court's partial grant of Plaintiff's amended motion for summary judgment as to Defendants' counterclaim concerning the Prohibited Residential Structures Covenant "became an appealable order." *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 229, 713 S.E.2d 140, 147 (2011). Therefore, although we may not review the denial of Defendants' motion for summary judgment on this issue, we may review the partial grant of Plaintiff's amended motion for summary judgment on appeal from the final judgment in this matter.

1. Standard of Review

This Court reviews a trial court's rulings on a motion for summary judgment de novo, and in doing so "we view the evidence in the light most favorable to the non-movant." *Erthal*, 223 N.C. App. at 377, 736 S.E.2d at 517 (citation omitted). Appellate review of a trial court's grant of summary judgment "requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Id.* at 378, 736 S.E.2d at 517 (citation omitted).

> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. (citation omitted).

2. Analysis

Defendants first contend that the trial court erred by concluding that Plaintiff's "shipping container residence" was not a "structure of a temporary character" within the meaning of the Prohibited Residential Structures Covenant and therefore, did not violate the Restrictive Covenants. As stated above, the Prohibited Residential Structures Covenant provides: "No structure of a temporary character, basement, tent, shack, garage, barn or other outbuilding [shall] be used on any lot any time as a residence, either temporary or permanent." The covenant does not define "structure of a temporary character"; it merely provides a list of proscribed structures. Thus, we must determine whether Plaintiff's "shipping container residence" falls within the prohibited category of a "structure of a temporary character."

The record reflects that throughout this litigation, Defendants have presented their argument on this issue as if it were self-evident as a matter of law. In their initial counterclaim, Defendants simply asserted that "Plaintiff's residence constructed out of shipping containers is a residence *made from a structure of temporary character*." (Emphasis added). And in their appellate brief, Defendants rely upon *Young v. Lomax*, 122 N.C. App. 385, 470 S.E.2d 80 (1996). The *Young* Court concluded that the residence at issue was a mobile home—a type of structure that was explicitly prohibited by the applicable restrictive covenant in that case—and held that "rendering a structure immobile after it has been installed does not change the fact that the structure is still a mobile home." 122 N.C. App. at 388, 470 S.E.2d at 82.

Defendants posit that Plaintiff's argument below—that her shipping-container residence was "no longer of a temporary character because she . . . affixed it to a foundation and ha[d] a deck constructed around it"—necessarily "fails as a matter of law" under *Young*; according to Defendants, "[s]hipping containers are by their very nature constructed to be of a temporary character." Yet, Defendants candidly acknowledge that "[t]here is no case in North Carolina [of which they] are aware that addresses shipping containers being converted into homes." This admission is only one of several reasons why *Young* does not control this case.

On a fundamental level, the well-established principles directing the interpretation of restrictive covenants remind us that "[e]ach case must be determined on its own particular facts." *Long*, 271 N.C. at 274, 156 S.E.2d at 242. Rendering a mobile home immobile presents a different factual question than utilizing shipping containers as building materials in the construction of a permanent home. Defendants fail to persuade with their bare and conclusory assertions that Plaintiff's home simply *is* a "structure of a temporary character" as a matter of law. And insofar as Defendants rely upon *Young* for these erroneous conclusions, their reliance is misplaced.

Instead of straining for precedent to analogize to the facts of the present case, we properly focus our analysis on the plain, unambiguous text of the Prohibited Residential Structures Covenant, which truly governs this issue. The plain text of this covenant contains a list of prohibited structures—not prohibited building materials. This text evinces the drafters' concern with the permanent character of the final residential structure, rather than the character of the base construction materials.

Moreover, notwithstanding Defendants' unsupported and conclusory contentions otherwise, the use of recycled or found materials in the construction of a residence does not necessarily render the residence temporary. Thus, Plaintiff's use of shipping containers does not, in and of itself, make her residence a "structure of a temporary character" under the Prohibited Residential Structures Covenant.

In the order granting Plaintiff's amended motion for summary judgment on this issue, the trial court properly focused on the permanent character of Plaintiff's residence, reasoning that

> Plaintiff's home has: i) a continuous block foundation; ii) a permanent deck; iii) the containers are permanently welded together; iv) the construction was inspected at each stage of construction; v) the construction was pursuant to a building permit; and vi) the home is in compliance with the Ashe County Building Code Requirements.

The court's summary-judgment order demonstrates a reasonable interpretation of the Prohibited Residential Structures Covenant, consistent with the covenant's plain text and properly favoring the unrestricted use of Plaintiff's property. *See id.* at 268, 156 S.E.2d at 239. Defendants have failed to show a "genuine issue as to any material fact" regarding whether Plaintiff's home is a "structure of a temporary character" under the Prohibited Residential Structures Covenant, or that Plaintiff was not "entitled to judgment as a matter of law." *Erthal*, 223 N.C. App. at 378, 736 S.E.2d at 517 (citation omitted). Therefore, the trial court did not err in granting Plaintiff's amended motion for summary judgment on this issue, and Defendants' argument is overruled.

D. The Residential Purpose and Parking Covenants

[3] Defendants also contend that the trial court erred by denying their motion for summary judgment as to whether Plaintiff's use of Lots 177 and 50 violated the Residential Purpose and Parking Covenants. Relatedly, Defendants assert that the court erred by denying their motion for directed verdict and by granting Plaintiff's motion for directed verdict on this issue.

However, as previously recognized, the denial of Defendants' motion for summary judgment "is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Harris*, 314 N.C. at 286, 333 S.E.2d at 256. We therefore limit our review to Defendants' arguments concerning the trial court's entry of directed verdict in favor of Plaintiff.

1. Standard of Review

"A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Merrick v. Peterson*, 143 N.C. App. 656, 661, 548 S.E.2d 171, 175 (citation omitted), *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). "When a court considers the propriety of a directed verdict motion, the nonmoving party is entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the nonmoving party." *Id.* "The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of [the] claim." *Id.*

Further, "Rule 50(a) requires that a motion for directed verdict state the specific grounds therefor." *Vanguard Pai Lung, LLC v. Moody*, 387 N.C. 376, 380, 912 S.E.2d 788, 792 (2025) (cleaned up); *see* N.C. Gen. Stat. § 1A-1, Rule 50(a). "This ensures that the trial court and the nonmoving party have adequate notice of those arguments." *Vanguard Pai Lung*, 387 N.C. at 381, 912 S.E.2d at 792 (cleaned up).

Consistent with Rule 50(a), "this Court, in reviewing a grant of directed verdict, may consider all of the grounds specifically stated by the moving party in its motion to the trial court," and the moving party is not allowed "to make an argument in support of directed verdict for the first time on appeal." *Merrick*, 143 N.C. App. at 662, 548 S.E.2d at 175. Moreover, "[i]n cases involving multiple defenses and theories of liability, it is critical that the movant direct the trial court with specificity to the grounds for its motion for a directed verdict." *Vanguard Pai Lung*, 387 N.C. at 381, 912 S.E.2d at 793 (cleaned up). "When a specific argument or theory that forms a ground for relief is not expressly stated in a directed verdict motion, that issue is waived . . . .” *Id.* Put another way, “[i]n a case involving multiple claims or defenses, an issue is raised at the directed verdict stage only if the movant expressly articulates that specific argument or theory to the trial court.” *Id.* at 377, 912 S.E.2d at 790.

2. The Residential Purpose Covenant

Defendants argue that the trial court erred by denying their motion for directed verdict and by granting Plaintiff’s motion for directed verdict because, *inter alia*, Plaintiff’s recreational use of Lot 177 violated the Residential Purpose Covenant. Defendants claim that Plaintiff’s use of Lot 177 “merely for recreational purposes” did not fall within the Residential Purpose Covenant’s requirement of use “only for residential purposes.”

We begin our analysis cognizant of our Supreme Court’s instruction that the primary approach for a court’s exercise of “[s]ound judicial construction of restrictive covenants” is to follow “the intentions of the parties,” including adherence to “the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking.” *J. T. Hobby*, 302 N.C. at 71, 274 S.E.2d at 179.

As quoted above, the Residential Purpose Covenant provides: “Lots shall be used only for residential purposes, except as designated by the Company.” In *J. T. Hobby*, the defendants, a married couple who operated a home for special-needs adults, argued that their property had a “residential,” rather than “institutional,” purpose, because it was “used for the habitation of human beings and for those activities such as eating, sleeping, and engaging in recreation which are normally incident thereto.” *Id.* at 71–72, 274 S.E.2d at 179–80. While declining to adopt this definition of “residential,” our Supreme Court agreed with the defendants that their home had a residential purpose and rejected the plaintiffs’ argument analogizing the the defendants’ establishment with that of a boarding house. *See id.* at 71–74, 274 S.E.2d at 179–81.

In the instant case, Defendants contend that this precedent “created a two-part requirement to meet the definition of residential with the first requirement being that the lot be used for human habitation and the second that it is utilized for other activities such as eating, sleeping and recreation but it requires both.” Not so. Defendants’ “two-part requirement” is an overread of *J. T. Hobby* for two reasons. First, the “requirement” that Defendants cite was actually the Supreme Court’s recapitulation of one of the parties’ arguments; but the Court did not adopt that argument, much less make it a requirement “to meet the definition of residential.”

Second, Defendants' interpretation of *J. T. Hobby* stands in contrast to the well-established interpretive principle that "covenants are strictly construed in favor of the *free use of land* whenever strict construction does not contradict the plain and obvious purpose of the contracting parties." *Armstrong*, 360 N.C. at 555, 633 S.E.2d at 85.

Even taken in the light most favorable to Defendants, there is no reading of the Residential Purpose Covenant that supports their insistence that the phrase "residential purposes" necessarily "requires habitation." The most reasonable reading of the Residential Purpose Covenant, one that follows "the intentions of the parties" and adheres "to the natural meaning of the words," *J. T. Hobby*, 302 N.C. at 71, 274 S.E.2d at 179, is that the phrase "residential purposes" in this covenant *does not* necessarily require habitation, despite Defendants' assertion otherwise.

In their appellate brief, Defendants offer a plethora of possible extreme, imagined recreational uses that might be permitted in other hypothetical cases if Plaintiff's use of Lot 177 were allowed, such as "ball fields, concert venues, dirt tracks, [and] paintball course[s]." Indeed, recognizing that no North Carolina case addresses the purely recreational use of property in this context, Defendants instead direct us—as they did the trial court below—to *Rawan v. Massad*, in which the Appeals Court of Massachusetts held that "the hosting of organized league baseball games" violated a restrictive covenant limiting the property at issue "to use for 'single[-]family residential purposes only.' " 80 Mass. App. Ct. 826, 830, 957 N.E.2d 248, 251 (2011).

Yet, Defendants' "parade of horribles" again ignores the well-settled rule of the interpretation of restrictive covenants that "[e]ach case must be determined on its own particular facts." *Long*, 271 N.C. at 274, 156 S.E.2d at 242. On this issue, Defendants rely upon inapplicable authority and ignore the pertinent facts of this case. We cannot accept Defendants' arguments.

"[I]t appears, as a matter of law, that [Defendants] cannot recover upon any view of the facts which the evidence reasonably tends to establish" even when viewed in the light most favorable to them. *Merrick*, 143 N.C. App. at 661, 548 S.E.2d at 175 (citation omitted). Therefore, the trial court did not err by granting Plaintiff's motion for directed verdict on the issue of the Residential Purpose Covenant.

3. The Parking Covenant

As regards the Parking Covenant, Defendants contend that "[u]ncontroverted evidence was presented at the trial that no parking was provided for" Lot 177 and that Plaintiff "openly admitted that there was not enough parking for" Lot 177. To the contrary, our careful review of the transcript, and specifically those portions that Defendants cite for these propositions, reveals no such evidence or admission. Indeed, portions of the transcript contain Plaintiff's repeated denials of Defendants' accusations concerning parking and her explanation that she did not purchase Lot 50 "solely for parking" for Lot 177—as Defendants assert—but rather "for a couple of reasons," including that it could "alleviate some of the animosity or situation with" Defendants.

Defendants have failed to show that the evidence at trial regarding Plaintiff's alleged violation of the Parking Covenant was "[u]ncontroverted." In that these assertions represent the entirety of Defendants' directed-verdict arguments concerning the Parking Covenant, Defendants also fail to persuade on this issue.

E. Final Judgment

Lastly, Defendants "adopt and incorporate" each of their prior arguments in support of their contention that the trial court erred by entering its final judgment. As each of those arguments failed previously, so too must they here.

III. Conclusion

For the foregoing reasons, we affirm the trial court's 13 December 2022 and 17 March 2023 orders, and we discern no error in the trial court's final judgment.

AFFIRMED IN PART; NO ERROR IN PART.

Judges GRIFFIN and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 1 October 2025)

BUILDERS MUT. INS. CO. v. EMPWR SOLAR LLC No. 24-918	Wake (24CV004393-910)	Affirmed
CAMACHO v. N.C. DEP'T OF ADULT CORR. No. 24-636	N.C. Industrial Commission (19-755320)	Affirmed
CITY OF ROANOKE RAPIDS v. HALIFAX CNTY. No. 23-419	Halifax (22CVS000337-410)	AFFIRMED IN PART AND REVERSED IN PART
HILLIARD v. GILLIAM No. 24-802	Moore (22CVS001522-620)	Affirmed
IN RE F.L.H. No. 24-910	Lincoln (23JA000050-540) (23JA000034-540)	Affirmed
IN RE K.A. No. 25-500	Watauga (21JT000017-940)	Affirmed
IN RE K.N.F. No. 25-138	Watauga (23JT000003-940)	Affirmed
IN RE W.L. No. 25-122	Guilford (24JA000333-400)	Affirmed
IVEY v. HALL No. 25-147	Davidson (16CVS000752-280)	No Error
JETT v. McGILL No. 25-423	Columbus (24CVS001122-230)	Dismissed
LANE v. CHEN No. 25-362	Durham (23CVD003264-310)	Dismissed
SALAMAH v. ELSAYED No. 25-205	Forsyth (24CVD500324-330)	Affirmed
SMARTSKY NETWORKS, LLC v. DAG WIRELESS, LTD No. 25-25	Durham (24CVS001522-310)	Affirmed
STATE v. ALSTON No. 25-212	Wilson (21CR051215-970)	Affirmed

STATE v. BAKER No. 24-948	Columbus (21CR052533-230) (21CR052534-230)	No Error
STATE v. BARNES No. 25-510	Nash (12CR053727-630) (12CR053728-630)	Affirmed
STATE v. BARNES No. 24-17	Martin (16CR050405-570) (16CR050406-570)	VACATED AND REMANDED IN PART; NO ERROR IN PART
STATE v. BEAM No. 25-164	Cleveland (16CR001176-220) (16CR001177-220) (16CR052305-220)	No Error
STATE v. CANIPE No. 25-121	Cleveland (22CR051762-220)	No Error
STATE v. COBB No. 25-491	New Hanover (21CR055991-640) (22CR052808-640)	No Error
STATE v. DANIEL No. 24-971	Lincoln (20CR051334-540)	No Error
STATE v. ETHRIDGE No. 25-306	Franklin (22CR050544-340)	Affirmed
STATE v. GOINS No. 25-69	Richmond (22CR050485-760) (22CR050490-760)	No Error
STATE v. HONEYCUTT No. 24-798	Yancey (20CR000151-990) (20CR050190-990)	No Error
STATE v. JORDAN No. 25-124	Perquimans (21CR000078-710)	No Error
STATE v. LAWRENCE No. 24-1098	Wake (20CR207228-910)	No Error
STATE v. MINTZ No. 24-941	Haywood (22CR051207-430)	Affirmed
STATE v. ROBLES-CHAVIRA No. 25-16	Guilford (22CR276647-400)	No Error

STATE v. ROGERS No. 25-45	Stanly (20CR051252-830) (20CR051253-830) (24CR271613-830)	Affirmed
STATE v. SAUNDERS No. 24-1094	Forsyth (23CR275569-330)	No Error
STATE v. SPICER No. 25-509	New Hanover (22CR301133-640)	No Error
STATE v. WASHINGTON No. 25-418	Carteret (97CR007906-150) (97CR007907-150) (98CR001125-150) (98CR001126-150) (97CR007905-150)	Dismissed
STOECKEL v. STOECKEL No. 24-865	Wake (23CVD000476-910)	Affirmed
TOM, LLC v. S. RIVER LAND CO., LLC No. 24-1075	Brunswick (24CVS000056-090)	Affirmed
TOPPING v. MEYERS No. 25-257	Mecklenburg (18CVS010730-590)	Dismissed
VALDEZ v. ANDERSON No. 24-1131	Davidson (23CVD002727-280)	Dismissed

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