301 N.C. App.—No. 4 **Pages 417-562**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 10, 2026

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS

OF

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COURT OF APPEALS

CASES REPORTED

FILED 5 NOVEMBER 2025 (SECOND HALF)

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Preservation of issues—anticipatory bond condition—order not appealed from—In an appeal from criminal judgments revoking defendant's probation and activating his sentences for various crimes, the Court of Appeals lacked jurisdiction to review defendant's argument that the trial court erred in setting an anticipatory bond as a condition of his probation, since this condition was added in a separate order modifying defendant's probation, from which defendant did not appeal. **State v. Stephens, 527.**

Preservation of issues—denial of motion for appropriate relief—order not appealed from—petition for certiorari denied—In an appeal from criminal judgments entered after defendant was convicted of fourteen sex-related crimes against a minor, the Court of Appeals lacked jurisdiction to review defendant's argument challenging the denial of his post-trial motion for appropriate relief (MAR)—based on a juror's statement that he had been bullied by the other jurors into voting "guilty" on all counts—where defendant failed to file notice of appeal from the order denying his MAR, as required under N.C.G.S. § 15A-1422(b). Although defendant did file a petition for a writ of certiorari, the language in section 15A-1422(b)—permitting appellate review of the denial of an MAR "only" in "an appeal regularly taken"—seemingly precluded certiorari review of his argument. In any event, defendant failed to show merit or extraordinary circumstances justifying issuance of a writ, since Evidence Rule 606(b) forbade the juror at issue from impeaching his own verdict through evidence of what happened in the jury room during deliberations. **State v. Johnson, 518.**

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First Amendment—public-forum doctrine—vulgar protest banner at public meeting—unlawful removal—resistance using reasonable force—Defendant's convictions for disrupting an official meeting and resisting a public officer were vacated where defendant's speech—consisting of silently holding a vulgar banner criticizing a county commissioner while standing at the back of a commissioners' board meeting during a public comment period—was protected under the First Amendment and where defendant's resistance to being unlawfully removed from the meeting room was done with reasonable (mostly verbal) and not excessive force. The content of defendant's banner, despite being offensive, did not constitute fighting words designed to provoke violence and instead consisted of criticism of an elected official's job performance that aligned with the stated purpose of the limited public forum. Further, law enforcement officers' directive to defendant to take the banner down because of its message and not in response to an actual disruption constituted impermissible viewpoint discrimination and was therefore unreasonable. **State v. Barthel, 466.**

Right to impartial jury—requests for individual voir dire and jury questionnaire—denied—abuse of discretion analysis—After a criminal defendant was convicted of fourteen sex-related crimes against a minor, he failed to demonstrate on appeal that the trial court violated his right to an impartial jury or abused its discretion by denying his request to conduct a voir dire of prospective jurors individually or in small groups on topics relating to child pornography and sexual acts with minors. The record showed that, in denying this request, the trial court made a reasoned decision, indicating that it had considered the circumstances of this particular case along with the sensitive topics at issue and determined that defense counsel would have the opportunity to ask about those topics in a regular voir dire. Further, the trial court did not abuse its discretion by preventing defendant from submitting a juror questionnaire asking jurors whether they had ever watched child pornography or performed a sexual act on a child; again, the court made a reasoned decision, indicating its agreement with the State that such questions were inappropriate for voir dire. **State v. Johnson, 518.**

Right to jury trial—substitution of jurors—review of evidence prior to substitution—instruction to start deliberations anew—There was no error in defendant's judgments entered after a jury found defendant guilty of several sexual offenses involving a minor where, despite defendant's contention that his constitutional right to a "properly constituted jury of twelve" was violated, the court did not err by substituting an alternate juror after deliberations had begun, pursuant to N.C.G.S. § 15A-1215(a), to remove a juror who had created an unsafe environment. The trial court properly instructed the newly constituted jury to disregard all previous deliberations and to begin deliberations anew. Further, although the jury's request to review one of the State's exhibits was granted prior to the juror substitution, all jurors, including the alternate juror, had heard testimony regarding the substance of the text messages that made up the requested exhibit and were thus operating with the same set of facts. **State v. Glenn, 499.**

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Civil—failure to pay post-separation support—insufficient findings of fact—
After the trial court in a domestic case denied plaintiff wife's motion for contempt, which alleged that defendant husband had willfully failed to comply with a prior post-separation support order, the order denying plaintiff's motion was vacated—and the matter was remanded—because the court did not include any findings of fact addressing whether the post-separation support order remained in effect, whether defendant had complied with or had the present ability to comply with its terms, or whether defendant's alleged nonpayment was willful—all factors which the court was required to consider under N.C.G.S. § 5A-21(a). **Taylor v. Taylor, 553.**

DIVORCE

Alimony—claim denied—dependency status—insufficient findings of fact—
An order denying plaintiff wife's claim for alimony was vacated—and the matter was remanded—where the trial court made insufficient factual findings supporting its conclusion that plaintiff was not a "dependent spouse." Specifically, the order contained no findings regarding plaintiff's monthly income or expenses, her accustomed standard of living, or defendant husband's ability to provide support—all factors which the court was required to consider under N.C.G.S. § 50-16.3A(b). Although the court did incorporate prior orders by reference, it could not rely upon a general incorporation of those orders' findings to demonstrate that it had properly considered all statutory factors under section 50-16.3A(b). **Taylor v. Taylor, 553.**

DOMESTIC VIOLENCE

Mutual protective orders—statutorily required findings absent—In a domestic violence protection order (DVPO) proceeding—where plaintiff initially sought a DVPO against defendant, who then counterclaimed for a DVPO against plaintiff, with the result that mutual DVPOs were entered—although the trial court's findings of fact were largely supported by competent evidence and were sufficient to support the trial court's conclusion of law as to the commission of an act of domestic violence by plaintiff, the order lacked specific findings of fact required to sustain mutual DVPOs pursuant to N.C.G.S. § 14-277.3A(b)(2). The standard DVPO form did not permit the parties to be correctly identified in the order in favor of defendant and against plaintiff (because the standard form contemplates only one claim per file number and only a single order against a single party). As a result, the nonstandard order entered against plaintiff lacked two findings of fact required for entry of mutual DVPOs: that both parties acted as aggressors and that neither party acted primarily in self-defense. Accordingly, the DVPO against plaintiff was vacated and the matter was remanded for entry of a new order with appropriate findings and corresponding relief. **Shuler v. Donahue, 417.**

Protective order—fear of continued harassment—infliction of substantial emotional distress—sufficiency of factual findings—In a domestic violence protection order (DVPO) proceeding—where plaintiff initially sought a DVPO against defendant, who then counterclaimed for a DVPO against plaintiff, with the result that mutual DVPOs were entered—the trial court's findings of fact regarding the two challenged elements required for a DVPO pursuant to N.C.G.S. § 50B-1(a)(2)—acts placing the complainant in fear of continued harassment and fear that causes substantial emotional distress—were supported. While plaintiff correctly contended that no evidence showed that she used information from her searches of defendant's phone or social media "to track him constantly," the two challenged elements were supported by the trial court's remaining findings of fact—which were unchallenged and therefore binding on appeal—including that plaintiff had gone through defendant's phone and social media, alternately sought and shunned his attention and affection, owned a handgun, and had made threats and attempts to commit suicide (including in defendant's presence) in response to the parties breaking up. Those acts constituted harassment for DVPO purposes because they were (1) knowing; (2) directed at defendant; (3) made in order to torment, terrorize, or terrify him; and (4) not made to serve a legitimate purpose. **Shuler v. Donahue, 417.**

JURISDICTION

Workplace personal injury—Civil Procedure Rule 12(b)—dismissal with prejudice—In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by the individual defendant (an employee of defendant demolition company)—while the trial court properly dismissed plaintiff's claim against the individual defendant as barred by the exclusivity provision of the Workers' Compensation Act, the dismissal should have been without, rather than with, prejudice; the trial court lacked the jurisdiction or authority to adjudicate the matter. Accordingly, the case was remanded for the entry of an order dismissing without prejudice. **Solis-Santos v. Lester, 439.**

JURY

Review of gun exhibit—in open court—not part of jury deliberations—no structural error—At a trial for multiple crimes including possession of a firearm by a felon, the trial court did not commit constitutional error per se by allowing the jury to review a gun—which had been admitted into evidence and published to the jury by the State—in open court and in the presence of non-jurors (multiple bailiffs, a probation officer, the court reporter, and the courtroom clerks) with the consent of both parties. The court's decision, which was motivated by general safety concerns, was authorized by statute and within the court's discretion to make. Importantly, although the court mistakenly referred to the jurors' review of the gun as being part of "deliberations" before it allowed the jury to see the exhibit, the transcript showed that the court did not in fact instruct the jury to deliberate in open court. Therefore, the court's mere misstatements did not violate defendant's constitutional right to have the verdicts determined by twelve jurors. **State v. Wilson, 546.**

PROBATION AND PAROLE

Jurisdiction—to revoke probation—expiration of probationary period—applicability of default rule—In an appeal from four judgments revoking defendant's probation and activating his sentences for crimes corresponding to four different file numbers, three of those judgments were vacated where the probationary period for each had already expired—since none of those judgments specified when probation would begin, meaning that the default statutory rule requiring probation to run concurrently with the active sentences applied—and, therefore, the trial court lacked jurisdiction to revoke defendant's probation under those three file numbers. On the other hand, the court did have jurisdiction to revoke defendant's probation under the fourth file number where, when originally entering the sentence, the court checked the box indicating that probation would begin after defendant's release from incarceration, which in turn meant that the revocation occurred within the valid probationary period. **State v. Stephens, 527.**

Probation revocation—willful absconding—sufficiency of notice—In a probation revocation proceeding, the State gave defendant adequate notice that it sought revocation on the ground that defendant had willfully absconded from supervision. Although the probation violation reports did not explicitly mention the term "absconding" or otherwise identify the probation condition defendant had allegedly violated, this was not statutorily required; rather, it was sufficient that the allegations in the reports described the conduct constituting the violation (in this case, defendant left a substance abuse treatment program and failed to report his whereabouts for more than nine days). **State v. Stephens, 527.**

Revocation—willful absconding—sufficiency of evidence—A judgment revoking defendant's probation was affirmed on appeal because the trial court had not abused its discretion in finding that defendant willfully absconded from supervision. Specifically, the evidence showed that defendant left a substance abuse treatment program that he was required to attend (per conditions set by the recovery court) without authorization, failed to notify his probation officer that he had left the program, and—despite knowing that he was subject to heightened supervision conditions—kept his whereabouts unknown for over nine days, during which local law enforcement officers made several unsuccessful attempts to contact him. Further, defendant failed to demonstrate an inability to comply with the terms of his probation where, although he claimed that he left the treatment program because of another participant who was still using drugs and that he did not take his phone with him when he left, defendant later admitted that the other participant had already been kicked out of the program before defendant left, and that his ex-wife—with whom he was staying—did have a phone he could have used to call his probation officer. **State v. Stephens, 527.**

SEARCH AND SEIZURE

Search pursuant to general administrative tax warrant—no valid search warrant—unconstitutional search—In a prosecution for drug trafficking in which the trial court denied defendant's motion to suppress evidence collected pursuant to a general administrative tax warrant, the trial court erred by determining that the tax warrant gave agents from the North Carolina Department of Revenue inherent authority to enter defendant's private residence to search for property of value. Where the agents were operating solely under the tax warrant, issued pursuant to N.C.G.S. § 105-242, and not under a jeopardy tax warrant (requiring immediate assessment and collection) or a valid search warrant, their entry into defendant's home without consent constituted a violation of her Fourth Amendment right to be free from unreasonable search and seizure, and any exceptions to the exclusionary rule were either not preserved for appellate review or were inapplicable. Therefore, the court's suppression order was reversed and defendant's judgment was vacated. **State v. Hickman, 506.**

SENTENCING

Second-degree murder—aggravating factor—taking advantage of a position of trust or confidence—sufficiency of evidence—During sentencing on a conviction for second-degree murder—arising from defendant having entered the bedroom of his seventeen-year-old recent girlfriend unexpectedly in the middle of the night and shot her three times during an argument over the victim's new relationship—defendant's guilty plea to the statutory aggravating factor of having taken advantage of a position of trust or confidence was supported by sufficient evidence. First, although defendant and the victim had a typically volatile teenage relationship, the victim's behavior on the night of her murder—interacting with defendant after his surprise appearance in her bedroom, then leaving for the bathroom and returning, all without telling him to leave or seeking help from the adults in the home—demonstrated that a position of trust or confidence existed between defendant and the victim. Second, defendant exploited that position to effectuate the crime by using his knowledge of the victim's household to: park in a location where his vehicle could not be seen from the home, enter through a door he knew was usually left unlocked, and reach the victim's bedroom without being detected. **State v. De Lossantos, 490.**

SEXUAL OFFENDERS

Registration—federal conviction—substantial similarity test—not void for vagueness—The trial court did not err by ordering defendant to register as a sex offender based on his prior conviction under a federal exploitation statute where the court held a hearing, received evidence of the relevant federal and state statutes, and specifically determined that the federal offense was substantially similar to a reportable conviction under North Carolina law (here, third-degree sexual exploitation of a minor pursuant to N.C.G.S. § 14-190.17A). Thus, the court's order complied with N.C.G.S. § 14-208.12B and Civil Procedure Rule 52. Although the wording of the federal and state exploitation statutes contained some differences, both statutes criminalized essentially the same conduct and included elements of the defendant's knowledge and possession of explicit material. Finally, the appellate court rejected defendant's argument that the substantial similarity test was unconstitutionally vague. **State v. Alcantara, 453.**

WORKERS' COMPENSATION

Exclusivity provision—workplace personal injury—Pleasant claim—In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by the individual defendant (an employee of defendant demolition company)—the trial court properly dismissed plaintiff's claim against the individual defendant as barred by the exclusivity provision of the Workers' Compensation Act. Plaintiff (a special employee of defendant company for purposes of the Act) and the individual defendant were co-employees of defendant company when plaintiff sustained his injuries; accordingly, defendant could only sustain a tort claim against the individual defendant for willful, wanton, reckless acts, as set forth in *Pleasant v. Johnson*, 312 N.C. 710 (1985). The evidence forecast by plaintiff—that the individual defendant had only received "on-the-job" training in operating a skid steer and was not provided with manuals, guidelines, or procedures for securing loads—sounded in negligence and thus could not meet the high bar required by *Pleasant*. **Solis-Santos v. Lester, 439.**

Exclusivity provision—workplace personal injury—special employee doctrine—In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by an employee of defendant demolition company—the trial court properly dismissed plaintiff's claim against defendant company as barred by the exclusivity provision of the Workers' Compensation Act. For purposes of the Act, plaintiff was a special employee of defendant company because: (1) an implied contract of hire existed between plaintiff and defendant company (the special employer) where plaintiff was assigned to work under the special employer's supervision and nothing in plaintiff's contract with the temporary staffing firm precluded him from also being employed by the special employer; (2) the work being done at the time of plaintiff's injury was essentially that of the special employer; and (3) the special employer had the right to control the details of plaintiff's work. **Solis-Santos v. Lester, 439.**

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.

DONNA DANIELLE SHULER, Plaintiff
v.
ANDREW ROBERT DONAHUE, III, Defendant

No. COA24-739

Filed 5 November 2025

1. Domestic Violence—protective order—fear of continued harassment—infliction of substantial emotional distress—sufficiency of factual findings

In a domestic violence protection order (DVPO) proceeding—where plaintiff initially sought a DVPO against defendant, who then counterclaimed for a DVPO against plaintiff, with the result that mutual DVPOs were entered—the trial court's findings of fact regarding the two challenged elements required for a DVPO pursuant to N.C.G.S. § 50B-1(a)(2)—acts placing the complainant in fear of continued harassment and fear that causes substantial emotional distress—were supported. While plaintiff correctly contended that no evidence showed that she used information from her searches of defendant's phone or social media "to track him constantly," the two challenged elements were supported by the trial court's remaining findings of fact—which were unchallenged and therefore binding on appeal—including that plaintiff had gone through defendant's phone and social media, alternately sought and shunned his attention and affection, owned a handgun, and had made threats and attempts to commit suicide (including in defendant's presence) in response to the parties breaking up. Those acts constituted harassment for DVPO purposes because they were (1) knowing; (2) directed at defendant; (3) made in order to torment, terrorize, or terrify him; and (4) not made to serve a legitimate purpose.

2. Domestic Violence—mutual protective orders—statutorily required findings absent

In a domestic violence protection order (DVPO) proceeding—where plaintiff initially sought a DVPO against defendant, who then counterclaimed for a DVPO against plaintiff, with the result that mutual DVPOs were entered—although the trial court's findings of fact were largely supported by competent evidence and were sufficient to support the trial court's conclusion of law as to the commission of an act of domestic violence by plaintiff, the order lacked specific findings of fact required to sustain mutual DVPOs pursuant to N.C.G.S. § 14-277.3A(b)(2). The standard DVPO form did not permit the parties to be correctly identified in the order in favor of defendant and against plaintiff (because the standard form contemplates only one claim per file number and only a single order against a single party). As a result, the nonstandard order entered against plaintiff lacked two findings of fact required for entry of mutual DVPOs: that both parties acted as aggressors and that neither party acted primarily in self-defense. Accordingly, the DVPO against plaintiff was vacated and the matter was remanded for entry of a new order with appropriate findings and corresponding relief.

Appeal by plaintiff from order entered 2 May 2024 by Judge Wayne L. Michael in District Court, Catawba County. Heard in the Court of Appeals 18 March 2025.

King Law Offices, P.C., by Krista S. Peace, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an Amended Domestic Violence Protective Order ("DVPO") against her in favor of Defendant. Plaintiff initially sought a DVPO against Defendant, but Defendant filed a counterclaim seeking his own DVPO against Plaintiff. The trial court heard both parties' claims at the same hearing; in addition to granting the DVPO against Plaintiff, the trial court also granted Plaintiff's claim for a DVPO against Defendant. The trial court rendered its ruling on both the claim and counterclaim for DVPO at the same time but entered two separately filed orders. Plaintiff appealed the DVPO entered against her; Defendant did not appeal the DVPO entered against him.

We hold that the trial court's findings of fact support its conclusion of law that Plaintiff committed an act of domestic violence against Defendant, but because the DVPOs entered here were "mutual" orders under North Carolina General Statute Section 50B-3(b), the trial court was also required to make findings of fact that "both parties acted as aggressors, . . . neither party acted primarily in self-defense, and that the right of each party to due process [was] preserved" to enter the DVPOs. N.C. Gen. Stat. § 50B-3(b) (2023). Because the trial court did not make these required findings for mutual DVPOs, we must vacate and remand the Amended DVPO for additional findings of fact.

I. Factual and Procedural Background

On 5 April 2024, Plaintiff filed a Complaint and Motion for DVPO against Defendant using the form "Complaint and Motion for Domestic Violence Protective Order" issued by the North Carolina Administrative Office of the Courts ("AOC"), AOC-G-250, Rev. 5/21. She alleged that she and Defendant "are current or former household members" and that they lived together "until Sunday, March 10[.]" She alleged that they had "argued about rent money for weeks," and on March 10, Defendant "packed up and left." She alleged "[h]e drove away from the home and came back and started to talk 10 minutes later" but she "reemphasized that [they] were broken up and asked him to leave[.]" She further alleged that he texted her "a couple times over the next couple of days about clothing" but she "never texted him." She "blocked his phone number on March 24" but he "used alternate messaging platforms to message" her. Defendant continued to call "almost every day" and used "different random phone numbers to text" her. She also alleged that on "Tuesday, April 2," he "approached [her] at a bar" and she "ran away from him and hid in the bathroom." On April 3, Defendant "showed up at [her] house unannounced with 2 engagement rings." Her "garage was open and he stood outside." Defendant had parked "near [her] neighbor's house, far enough away to watch [her] pull in" and "he walked 200 yards" to her house. Plaintiff "shut the door and locked it" and did not "say anything."

On 5 April 2024, the trial court entered an *ex parte* DVPO order against Defendant, directing him not to "assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace or other means), or interfere with" Plaintiff. The DVPO also required that Defendant stay away from Plaintiff's residence, workplace, and "Coyote Joe's[,]" a local bar the parties frequented both during and after their relationship. A hearing on the DVPO was set for 16 April 2024.

On 16 April 2024, counsel for Defendant filed a notice of appearance and a Motion to Dismiss, Answer, and Counterclaim for a DVPO against Plaintiff. On 19 April 2024, Defendant filed an Amended Motion to Dismiss, Answer, and Counterclaim for DVPO. Defendant's counterclaim was not filed using the AOC domestic violence complaint form but the counterclaim included generally the same allegations and information as included in the AOC domestic violence complaint form in addition to the motion to dismiss and answer.

In the amended motion to dismiss, Defendant contended that Plaintiff "failed to explicitly show" that he had (1) "attempted to cause or ha[d] intentionally caused [her] bodily injury" or (2) "placed [her] or a member of [her] family in fear of imminent serious bodily injury" or "continued harassment." Defendant also contended that "Plaintiff failed to raise any allegations about substantial emotional distress."

In his counterclaim for DVPO, Defendant alleged that Plaintiff placed him "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" and "intentionally placed [him] at a substantial risk of physical and emotional injury" because she had: gone "through [his] phone and social media to see if he is talking to anyone else"; stalked him on social media platforms; "interrogat[ed]" his "friends . . . on social media resulting in . . . Defendant being isolated from others"; threatened "to leave Defendant if he did not give her access to his phone" and social media accounts; "slamm[ed] stuff"; accused "him of cheating"; "constantly put[ ] him down"; "scream[ed] and yell[ed] at Defendant keeping Defendant up at all hours of the night without any provocation"; and "br[o]k[e] and destroy[ed] property[,]" including the "glass in the shower." Her actions caused Defendant to be "fearful of being evicted from his residence[.]" Defendant also alleged Plaintiff "has used or threatened to use a deadly weapon against herself and has a pattern of prior conduct of using such threats of violence with a firearm[,]" including a threat to commit suicide in April 2022 with "a firearm pointed at her chest" and overdoses of "Baclofen twice (2021 and 2023)," with both resulting in her "being in the ICU."

On 30 April 2024, the trial court held a hearing on Plaintiff's claim and Defendant's counterclaim for DVPOs. At the hearing, Plaintiff testified that she and Defendant began dating in the fall of 2020. Plaintiff characterized their relationship as being "on again[,]" "off again" until a "definitive breakup" on 10 March 2024. Plaintiff explained that she and Defendant had "been arguing on and off for the last two weeks" over whether they were going to move in together. The parties "could not reach an agreement[ ]" and Defendant left Plaintiff's home. Plaintiff made it "[a]bsolutely" clear to Defendant she "did not want any[]more contact with him[]" following the breakup. However, Plaintiff testified Defendant continued to reach out to her through "calls from his direct line[,] [a] lot of no caller ID calls, which he had a prior history of doing every other time [the parties'] had broken up[.]" Defendant would make "up to 20 [calls] at different times[,]" and "lots of text messages from his number and various other numbers."

Plaintiff further described two events when Defendant "showed up at [her] house . . . unannounced[ ]" and "uninvited." On 27 March 2024, Plaintiff arrived at her home and noticed that Defendant was there waiting for her. Plaintiff "quickly[]" pulled into her driveway and walked to her front door, and Defendant "ran up [the] driveway . . . with a card in his hand telling [her] he had this letter that explained everything he wanted to tell her." Plaintiff repeated to Defendant she was not interested and that "[t]his is over[,]" and explained that she would call the police if he did not leave. On 3 April 2024, Defendant again showed up unannounced at Plaintiff's house. Plaintiff "ran into [her] house" and Defendant began "screaming at [her] to please talk to him," saying that he had gotten her two engagement rings.

Defendant also presented evidence at the hearing. He testified about the parties' relationship, which he also characterized as on-again and off-again. He testified that he had moved in with Plaintiff in December 2023 when she purchased her home, but he still had his own apartment because "she had demonstrated instability in her commitment to [their] relationship early on." They had moved in together previously in December 2020, but after visiting his family that year at Christmas, she told him he "need[ed] to move out." He moved to Tampa, Florida and within two weeks, "as soon as [he] had unloaded the [moving] truck[,]" Plaintiff wanted him to move back in with her. Defendant testified that they had broken up about seven times over the four years they had been dating. He said that each time they broke up, she would "block[him] immediately and completely cut[] off contact." He also testified about Plaintiff's suicide attempts and his concerns about her mental health.

On 30 April 2024, at 5:14 pm, the trial court filed two DVPOs; one DVPO granted Plaintiff's claim for a DVPO, granting her protection against Defendant ("Plaintiff's DVPO"), and the other granted Defendant's counterclaim for a DVPO, granting him protection against Plaintiff ("Defendant's DVPO"). In the two DVPOs, the trial court granted essentially the same protections for each party against the other.

On 2 May 2024, the trial court filed an Amended DVPO for Defendant ("Defendant's Amended DVPO"). Defendant's Amended DVPO stated that it was "[d]eclared in Open Court this the 30th day of April, 2024" and granted Defendant the same protections as Defendant's DVPO filed on 30 April 2024.

In Defendant's Amended DVPO, the trial court made the following findings of fact:

> 3. . . . Plaintiff placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress on . . . Defendant by going through . . . Defendant's phone and social media and other means to track him

> constantly, and alternately seeking and shunning his attention and affection.
>
> 4. . . . Plaintiff is in possession of, owns or has access to firearms, ammunition, and gun permits being one (1) handgun.
>
> 5. . . . Plaintiff made threats to commit suicide.

The trial court ordered as follows:

> 1. . . . Plaintiff shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with . . . Defendant. A law enforcement officer shall arrest . . . Plaintiff if the officer has probable cause to believe . . . Plaintiff has violated this provision.
>
> 2. . . . Plaintiff shall stay away from . . . Defendant's residence or any place where . . . Defendant receives temporary shelter. A law enforcement officer shall arrest . . . Plaintiff if the officer has probable cause to believe . . . Plaintiff has violated this provision.
>
> 3. . . . Plaintiff shall stay away from the following places: the place where . . . Defendant works, the Rose, and Coyote Joes.
>
> 4. . . . Plaintiff is prohibited from possessing or receiving, purchasing a firearm for the effective period of this Order, and . . . Plaintiff's concealed handgun permit is suspended for the effective period of this Order.
>
> 5. . . . Plaintiff is to surrender to the sheriff serving this order the firearms, ammunition, and gun permits as described in block No. 4 of the Findings on Page 2 of this Order and any other firearms and ammunition in . . . Plaintiff's care, custody, possession, ownership or control.
>
> . . . .
>
> 6. That . . . Defendant, through his attorney, shall provide a list of his personal property which he contends is still at . . . Plaintiff's residence. . . . Plaintiff, through her attorney, shall arrange how she will return those items to . . . Defendant.
>
> 7. The terms of this order shall be effective until April 30, 2025.

Plaintiff's DVPO is on the form Domestic Violence Order of Protection, AOC-CV-306, Rev. 3/22. The trial court found Defendant placed her "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" The trial court also found that from March 2024 until he was served with process, Defendant was "repeatedly texting and phoning . . . [D]efendant, including from disguised numbers, after the parties (sic) breakup and after being asked not to contact her, and going to her home uninvited on at least 2 occasions after the breakup." The decree provisions in Plaintiff's DVPO mirror those in Defendant's Amended DVPO.

Plaintiff timely filed notice of appeal of Defendant's Amended DVPO on 15 May 2024. Defendant did not appeal Plaintiff's DVPO, nor did he submit a brief challenging the arguments presented by Plaintiff in this appeal.

Although Defendant's Amended DVPO by its terms expired on 30 April 2025, we first note that Plaintiff's appeal is not moot because of the "stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (citations, quotation marks, and brackets omitted). This Court has held that an appeal of a DVPO is not rendered moot by expiration of the order on appeal because the party affected by the order "may suffer collateral legal consequences as a result of the entry of the order." *Id.* at 436, 549 S.E.2d at 914. In addition to potential "collateral legal consequences, there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable." *Id.* at 437, 549 S.E.2d at 914. These non-legal collateral consequences may affect "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like[.]" *Id.* (citation and quotation marks omitted).

II. Analysis

On appeal, Plaintiff argues there was insufficient evidence to support parts of the trial court's findings of fact and that the findings were insufficient to support its conclusions of law and entry of Defendant's Amended DVPO against her. Further, Plaintiff argues the trial court did not make sufficient findings "to support the entry of a mutual DVPO."

On appeal from a DVPO, the trial court sits without a jury so,

> the standard of review . . . is whether there was competent evidence to support the trial court's findings of fact

> and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (quotation marks omitted) (quoting *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009)).

A. Sufficiency of Evidence to Support Findings for Entry of DVPO

[1] Plaintiff argues there was insufficient evidence to support the trial court's findings of fact and that the findings were insufficient to support its conclusions of law and entry of Defendant's Amended DVPO. We will first address whether the findings of fact support entry of a DVPO, without consideration of the requirements for a mutual DVPO, because if the findings do not support entry of a DVPO, they could not support a mutual DVPO.

In this case, Defendant did not allege Plaintiff had injured him or attempted to cause him bodily injury or that she committed any of the acts listed in North Carolina General Statute Sections 14-27.2 through 14-27.7. Instead, as in *Kennedy v. Morgan*, his claim was based on the allegation of

> fear of continued harassment that rises to such a level as to inflict substantial emotional distress. Thus, under the facts presented in this situation, under [North Carolina General Statute Section] 50B-1(a)(2), a conclusion of law that an act of domestic violence has occurred required evidence and findings of the following: (1) [the d]efendant has or has had a personal relationship . . . with [the] plaintiff; (2) [the] defendant committed one or more acts upon [the] plaintiff or a minor child residing with or in the custody of [the] plaintiff; (3) the act or acts of [the] defendant placed [the] plaintiff or a member of her family or household in fear of imminent serious bodily injury *or* continued harassment . . . ; and (4) the fear rises to such a level as to inflict substantial emotional distress.

221 N.C. App. 219, 222, 726 S.E.2d 193, 195 (2012) (emphasis in original) (citations, brackets, ellipsis, and footnote omitted) (quoting N.C. Gen. Stat. § 50B-1 (2011)).

Plaintiff challenges the third and fourth elements required under North Carolina General Statute Section 50B-1(a)(2): the trial court's findings that "(3) the act or acts of [D]efendant placed [her] or a member of her family or household in fear of imminent serious bodily injury *or* continued harassment . . . [;] and (4) the fear rises to such a level as to inflict substantial emotional distress." *Id.* (emphasis in original) (citation, quotation marks, brackets, and ellipsis omitted).

Plaintiff first argues that "the record is wholly devoid of competent evidence to support the entry of the DVPO against [her]." Specifically, Plaintiff contends "[t]he record and . . . transcript are wholly devoid of evidence to support" the trial court's Finding of Fact 3, which reads:

> . . . Plaintiff placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress on . . . Defendant by going through . . . Defendant's phone and social media and other means to track him constantly, and alternately seeking and shunning his attention and affection.

Plaintiff does not challenge the trial court's other findings that she "is in possession of, owns or has access to firearms, ammunition, and gun permits being one . . . handgun[,]" and that she "made threats to commit suicide." "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012) (citation omitted).

The trial court found that "Plaintiff placed in fear of continued harassment that rises to such level as to inflict substantial emotional distress on . . . Defendant *by going through . . . Defendant's phone and social media and other means to track him constantly, and alternately seeking and shunning his attention and affection*." (Emphasis added.) We note that Plaintiff does not claim the evidence fails to support the finding that she went "through the Defendant's phone and social media" or that she was "alternately seeking and shunning his attention and affection." And the evidence does abundantly support these portions of the findings. Plaintiff contends that the evidence does not support the portion of the finding that she used the information from his phone or social media "to track him constantly."

In *Moorhead v. Moorhead*, this Court addressed the findings required for harassment, the "second statutory definition of domestic violence:"

> [The p]laintiff sought and was granted a DVPO under the second statutory definition of domestic violence: placing the aggrieved party or a member of the aggrieved

> party's family or household in fear of continued harassment, as defined in North Carolina General Statute Section 14-277.3A, that rises to such a level as to inflict substantial emotional distress. N.C. Gen. Stat. § 50B-1(a)(2) (2023). Section 14-277.3A delineates the criminal offense of "stalking" and includes the following definition pertinent to this appeal:
>
> > (2) Harasses or harassment. — Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and *that serves no legitimate purpose*.
>
> N.C. Gen. Stat. § 14-277.3A(b)(2) (2023) (emphasis added). Under these statutes, the trial court must make findings of fact regarding the defendant's conduct, the effect of the conduct on the plaintiff, and whether the defendant's conduct serves no legitimate purpose. We review the findings of fact to determine if they are supported by competent evidence, and we defer to the trial court's assessment of the defendant's credibility and whether the defendant's actions served no legitimate purpose.

296 N.C. App. 90, 94, 909 S.E.2d 327, 330-31 (2024) (citations, quotation marks, and brackets omitted).

Plaintiff argues that there was no evidence that she had "tracked" Defendant, even if the evidence did show that she had "gone through Defendant's phone and social media." Plaintiff is correct; Defendant did not contend that Plaintiff had tracked him. Defendant also did not testify at the hearing about some of the allegations in his complaint. For example, he did not present any evidence to support his allegations that Plaintiff had broken or thrown something or broken glass in the shower.

The definition of "harassment" applicable under North Carolina General Statute Section 50B-1 is more than conduct that is irritating or annoying, even if the conduct causes "substantial emotional distress[.]" N.C. Gen. Stat. § 50B-1(a)(2). Domestic violence requires "harassment, as defined in [North Carolina General Statute Section] 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]" *Id.* Harassment is

> [k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3A(b)(2) (2023). In *Moorhead*, the defendant contended his actions did not constitute "harassment" because he had a legitimate purpose for placing a tracker on the plaintiff's car, accessing security cameras in her home, and hiring a private detective to follow her. *See* 296 N.C. App. at 95, 909 S.E.2d at 331. The defendant claimed he had a legitimate purpose of monitoring the car's condition and making sure the plaintiff did not expose their children to any dangerous people. *See id.* But this Court did not affirm the trial court's finding of harassment based only on the defendant's acts of placing a tracker on the car or his obtaining information about the plaintiff using the camera or an investigator; the relevant findings were about the absence of a legitimate purpose for the defendant's actions *and* his use of information he obtained to harass the plaintiff:

> As the trial court found, it was not simply – or even primarily – [the d]efendant's placement of a tracking device on [the p]laintiff's car, his hiring of a private investigator to monitor [the p]laintiff, or his access of security cameras inside [the p]laintiff's home that formed the gravamen of his harassment of [the p]laintiff. As the trial court found, [the d]efendant used the information he uncovered to harass [the p]laintiff by email, in-person confrontation, text, and phone calls.
>
> . . . .
>
> The trial court found [the d]efendant used the information he obtained from the investigator to let [the p]laintiff know he knew where she was traveling or that he had seen [the p]laintiff's boyfriend playing volleyball with the parties' children inside [the p]laintiff's home. *[The p]laintiff's testimony that those communications made her feel "unsafe," "panicked," and harassed was competent*

> *evidence for the trial court to consider*. The determination that [the d]efendant's acts – communicating that he knew where [the p]laintiff was and what was occurring in the privacy of her home – served no legitimate purpose was reserved for the finder of fact, and there was competent evidence to support it.

Id. at 94-97, 909 S.E.2d at 331-32 (emphasis added) (citation, quotation marks, brackets, and emphasis omitted).

In *Moorhead*, the plaintiff also "testified about the fear and anxiety she experienced because of [the d]efendant's communications[.]" *Id.* at 98, 909 S.E.2d at 333. Here, Defendant did not testify about any fear or anxiety caused by Plaintiff going through his cell phone. Instead, he testified that this was a breach of trust:

> We agreed to have shared phones, and so I did. You know, she had entire access to my phone, but I don't expect to wake up at 4:00 a.m. and find you on the toilet reading my phone, you know. I should be able to have private conversations with my brother and things like that. I don't know. I felt like that was a bridge too far.

Unlike *Moorhead*, here the trial court made no findings regarding whether Plaintiff's conduct of going through Defendant's phone or social media served a legitimate purpose. And even if we assume that Plaintiff had no legitimate purpose to go through Defendant's phone and social media, the trial court made no findings about the effect on Defendant or how Plaintiff used any information she may have obtained. There is also no evidence and no finding that Defendant was "torment[ed], terrorize[d], or terrifie[d,]" N.C. Gen. Stat. § 14-277.3A(b)(2), solely by Plaintiff's action of "going through Defendant's phone and social media." Thus, the trial court's finding that Plaintiff had "track[ed] him constantly" and that this "tracking" him constituted "continued harassment that rises to such a level as to inflict substantial emotional distress" was not supported by the evidence. However, the trial court's other findings of fact are unchallenged, so we must consider whether the remaining findings support the trial court's conclusion of an act of domestic violence.

B. Conclusion of Law of Acts of Domestic Violence

Plaintiff next argues that even if supported by competent evidence, "the trial court[']s findings of fact were insufficient to support its conclusions of law." The trial court made the following conclusions of law: "1. . . . Plaintiff has committed acts of domestic violence against . . .

Defendant"; and "2. [t]here is danger of serious and immediate injury to . . . Defendant."

Plaintiff contends the "only 'act' " the trial court found that "Plaintiff committed" was " 'going through . . . Defendant's phone and social media . . . , and alternately seeking and shunning his attention and affection.' " Such finding, Plaintiff claims, was not sufficient to support the trial court's conclusion that an act of domestic violence occurred under North Carolina General Statute Section 50B-1(a)(2). But the trial court did make other findings, so we must consider all the unchallenged findings and the findings supported by the evidence to determine if they support the trial court's conclusions of law.

Unlike a trial court's findings of fact, "conclusions of law are reviewable *de novo* on appeal." *Bunting v. Bunting*, 266 N.C. App. 243, 249, 832 S.E.2d 183, 188 (2019) (citation and quotation marks omitted).

Under Section 50B-1(a) of our North Carolina General Statutes,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> > (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
> >
> > (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [North Carolina General Statute Section] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
> >
> > (3) Committing any act defined in [North Carolina General Statute Sections] 14-27.21 through . . . 14-27.33.

N.C. Gen. Stat. § 50B-1(a). North Carolina General Statute Section 50B-3 designates that "[i]f the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2023). "Although [North Carolina General Statute Section] 50B-3(a) states that the trial court must 'find' that an act of domestic violence has occurred, in fact this is a conclusion of law[.]" *Kennedy*, 221 N.C. App. at 223 n.2, 726 S.E.2d at 196 n.2.

> The conclusion of law must be based upon the findings of fact. While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the act of domestic violence.

Id. at 223-24, 726 S.E.2d at 196 (citations and quotation marks omitted).

Here, the trial court concluded “Plaintiff has committed acts of domestic violence against . . . Defendant[]” and that “[t]here is danger of serious and immediate injury to . . . Defendant.” The trial court granted Defendant protections from Plaintiff under Section 50B-1(a)(2), finding that she “placed [Defendant] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]” As noted above, “harassment” is “[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.” N.C. Gen. Stat. § 14-277.3A(b)(2).

> Thus, to support a conclusion of law that an act of domestic violence has occurred due to harassment, . . . there must also be evidence . . . that [a party]’s acts (1) were knowing, (2) were directed at a specific person, . . . (3) tormented, terrorized, or terrified the person, . . . and (4) served no legitimate purpose.

Kennedy, 221 N.C. App. at 222, 726 S.E.2d at 195-96 (citation, quotation marks, and brackets omitted).

We have already determined that a portion of Finding of Fact No. 3 is not supported by the evidence, at least to the extent the trial court found Plaintiff was “tracking” Defendant using information from his phone or social media. We must therefore consider whether the remaining findings can support the trial court’s conclusion of law that an act of domestic violence occurred.

The part of Finding No. 3 supported by the evidence is that Plaintiff was “going through the Defendant’s phone and social media and other means . . . and alternately seeking and shunning his attention and affection.” The unchallenged findings are that Plaintiff “is in possession of, owns or has access to firearms, ammunition, and gun permits being one . . . handgun[,]” and that she “made threats to commit suicide.” Although the trial court did not specifically identify Plaintiff’s ownership of guns or her suicide attempts as causing Defendant to be “in fear of continued harassment that rises to such a level as to inflict substantial emotional distress,” we conduct *de novo* review to determine if these findings, along with the supported portions of Finding No. 3, support the conclusion of law.

North Carolina General Statute Section 50B-3.1(a) specifically addresses a "[t]hreat[] to commit suicide" as one of the factors which will support an order requiring the perpetrator of domestic violence to be required to surrender firearms. *See* N.C. Gen. Stat. § 50B-3.1(a) ("Required Surrender of Firearms.-- Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors: . . . (3) Threats to commit suicide by the defendant."). Our cases have normally addressed findings regarding threats to commit suicide in the context of a challenge to the trial court's order requiring a defendant to surrender firearms, but in those cases, a threat to commit suicide, particularly in the presence of the other party to the domestic violence case, may be part of the harassment of the victim. *See, e.g.*, *Moorhead*, 296 N.C. App. at 99, 909 S.E.2d at 333-34.

In the context of a criminal case, our Supreme Court has noted that threats to commit suicide can be a "component" of "terroristic threats[.]" *See State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 406 (1986) ("Although we have found no cases in which threatening to commit suicide has alone been held to constitute terrorizing, the threat of suicide was a component in a Minnesota case in which the defendant was convicted of terroristic threats after making phone calls to his former wife's sister threatening to kill the former wife, the wife's fiance, and himself if his former wife and her fiance got married."). Certainly, attempted suicide and threats of suicide do not serve a legitimate purpose, so we must consider whether Plaintiff's suicide threats may be considered as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person[.]" N.C. Gen. Stat. § 14-277.3A(b)(2).

Based on the evidence here, Plaintiff's purpose in her suicide attempts or threats was to torment or terrorize Defendant—the evidence showed that she had attempted or threatened suicide at least twice in response to the parties breaking up. The parties had been through this same type of situation before more than once. The evidence showed that Plaintiff had threatened suicide on "two occasions" when the parties had broken up. The first suicide attempt occurred when Plaintiff had "OD'd on Baclofen" after Defendant discovered Plaintiff had been unfaithful to him at a work conference. A year later, Defendant was "in her car when she had the revolver to her chest" and Plaintiff said that if Defendant left her, "[she] ha[d] nothing to live for." Based on these events, Defendant testified that he had "concerns about her mental health" when the two of them broke up, and he had these same concerns when they broke up in March of 2024.

The trial court's findings of Plaintiff's suicide attempts and gun ownership, along with her actions of "going through . . . Defendant's phone and social media" and "alternately seeking and shunning his attention and affection" support the trial court's conclusion that an act of domestic violence based on Plaintiff's acts occurred. And Plaintiff's acts were: (1) "[k]nowing"; (2) "directed at a specific person"; (3) "torment[ed], terrorize[d], or terrifie[d] that person"; and (4) "serve[d] no legitimate purpose." *Id.*

Plaintiff does not contend that she did not threaten or attempt suicide in response to prior break-ups. She argues instead that the evidence only gives a "vague timeline" of these events and that they "appeared to have taken place during the course of the parties (sic) relationship and relate solely to his dissatisfaction with the relationship and not to anything amounting to domestic violence pursuant to [Section] 50B." But Plaintiff also acknowledges that the evidence shows that one of the suicidal events was in August of 2022 and the other was "prior to the August 2022 incident." Essentially, Plaintiff argues her suicide attempts are not really relevant because they occurred long ago. But the trial court is the sole judge of the weight and credibility of the evidence, and Plaintiff did not challenge the trial court's finding that she was "alternately seeking and shunning [Defendant's] attention and affection" and that she had attempted suicide. We cannot substitute our judgment for that of the trial court. *See Crenshaw v. Crenshaw*, 296 N.C. App. 1, 21, 907 S.E.2d 743, 755 (2024) ("The trial court, as the fact finder, is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court." (citation and quotation marks omitted)).

The evidence overall showed a long pattern of break-ups and reconciliations and much emotional drama on both sides of the relationship during the entire four years. Defendant testified that they had broken up about seven times, and Plaintiff had threatened suicide in relation to two of those incidents. Based on the evidence, Plaintiff's suicide attempts were directed at Defendant and seeking to force him not to leave her. The overdose occurred after Defendant had learned of Plaintiff's infidelity. She threatened to kill herself by pointing a gun at her chest in a car, in Defendant's presence, because she would have "nothing to live for" if they broke up. She threatened to shoot herself only inches away from Defendant because they were breaking up. Both attempts arose from the potential end of the parties' relationship. The fact that Plaintiff still owned guns also supports the trial court's conclusion, as one of Plaintiff's suicide attempts involved use of a gun. The trial court properly considered this context in finding harassment as the suicide threats and attempts were (1) "[k]nowing"; (2) "directed at a specific person"; (3) "torment[ed], terrorize[d], or terrifie[d] that person"; and (4) "serve[d] no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2). The trial court's conclusion of law as to an act of domestic violence was therefore supported by the unchallenged and supported findings of fact.

C. Mutual DVPOs

[2] Though we conclude that all but one portion of one of the trial court's findings were supported by competent evidence, and the remaining findings did support the trial court's conclusion of law as to the commission of an act of domestic violence, we must remand for the trial court to make additional findings of fact. The trial court clearly intended to enter mutual DVPOs but did not make statutorily required findings to support such entries of mutual DVPOs.

Here, the trial entered two orders: a DVPO against Defendant and a DVPO against Plaintiff. Both included essentially the same decree provisions as to protection. The trial court rendered its rulings on Plaintiff's DVPO and Defendant's DVPO at the same time, at the close of the hearing on Plaintiff's claim and Defendant's counterclaim. The trial court also filed the two DVPOs at the same time on 30 April 2024 at 5:14 pm. Two days later, the trial court filed Defendant's Amended DVPO, which is the order on appeal, but the Amended DVPO does not have any differences relevant to this appeal from Defendant's DVPO filed on 30 April 2024. Plaintiff's DVPO entered against Defendant was filed using a standard AOC domestic violence order form, but the DVPO entered against Plaintiff was not on the standard form. Though not filed using the standard AOC form, Defendant's DVPO against Plaintiff included essentially the same language as to the findings of fact and conclusions of law and other provisions as used on the standard AOC domestic violence order form.

According to the hearing transcript, the trial court entered these orders in this manner because the standard AOC domestic violence order form, AOC-CV-306, Rev. 3/22, does not have check boxes or preprinted language required for entry of mutual DVPOs. The trial court explained this at the hearing's conclusion:

> Now, the form of the order in favor of [Defendant] against [Plaintiff] is problematic because *it doesn't fit the form*. Okay? As a matter of practicality it would have been better had you filed a separate action seeking 50B relief. You're certainly entitled to do it the way you did it. The Rules of Civil Procedure, Rule 2 provides there's one form of action and Rule 18 provides you join any forms of action. So legally you're absolutely correct. *Only [problem] is it won't fit in the computer. Now, I have prepared with the Clerk's assistance an order in favor of [Defendant] against [Plaintiff] but the order identifies him as the plaintiff and her as the defendant and that can be very confusing*. Here's that order. You've got to fix it.

(Emphasis added.)

As a general rule, trial courts use the standard AOC domestic violence order form to help ensure compliance with statutory requirements. It also allows for easy entry of domestic violence orders into the National Crime Information Center registry.

> (c) A copy of any order entered and filed under this Article shall be issued to each party. Law enforcement agencies shall accept receipt of copies of the order issued by the clerk of court by electronic or facsimile transmission for service on defendants. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence.
>
> . . . .
>
> (c1) When a protective order issued under this Chapter is filed with the Clerk of Superior Court, the clerk shall provide to the applicant an informational sheet developed by the Administrative Office of the Courts that includes:
>
> (1) Domestic violence agencies and services.
>
> . . . .
>
> (d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis.

N.C. Gen. Stat. § 50B-3(c)-(d).

But the standard AOC domestic violence order form contemplates only one claim per file number and only one order against one defendant. Or as the trial court put it: the problem with addressing both a claim and counterclaim for DVPO in the same order and file number is that "it doesn't fit the form." In addition, the trial court noted that mutual DVPOs in the same case "won't fit in the computer."

Here, we must first determine whether the trial court's orders, read together, constitute mutual DVPOs as contemplated by North Carolina General Statute Section 50B-3(b). That provision does not explicitly define a "mutual" DVPO, but it does describe what "mutual" protective orders must include:

> Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

N.C. Gen. Stat. § 50B-3.

Here, both parties filed a claim for a DVPO under North Carolina General Statute Section 50B-3. The statute provides that protective orders "shall not be mutual in nature" except under certain circumstances. The term "shall" is mandatory, so for the trial court to enter "mutual" DVPOs, it must comply with this statute. *See Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 863, 821 S.E.2d 755, 761 (2018) ("As used in statutes, the word 'shall' is generally imperative or mandatory." (citation and quotation marks omitted)). Although Defendant filed his claim as a counterclaim to Plaintiff's complaint, Defendant clearly filed a claim for a DVPO under North Carolina General Statute Section 50B-3. Thus, the first condition for "mutual" orders, that "both parties file a claim[,]" has been satisfied in this case.

Since the term "mutual" is not defined by the statute, we use the word's ordinary meaning. *See Regional Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990) ("Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." (citation omitted)). Black's Law Dictionary defines "mutual" as "[g]enerally, directed by each toward the other or others; reciprocal." *Mutual*, Black's Law Dictionary (12th ed. 2024). Under this definition, based on the language of the trial court's orders and the context of this action, we conclude the two DVPO orders are mutual DVPOs.

The language in Defendant's DVPO and Defendant's Amended DVPO indicates both claims were heard on 30 April 2024 "based upon . . . Plaintiff's claim for Domestic Violence *and* . . . Defendant's counterclaim for Domestic Violence." (Emphasis added.) Although the two claims for DVPO could have been filed separately, as the trial court correctly noted, the claims were in the same action. The manner of filing the claims, in the same file number as a claim and counterclaim or as separate claims, does not alone determine whether the DVPOs are mutual DVPOs. But here, where both Plaintiff's claim for protection and Defendant's counterclaim for protection were heard on the same date and the trial court granted reciprocal protections to both parties after considering evidence presented at this hearing, we conclude these orders were mutual DVPOs.

The second requirement for "mutual" DVPOs is that the trial court must make "detailed findings of fact indicating that both parties acted as aggressors" and "that neither party acted primarily in self-defense." *See* N.C. Gen. Stat. § 14-277.3A(b)(2). Further, these are findings the trial court "*shall*" make, *id.* (emphasis added), so these findings are mandatory for the entry of mutual DVPOs.

In Defendant's DVPO, the trial court found Plaintiff went "through . . . Defendant's phone and social media[,]" and was "alternately seeking and shunning his attention and affection." In Plaintiff's DVPO, the trial court found Defendant "repeatedly text[ed] and phon[ed] . . . [Plaintiff], including from disguised numbers, after the parties' breakup and after being asked not to contact [Plaintiff,]" along with "going to her house uninvited on at least [two] occasions after their breakup." These findings address only the events surrounding their breakup and do not clearly address either party acting as an "aggressor." There was no evidence of self-defense presented, but the trial court did not make a finding that "neither party acted primarily in self-defense."

We note that the requirement for findings regarding acting as an "aggressor" and not acting in self-defense may be easier to apply in cases where domestic violence is alleged based on a party's attempt "to cause bodily injury, or intentionally causing bodily injury[,]" or "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury." N.C. Gen. Stat. § 50B-1(a). What qualifies as "aggression" or "self-defense" is less clear in the context of domestic violence committed by acts of "harassment, as defined in [North Carolina General Statute Section] 14-277.3A, that rises to such a level as to inflict substantial emotional distress." *Id.*

North Carolina General Statute Section 50B-1 does not define "aggressor," so we apply that term's ordinary dictionary definition. Merriam-Webster defines "aggressor" as "one that commits or practices aggression." *Aggressor*, Merriam-Webster's Collegiate Dictionary (11th ed. 2007). Merriam-Webster then defines "aggression" as (1) "a forceful action or procedure (as an unprovoked attack) esp[ecially] when intended to dominate or master"; (2) "the practice of making attacks or encroachments"; or (3) "hostile, injurious, or destructive behavior or outlook esp[ecially] when caused by frustration[.]" *Aggression*, Merriam-Webster's Collegiate Dictionary (11th ed. 2007).

The evidence presented here could support a finding that both parties acted as aggressors, particularly under the third definition: "hostile, injurious, or destructive behavior or outlook esp[ecially] when caused by frustration." *Id.* In fact, considering the findings in both DVPOs, the findings could indicate that the trial court found that both parties acted as aggressors in harassing the other to the extent that they each inflicted substantial emotional distress upon the other. But the trial court did not make "detailed" findings on this factor, and because the trial court is the sole judge of the weight and credibility of the evidence, remand is necessary for the trial court to consider whether the evidence supports the required findings for mutual DVPOs.

The last requirement for mutual DVPOs is that "the right of each party to due process is preserved." N.C. Gen. Stat. § 50B-3(b). Plaintiff does not argue on appeal that her right to due process was impaired. Both parties received a full hearing on their respective domestic violence claims. *See Holder v. Kunath*, 244 N.C. App. 605, 609, 781 S.E.2d 806, 808 (2016) ("[North Carolina General Statute Section] 50B-3(b) . . . which governs the granting of mutual DVPOs when, as here, both parties have filed motions, states that the court must ensure that 'the right of each party to due process is preserved' before entering mutual orders. Under both the federal and state constitutions, 'the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' " (citation and brackets omitted)). Thus, Plaintiff's right to due process was preserved in this case.

In reading the trial court's orders together, these orders were intended to be mutual DVPOs, granting reciprocal protections requested by claims filed by each party at the same time after a full hearing on both the claim and counterclaim. Because the trial court did not make the required findings under North Carolina General Statute Section 50B-3 to support entry of mutual DVPOs, we must vacate the trial court's order granting Defendant protection against Plaintiff and remand for entry of a new order including findings as required by North Carolina General Statute Section 50B-3 based on the evidence presented at the hearing on 30 April 2024. In particular, if the trial court determines that such findings are warranted, it must make "detailed findings of fact indicating that both parties acted as aggressors" and findings "that neither party acted primarily in self-defense." N.C. Gen. Stat. § 50B-3(b). On remand, the trial court shall make any findings of fact it deems supported by the evidence; this opinion does not require entry of a new DVPO. If the trial court is unable to make the required "detailed findings of fact" supporting entry of a mutual DVPO, the trial court may enter an order denying the DVPO.

We recognize that the end result could be that although we have determined that the trial court would not have erred in entering a DVPO against Plaintiff if Defendant's claim had been brought independently, the DVPO may ultimately fail because it was entered as part of a mutual DVPO. This case is also complicated by the fact that Defendant did not appeal the DVPO entered against him, so that DVPO remains undisturbed[1] regardless of the result on remand of Defendant's Amended DVPO against Plaintiff. Defendant did not appeal Plaintiff's DVPO entered against him so this Court has no jurisdiction to review it and this opinion has no effect on that DVPO.

We also appreciate the trial court's frustration with the inadequacy of the standard AOC domestic violence order form, AOC-CV-306, Rev. 3/22, based on the need for the findings required by statute and for the information in the DVPO to "fit in[to] the computer." *See* N.C. Gen. Stat. §§ 50B-3(c)-(d). Although North Carolina General Statute Section 50B-3 was amended in 1996 to add the requirements for specific findings for entering mutual DVPOs, *see* N.C. Sess. Laws 1995-591, the standard AOC domestic violence order form, Form AOC-CV-306, Rev. 3/22, has not been revised nor has a new form been created to facilitate entry of mutual DVPOs under North Carolina General Statute Section 50B-3. Revision of Form AOC-CV-306, Rev. 3/22, or adoption of a new form for entry of mutual DVPOs would likely be of great assistance to our

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1. We recognize that both DVPOs may have expired one year after the date of entry, unless renewed under North Carolina General Statute Section 50B-3(b). *See* N.C. Gen. Stat. § 50B-3(b) ("Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years[.]"). But for the same reasons this appeal is not moot, even if Defendant's Amended DVPO has expired and has not been extended, the trial court is required to enter a new order as directed by this opinion.

trial courts, parties seeking protection from domestic violence, and law enforcement agencies who must register and enforce these orders.

III. Conclusion

The trial court's findings were supported by competent evidence except for the portion noted above, and the remaining findings support the conclusion that Plaintiff committed an act of domestic violence under North Carolina General Statute Section 50B-1. But because the two DVPOs were mutual DVPOs under North Carolina General Statute Section 50B-3(b), the DVPO on appeal was required to include "detailed findings of fact indicating that both parties acted as aggressors," and "that neither party acted primarily in self-defense." N.C. Gen. Stat. § 50B-3(b). The DVPO on appeal did not include these findings so we vacate the order and remand for entry of a new order based on the evidence presented at the hearing on 30 April 2024, including appropriate findings and granting appropriate relief based on those findings.

VACATED AND REMANDED.

Judges ZACHARY and COLLINS concur.

GUADALUPE SOLIS-SANTOS, Plaintiff
v.
JAMES THOMAS LESTER III AND PRIME DEMOLITION AND CONTRACTING, LLC, Defendants

No. COA25-7

Filed 5 November 2025

1. Workers' Compensation—exclusivity provision—workplace personal injury—special employee doctrine

In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by an employee of defendant demolition company—the trial court properly dismissed plaintiff's claim against defendant company as barred by the exclusivity provision of the Workers' Compensation Act. For purposes of the Act, plaintiff was a special employee of defendant company because: (1) an implied contract of hire existed between plaintiff and defendant company (the special employer) where plaintiff was assigned to work under the special employer's supervision and nothing in plaintiff's contract with the temporary staffing firm precluded him from also being employed by the special employer; (2) the work being done at the time of plaintiff's injury was essentially that of the special employer; and (3) the special employer had the right to control the details of plaintiff's work.

2. Workers' Compensation—exclusivity provision—workplace personal injury—Pleasant claim

In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by the individual defendant (an employee of defendant demolition company)—the trial court properly dismissed plaintiff's claim against the individual defendant as barred by the exclusivity provision of the Workers' Compensation Act. Plaintiff (a special employee of defendant company for purposes of the Act) and the individual defendant were co-employees of defendant company when plaintiff sustained his injuries; accordingly, defendant could only sustain a tort claim against the individual defendant for willful, wanton, reckless acts, as set forth in *Pleasant v. Johnson*, 312 N.C. 710 (1985). The evidence forecast by plaintiff—that the individual defendant had only received "on-the-job" training in operating a skid steer and was not provided with manuals, guidelines, or procedures for securing loads—sounded in negligence and thus could not meet the high bar required by *Pleasant*.

3. Jurisdiction—workplace personal injury—Civil Procedure Rule 12(b)—dismissal with prejudice

In a tort proceeding arising from workplace injuries sustained by plaintiff (an employee of a specialized temporary staffing firm)—allegedly as the result of actions by the individual defendant (an employee of defendant demolition company)—while the trial court properly dismissed plaintiff's claim against the individual defendant as barred by the exclusivity provision of the Workers' Compensation Act, the dismissal should have been without, rather than with, prejudice; the trial court lacked the jurisdiction or authority to adjudicate the matter. Accordingly, the case was remanded for the entry of an order dismissing without prejudice.

Appeal by plaintiff from order entered 6 September 2024 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 12 August 2025.

A.G. Linett & Associates, PA, by Adam G. Linett and Eliu F. Mendez, and Hill, Peterson, Carper, Bee & Deitzler, PLLC, by C. Michael Bee, pro hac vice, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by Luke A. Dalton, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Guadalupe Solis-Santos appeals from the trial court's order granting Defendants James Thomas Lester, III, and Prime Demolition and Contracting, LLC's motion to dismiss Plaintiff's amended complaint with prejudice pursuant to N.C. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. We conclude that the trial court properly determined that the Workers' Compensation Act provided the exclusive remedy for Plaintiff's workplace injuries, thereby depriving the court of subject-matter jurisdiction over Plaintiff's civil claims. However, the court erred by dismissing Plaintiff's amended complaint with prejudice. After careful review, we affirm in part but vacate that portion of the trial court's order dismissing Plaintiff's amended complaint with prejudice and remand for entry of an order dismissing Plaintiff's amended complaint without prejudice.

I. Background

Global Environmental Control III, Inc. ("Global") is a staffing company that provides temporary workers with skilled-labor specialties to other companies. Prime Demolition and Contracting, LLC ("Prime Demolition") is a company that focuses on structural demolition and interior strip-outs.

In November 2019, Global and Prime Demolition entered into a General Staffing Agreement ("the Staffing Agreement") pursuant to which Global would provide Prime Demolition with skilled temporary employees upon request. The Staffing Agreement provided, *inter alia*, that Global would assign employees to Prime Demolition; pay the assigned employees' wages and provide benefits; and "handle unemployment and workers' compensation claims involving [a]ssigned [e]mployees." Prime Demolition would "[p]roperly supervise [a]ssigned [e]mployees performing its work" and "[p]roperly supervise, control, and safeguard its premises, processes, or systems."

In 2021, a third party contracted with Prime Demolition for a project that involved conducting an interior strip-out of a former skating rink in order to convert it to a school. To meet its labor needs, Prime Demolition requested temporary workers from Global to assist in the requisite demolition work. In response to the request, Global directed multiple employees—including Plaintiff—to the Prime Demolition project site. Plaintiff is certified in demolition work and asbestos removal.

On 8 March 2021, while working at the job site, Plaintiff was instructed to assist in transporting a tall metal light tower that an electrician had left on the skating-rink floor. Prime Demolition employee James Thomas Lester, III, used a skid steer to move the light tower while Plaintiff held the light tower steady. As Lester slowly moved the light tower forward, Plaintiff released his grip on it to move some cables on the floor. The light tower then toppled from the skid steer. The light tower hit Plaintiff on his head and left side, knocking him to the ground. Plaintiff suffered serious injuries and sought medical care.

On 25 October 2021, the North Carolina Industrial Commission approved the settlement agreement resolving Plaintiff's workers' compensation claim against Global for $67,500.

On 17 May 2023, Plaintiff filed a complaint against Prime Demolition and Defendant Johnny Welker alleging negligence; gross negligence; negligent hiring, supervision, or retention; and a *Pleasant* claim. On 27 July 2023, Johnny Welker and Prime Demolition each filed an answer. In September 2023, Plaintiff filed a motion for leave to amend his complaint to name James Thomas Lester, III, as a defendant, to remove Johnny Welker as a defendant, and to correct the address at which the incident occurred. The trial court entered a consent order on 28 September 2023 granting Plaintiff's motion and Plaintiff filed his amended complaint the next day.

Prime Demolition and Defendant James Thomas Lester, III, each filed an answer to Plaintiff's amended complaint on 8 November 2023. On 21 December 2023, Plaintiff voluntarily dismissed his complaint against Johnny Welker.

On 13 August 2024, Defendants filed a motion to dismiss Plaintiff's amended complaint pursuant to N.C. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction "due to the exclusivity of the North Carolina Workers Compensation Act." The motion to dismiss came on for hearing in Forsyth County Superior Court on 19 August 2024. On 6 September 2024, the trial court entered an order granting Defendants' motion to dismiss and dismissing Plaintiff's amended complaint with prejudice.

Plaintiff timely filed notice of appeal.

II. Discussion

Plaintiff argues that the trial court erred by granting Defendants' Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. Plaintiff contends that his claims are not barred by the exclusivity provision of the Workers' Compensation Act in that he was not an employee of Prime Demolition; he was not a coworker of Lester; and even if he were, Lester engaged in willful, wanton, or reckless conduct at the job site, causing Plaintiff's injuries and entitling him to pursue his *Pleasant* claim. We disagree.

A. Standard of Review

"An appellate court's review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is de novo, except to the extent the trial court resolve[d] issues of fact, and those findings are binding on the appellate court if supported by competent evidence in the record." *Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) (cleaned up).

"Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Bassiri v. Pilling*, 287 N.C. App. 538, 543, 884 S.E.2d 165, 169 (2023) (citation omitted). "Also, unlike a Rule 12(b)(6) motion, consideration of matters outside the pleadings does not convert the Rule 12(b)(1) motion to one for summary judgment." *Id.* at 543–44, 884 S.E.2d at 169 (cleaned up).

B. Special-Employee Doctrine

[1] Plaintiff first argues that "the trial court erred in granting Defendants' motion to dismiss for lack of subject[-]matter jurisdiction in finding that [he] was an employee of Defendant Prime Demolition," thereby limiting Plaintiff's remedies to those provided under the Workers' Compensation Act.

"The issue of whether [a] plaintiff's claim is barred by the Workers' Compensation Act is a question of subject[-]matter jurisdiction." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988). As our Supreme Court has noted, "[t]he [s]uperior [c]ourt is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute." *Morse v. Curtis*, 276 N.C. 371, 374–75, 172 S.E.2d 495, 498 (1970); *see also* N.C. Gen. Stat. § 7A-240 (2023). "By statute the

[s]uperior [c]ourt is divested of original jurisdiction of all actions which come within the provisions of the [Workers'] Compensation Act." *Morse*, 276 N.C. at 375, 172 S.E.2d at 498. Thus, "[i]n general, the provisions of the Workers' Compensation Act are the exclusive remedy in the event of an employee's injury by accident in connection with his or her employment." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 737, 796 S.E.2d 529, 532 (cleaned up), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017); *see also* N.C. Gen. Stat. § 97-10.1.

The Act defines the term "employee" as including "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." N.C. Gen. Stat. § 97-2(2). Our Court has determined that "special employees" may be treated the same as workers who meet the Act's definition of "employee." *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 459, 204 S.E.2d 873, 876–77, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1974). As such, special employees and employees are similarly subject to the jurisdictional limitations of the Act's exclusivity provision. *Id.*

Under the special-employee doctrine, "a general employee of one [employer] can also be the special employee of another [employer] while doing the latter's work and under his control." *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360 (citation omitted), *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995). The employer and special employer then have joint liability under the Act, which "provides the plaintiff-employee with two separate potential sources of workers' compensation benefits. However, under the special employment doctrine, the employee's receipt of workers' compensation benefits from either employer bars the employee from proceeding at common law against either of the employers." *Taft v. Brinley's Grading Servs., Inc.*, 225 N.C. App. 502, 506, 738 S.E.2d 741, 744 (2013) (citations omitted).

Our Court has applied the three-prong *Collins* test for determining whether a worker is a special employee under the employ of a special employer:

> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

Whicker v. Compass Grp. USA, Inc., 246 N.C. App. 791, 797, 784 S.E.2d 564, 569, *disc. review denied*, 369 N.C. 69, 793 S.E.2d 228 (2016); *see also Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876.

In the present case, Plaintiff asserts that "[u]nder the facts of this particular case, particularly in light of the detailed [Staffing Agreement], it is clear that Prime [Demolition] cannot claim the exclusivity provisions of the [Workers' Compensation] Act as [Plaintiff's] 'special employer.' " We disagree.

1. *First Prong of the* Collins *Test: Express or Implied Contract*

"As our Supreme Court has observed, employment . . . is a matter of contract." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 413, 677 S.E.2d 485, 493 (cleaned up), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009). In the case at bar, it is undisputed that there was no express contract of hire between Plaintiff and Prime Demolition. Accordingly, the issue is limited at this juncture to whether there was an implied contract of hire between Plaintiff and Prime Demolition.

"An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Whicker*, 246 N.C. App. at 798, 784 S.E.2d at 570 (citation omitted). This Court has concluded that an implied contract existed between an employee and a special employer where the employee "accepted the assignment from [the temporary employment agency] and performed the work at the direction and under the supervision of [the special employer]." *Brown*, 119 N.C. App. at 760, 460 S.E.2d at 360.

Here, Plaintiff maintains that the Staffing Agreement supports his contention that he was not a special employee of Prime Demolition. However, in the cases cited by Plaintiff, the contracts expressly provided that the worker in question was employed *solely by the general employer*. *See Taft*, 225 N.C. App. at 508, 738 S.E.2d at 745–46 (where the express contract stated that "all of the personnel assigned by [the general employer] to [the special employer]'s business in order to fill the relevant job positions are employees of [the general employer] and only [the general employer]" and the president of the special employer "conceded that, pursuant to the [express contract], [the plaintiff] was solely an employee of [the general employer]"); *Gregory v. Pearson*, 224 N.C. App. 580, 586, 736 S.E.2d 577, 581 (2012) (where the express contract stated that "temporary employees are not employees of the [special employer]"), *aff'd and ordered not precedential*, 367 N.C. 315, 754 S.E.2d 416 (2014)[1]; and *Shelton*, 197 N.C. App. at 412, 677 S.E.2d at 492 (where the express contract between the general employer and special employer stated that workers "will be employees of the [general employer]" and the "record contain[ed] extensive evidence from various witnesses, including [the special employer]'s Human Resources Manager, identifying [the plaintiff] as an employee of [the general employer] and not an employee of [the special employer]").

In the instant case, there is no contractual provision declaring that Plaintiff was *solely* the employee of Global. The Staffing Agreement did not expressly retain the temporary employees as Global's employees or preclude them from also being employed by Prime Demolition. Plaintiff accepted an assignment to work for and under the supervision of Prime Demolition. Consequently, there was competent evidence supporting the trial court's finding that an implied contract existed between Plaintiff and Prime Demolition.

Moreover, the record contains ample other evidence that Plaintiff and Prime Demolition had an implied employment contract. The owner/managing member of Prime Demolition provided an affidavit in which he stated: "On March 8, 2021, Plaintiff was performing work for Prime [Demolition] at the Project pursuant to an implied contract with Prime" Demolition. Additionally, in a deposition, Prime Demolition's owner/managing member answered affirmatively when asked: "Did you have any type of implied contract with [Plaintiff]?" and again confirmed that "Prime [Demolition] had [an] implied contract with [P]laintiff . . . on those days for that work."

Accordingly, we conclude that there was competent evidence to support the trial court's finding that "Plaintiff performed work for Prime [Demolition] at the Project pursuant to an implied contract with Prime" Demolition.

2. Second Prong of the **Collins** *Test: Type of Work*

The second prong of the *Collins* test requires that "the work being done is essentially that of the special employer." *Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876 (citation omitted). Here, it is uncontested that Plaintiff was injured while working for Prime Demolition at the Prime

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1. We note that, in addition to *Gregory*'s factual inapplicability to the case before us, our Supreme Court has held that the decision in *Gregory* "stands without precedential value." *Gregory v. Pearson*, 367 N.C. 315, 316, 754 S.E.2d 416, 416 (2014). Plaintiff's reliance upon *Gregory* is thus wholly inapposite.

Demolition job site. Thus, the second prong of the *Collins* test was satisfied as regards Plaintiff's special-employee status.

3. Third Prong of the **Collins** *Test: Control Over Work*

Plaintiff next contends that Prime Demolition's "limited supervision" of him was "insufficient" to meet the third prong of the *Collins* test.

As stated above, the third prong of the *Collins* test is whether "the special employer has the right to control the details of the work." *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569 (citation omitted). "This Court has stressed that the third prong, control of *the detail* of the work, may be the most significant." *Shelton*, 197 N.C. App. at 412, 677 S.E.2d at 492 (cleaned up); *see also Hayes v. Bd. of Trs. of Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944) ("The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.").

The Staffing Agreement provided that Prime Demolition would:

> a. Properly supervise [a]ssigned [e]mployees performing its work and be responsible for its business operations, products, services, and intellectual property;
>
> b. Properly supervise, control, and safeguard its premises, processes, or systems, and not permit [a]ssigned [e]mployees to operate any vehicle or mobile equipment, or entrust them with unattended premises, cash, checks, keys, credit cards, merchandise, confidential or trade secret information, negotiable instruments, or other valuables without [Global]'s express prior written approval or as strictly required by the job description provided to [Global];
>
> c. Provide [a]ssigned [e]mployees with a safe work site and provide appropriate information, training, and safety equipment with respect to any hazardous substances or conditions to which they may be exposed at the work site.

A former Global office manager explained that Prime Demolition had control over Plaintiff while he was at Prime Demolition's job site:

> Q. Once a worker is sent to the client, to the job site, does that -- let's talk about Prime [Demolition]. Does Prime [Demolition] then have control in managing that worker,

dictating what work is done, directing that worker to do certain job responsibilities?

. . . .

[A.] Yes, sir.

Q. Does Global have any say in what work is done at a specific job site?

. . . .

[A.] No.

Q. Okay. So, to be clear, [Plaintiff] was sent to the job site where Prime [Demolition] was working to do demo work, correct?

A. Yes, sir.

Q. Okay. When he was sent, did Global direct [Plaintiff] to do any specific demo work that day?

A. No, sir.

Q. Did Global direct [Plaintiff] to do any type of demo work anywhere on that job site?

A. No, sir.

Q. *The direction*, *control*, *and supervision* would have been by Prime [Demolition] to do that demo work at the job site?

A. Yes, sir.

. . . .

Q. Was it Global's understanding that once the worker was sent to a job site that the client, such as Prime [Demolition], would have *direct control and supervision* over that employee while that worker was doing the specific type of work they were looking for?

. . . .

[A.] Yes, sir.

. . . .

> Q. Since you had worked with Prime [Demolition] before while at Global, did you trust that Prime [Demolition] was *properly supervising*, *controlling*, *directing* the employees to do the proper work that they were retained to do or staffed to do?
>
> . . . .
>
> [A.] Yes, sir.

(Emphases added).

The owner/managing member of Prime Demolition testified at a deposition that Plaintiff "was just sent from Global as a laborer that we could use at our *control or direction*" and clarified that while Prime Demolition could not fire Plaintiff from Global, it "*had the authority to control* [its] particular job sites." (Emphases added). When asked whether "Prime [Demolition] *had the ability to control the details of* [Plaintiff]'s work," the owner/managing member responded: "Correct." (Emphasis added). The owner/managing member of Prime Demolition also stated in an affidavit that Plaintiff was loaned to Prime Demolition "to perform demolition work for Prime [Demolition] at the Project *under* [*Prime Demolition*]*'s direction and control*." (Emphasis added). At her deposition, Plaintiff's wife confirmed that she and her husband were "acting *under the supervision and control* of Prime Demolition" on 8 March 2021. (Emphasis added).

Here, there was plentiful evidence that the third prong of the *Collins* test was satisfied—that Prime Demolition had "the right to control the details of the work" that Plaintiff performed. *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569 (citation omitted). Accordingly, we conclude that the third prong of the *Collins* test was satisfied, and the trial court did not err in its findings that Plaintiff performed his work on 8 March 2021 under Prime Demolition's control.

Having satisfied the three prongs of the *Collins* test, we conclude that the court's findings of fact as to Prime Demolition's special-employer status are supported by competent evidence of record. The trial court did not err in determining that "Prime [Demolition] was Plaintiff's special employer," or that Plaintiff's remedies were limited to those provided by the Workers' Compensation Act. Therefore, the trial court lacked subject-matter jurisdiction over Plaintiff's claims against Prime Demolition.

C. Claims Against Coworker

[2] Plaintiff also argues that "the trial court erred in dismissing [his] claims against Defendant James Thomas Lester III."[2] Plaintiff first contends that because Prime Demolition was not his employer, Lester was not his co-employee and hence, Plaintiff's "negligence claims against . . . Lester were improperly dismissed." In the alternative, Plaintiff contends that if he and Lester were co-employees, the court erred by dismissing Plaintiff's *Pleasant* claim against Lester. We disagree.

To begin, the trial court properly determined that Prime Demolition was Plaintiff's special employer. There is no dispute that Lester was an employee of Prime Demolition. Thus, Plaintiff and Lester were co-employees when Plaintiff was injured at the Prime Demolition job site and Plaintiff's remedies were limited to those provided by the Workers' Compensation Act unless he could sufficiently allege a *Pleasant* claim.

Generally, the Workers' Compensation Act provides the exclusive remedy for an injured worker's workplace injuries. *Fagundes*, 251 N.C. App. at 737, 796 S.E.2d at 532. One "exception arises when a co-employee acts in a willful, wanton, and reckless manner"; in such cases, "an injured plaintiff [may] seek recovery from the co-employee in a common law action." *Trivette v. Yount*, 366 N.C. 303, 306, 735 S.E.2d 306, 308 (2012) (citing *Pleasant v. Johnson*, 312 N.C. 710, 716–17, 325 S.E.2d 244, 249–50 (1985)). However, a plaintiff "must clear a high bar in alleging and proving such a claim." *Est. of Baker v. Reinhardt*, 288 N.C. App. 529, 536, 887 S.E.2d 437, 444 (2023) (cleaned up).

In *Pleasant*, the plaintiff and the defendant were employees of the same company. 312 N.C. at 711, 325 S.E.2d at 246. One day, as the plaintiff was walking across a parking lot toward the employer's job site, a truck driven by the defendant struck the plaintiff and seriously injured his right knee. *Id.* The plaintiff received disability benefits under the Workers' Compensation Act and then filed an action against the defendant, claiming that his co-employee was "willfully, recklessly and wantonly negligent" in causing the plaintiff's injuries. *Id.* Our Supreme Court

2. In his amended complaint, Plaintiff also brought a *Pleasant* claim against Prime Demolition, asserting that Lester "engaged in willful, wanton, and reckless conduct" and that "his actions are therefore imputed to Defendant [Prime Demolition] under the principles of agency and the theory of *respondeat superior*." However, Plaintiff does not challenge the trial court's dismissal of his *Pleasant* claim against Prime Demolition on appeal. Accordingly, any *Pleasant* claim against Prime Demolition is abandoned and will not be addressed. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

held: "[T]he Workers' Compensation Act does not shield a co-employee from liability for injury caused by his willful, wanton and reckless negligence." *Id.* at 717, 325 S.E.2d at 249. The Court defined "wanton" and "reckless" conduct as that which "manifest[s] a reckless disregard for the rights and safety of others" and "willful negligence" as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E.2d at 248.

"The burden of proof is heavy on a plaintiff who seeks to recover under *Pleasant*. Even unquestionably negligent behavior rarely meets the high standard of 'willful, wanton and reckless' negligence established in *Pleasant*." *Fagundes*, 251 N.C. App. at 740, 796 S.E.2d at 534 (cleaned up). "In short, the negligence exhibited must be so gross as to be 'equivalent in spirit to actual intent.' " *Baker*, 288 N.C. App. at 536, 887 S.E.2d at 443 (cleaned up).

In the case before us, Plaintiff and Lester were both working for Prime Demolition at the job site on 8 March 2021. Plaintiff was directed to assist in moving a metal light tower. While Plaintiff steadied the light tower, Lester used a skid steer to lift it. As Lester slowly moved the light tower forward, Plaintiff released his hold on the tower to move some cables on the floor. The light tower then fell and struck Plaintiff on his head and the left side of his body. Plaintiff was knocked to the ground and suffered serious injuries.

Essentially, Plaintiff's purported *Pleasant* claim sounds in negligence, and thus fails to rise to the level of a *Pleasant* claim. Plaintiff presents the following as evidence of Lester's willful, wanton, and reckless negligence: 1) Lester admitted that he had never read the operating manual for the skid steer, "he was not given any instruction on its operation, and he had not watched any training videos regarding its operation"; 2) "Lester stated that formal training classes in skid steer operations are not required"; 3) the only training that Lester received for operating a skid steer "was on-the-job training"; and 4) Lester was not provided guidelines or procedures on securing a load to the skid steer and admitted that he did not secure the metal light tower before moving it.

But "[e]ven if we take this evidence, accurately described, in the light most favorable to Plaintiff, it falls short of showing negligence so egregious as to be equivalent in spirit to actual intent." *Id.* at 541, 887 S.E.2d at 446 (cleaned up). Plaintiff presents no evidence that Lester was aware of any danger posed by moving the metal light tower with the skid steer, and even if he had presented such evidence, "[k]nowledge of a dangerous hazard, standing alone, does not establish a viable claim under *Pleasant*." *Id.* at 542, 887 S.E.2d at 447. Hence, the Act provides the exclusive remedy for Plaintiff's civil claims, and "the trial court did not err by dismissing Plaintiff's claim[s] . . . for lack of subject[-]matter jurisdiction." *Cunningham*, 201 N.C. App. at 288–89, 689 S.E.2d at 529.

D. Dismissal with Prejudice

[3] The trial court properly dismissed Plaintiff's amended complaint for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1). However, as our Supreme Court has explained, "when a complaint is dismissed for lack of subject[-]matter jurisdiction, that decision does *not* result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim." *United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem*, 383 N.C. 612, 650, 881 S.E.2d 32, 60 (2022). Accordingly, "a dismissal under Rule 12(b)(1) must be made without prejudice, since a trial court without jurisdiction would lack authority to adjudicate the matter." *Holton v. Holton*, 258 N.C. App. 408, 415, 813 S.E.2d 649, 655 (2018).

In the present case, the trial court dismissed the amended complaint on the basis of its determination that, because the Workers' Compensation Act provided the exclusive remedy for Plaintiff's claims, the court lacked jurisdiction over the subject matter of Plaintiff's claims. "[H]aving properly determined that it lacked subject-matter jurisdiction over the matter, the trial court should have dismissed the matter without prejudice pursuant to Rule 12(b)(1)." *Pugh v. Howard*, 288 N.C. App. 576, 588, 887 S.E.2d 734, 744 (2023). "As a result, we vacate the portion of the trial court's order dismissing the amended complaint with prejudice and remand this case to Superior Court, Forsyth County, with instructions to dismiss the amended complaint *without*, rather than with, prejudice." *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60.

III. Conclusion

For the foregoing reasons, we conclude that the trial court properly dismissed Plaintiff's amended complaint pursuant to Rule 12(b)(1) but erred by dismissing Plaintiff's amended complaint with prejudice. We therefore affirm in part but vacate that portion of the trial court's order dismissing the amended complaint with prejudice and remand for entry of an order dismissing the amended complaint without prejudice.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges HAMPSON and MURRY concur.

STATE OF NORTH CAROLINA
v.
ENOC ALCANTARA

No. COA25-98

Filed 5 November 2025

Sexual Offenders—registration—federal conviction—substantial similarity test—not void for vagueness

The trial court did not err by ordering defendant to register as a sex offender based on his prior conviction under a federal exploitation statute where the court held a hearing, received evidence of the relevant federal and state statutes, and specifically determined that the federal offense was substantially similar to a reportable conviction under North Carolina law (here, third-degree sexual exploitation of a minor pursuant to N.C.G.S. § 14-190.17A). Thus, the court's order complied with N.C.G.S. § 14-208.12B and Civil Procedure Rule 52. Although the wording of the federal and state exploitation statutes contained some differences, both statutes criminalized essentially the same conduct and included elements of the defendant's knowledge and possession of explicit material. Finally, the appellate court rejected defendant's argument that the substantial similarity test was unconstitutionally vague.

Appeal by Petitioner from order entered 26 June 2024 by Judge Michael Duncan in Guilford County Superior Court. Heard in the Court of Appeals 9 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Zachary Smith, for the State-Appellee.

Jason Christopher Yoder for Petitioner-Appellant.

COLLINS, Judge.

Petitioner[1] Enoc Alcantara appeals from the trial court's order concluding that the federal statute under which Petitioner was convicted

1. Throughout this case, Mr. Alcantara has referred to himself as a defendant and the courts have generally done the same. This is not accurate. He is a petitioner in a civil proceeding.

in 2003 is substantially similar to the North Carolina statute for third-degree sexual exploitation of a minor and requiring Petitioner to register as a sex offender in North Carolina. Petitioner argues that the trial court's order should be reversed because (1) the order fails to contain all the required conclusions of law; (2) the State failed to provide the trial court with the correct version of N.C. Gen. Stat. § 14-190.17A; (3) 18 U.S.C. § 2252(a)(4)(A) is not substantially similar to N.C. Gen. Stat. § 14-190.17A; and (4) the test for determining substantial similarity is unconstitutionally vague. For the following reasons, we affirm.

I. Background

Petitioner pled guilty on 22 April 2003 in the United States District Court for the district of Puerto Rico to one count of violating 18 U.S.C. § 2252(a)(4)(A) ("federal exploitation statute"), which criminalizes "[c]ertain activities relating to material involving the sexual exploitation of minors." Petitioner was sentenced to an active term of forty months' imprisonment.

On 20 October 2021, the Guilford County Sheriff's Department notified Petitioner that he was required to register as a sex offender in North Carolina based on his prior federal conviction and that he had the right to contest the requirement. Petitioner filed a Petition and Order for Judicial Determination of Sex Offender Registration Requirement on 3 November 2021.

At a hearing in June 2022, the State presented copies of Petitioner's 2003 federal conviction for sexual exploitation of a minor; the 2021 version of the federal exploitation statute; and the 2021 version of N.C. Gen. Stat. § 14-190.17A, which criminalizes sexual exploitation of a minor ("state exploitation statute"). After the hearing, the trial court entered an order concluding that the federal exploitation statute was substantially similar to the state exploitation statute and ordering Petitioner to register as a sex offender in North Carolina for a term of thirty years. Petitioner appealed that order to this Court.

In December 2023, this Court issued an opinion vacating the trial court's order and remanding the matter to the trial court for a new hearing where the State was permitted to offer additional evidence. *See In re Alcantara*, 291 N.C. App. 430, 434–35 (2023). This Court reasoned that by failing to present the trial court with the 2003 version of the federal exploitation statute, "or evidence that there had not been any changes in the intervening 18 years, the State failed to meet its burden to present sufficient evidence of the applicable statute." *Id.* at 434.

The matter came on for a new hearing in March 2024, wherein the State again argued that the federal exploitation statute is substantially similar to the state exploitation statute. The State's exhibits introduced, without objection, included: the 2002 and 2003 versions of the federal exploitation statute, 18 U.S.C. § 2256, and the 2023 version of the state exploitation statute.

After hearing arguments from both parties, the trial court took the matter under advisement. The trial court reconvened several months later and announced its findings in open court. The trial court found that the State met its burden of proving by a preponderance of the evidence that the federal exploitation statute is substantially similar to the state exploitation statute. The trial court, therefore, concluded that Petitioner is required to "register as a sex offender pursuant to North Carolina General Statutes for a period of thirty years based upon the out-of-state or federal conviction, which it is a federal conviction." The trial court entered a written order memorializing its decision on 26 June 2024. Petitioner appeals.

II. Discussion

Petitioner's various arguments on appeal raise issues of law, which this Court reviews de novo. *In re McIlwain*, 283 N.C. App. 378, 379 (2022). 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. Bryant*, 267 N.C. App. 575, 577 (2019) (citation omitted).

A. Trial Court's Written Order

Petitioner first argues that the trial court's "order should be reversed because it fails to contain all of the conclusions of law required under N.C. Gen. Stat. § 14-208.12B(d)." Petitioner's argument lacks merit.

N.C. Gen. Stat. § 14-208.12B governs sex offender registration for federal offenses. When a person is notified that they may be required to register as a sex offender in North Carolina based on a federal conviction that is substantially similar to a North Carolina "reportable conviction," the person may "contest the requirement to register by filing a petition to obtain a judicial determination as to whether the person is required to register under this Article." N.C. Gen. Stat. § 14-208.12B(a) (2025). The trial court's review is limited to determining whether the person's federal conviction is "substantially similar to a reportable conviction, as defined in [N.C. Gen. Stat. §] 14-208.6(4)(a)." *Id.* A reportable conviction includes "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses. . . ." *Id.* § 14-208.6(4)(a) (2025). The State bears the burden of proving substantial similarity by a preponderance of the evidence. *Id.* § 14-208.12B(c) (2025).

If, "[a]fter reviewing the petition, receiving any and all evidence presented by the parties at the hearing, [and] considering any arguments of the parties," the trial court determines the federal conviction is "substantially similar" to a reportable conviction under N.C. Gen. Stat. § 14-208.6(4)(a), the trial court "shall order the person to register as a sex offender" and "shall prepare a written order" that is filed with the clerk of court. *Id.* § 14-208.12B(d) (2025). Our sex-offender registration statutes are civil in nature, and, therefore, the rules of civil procedure apply. *See In re Hall*, 238 N.C. App. 322, 330 (2014); *see also State v. Strudwick*, 379 N.C. 94, 120 (2021) (applying Civil Procedure Rule 60 to a trial court's order for satellite-based monitoring).

Civil Procedure Rule 52 governs when a trial court's judgments and orders must include findings of fact and conclusions of law. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a) (2025). While trial court judgments in bench trials must contain findings of fact and conclusions of law, findings of fact and conclusions of law are generally not necessary on decisions on motions unless requested by a party. *Id.* A party's request for specific written findings and conclusions must be made prior to the trial court's entry of the written order. *J.M. Dev. Grp. v. Glover*, 151 N.C. App. 584, 586 (2002).

Here, upon remand from this Court, the trial court held a hearing in March 2024, where it considered the evidence introduced at the previous hearing, received additional evidence, and heard arguments by both parties. The trial court took the matter under advisement, and approximately three months later, it reconvened and announced its ruling in open court: "[T]he [c]ourt is going to find and require that the [Petitioner] . . . is required to register as a sex offender as set forth under Part 2, Article 27A of Chapter 14 of the North Carolina General Statutes based on out-of-state or federal conviction." The following colloquy ensued:

> [THE STATE]: Your Honor, I would have two requests. One, that the Court make a specific finding as it was one of the points in the appellate decision, I believe, that the federal law in effect at the time of [Petitioner's] conviction is what is, in fact, substantially similar to North Carolina law, to make that finding specifically. And also to just

> incorporate the State's exhibits into the Court's findings by reference.
>
> THE COURT: What I'm willing to do in addition to signing an AOC form, if you'll prepare a short order making those findings, I will attach it to -- in fact, and make it part of the Court order, but I'm going to ask that you prepare a short order making those findings and conclusions and, therefore, [c]ourt's ordering, as it already has, favor [Petitioner's counsel] with a copy of it before you task it to me for signature, but I'll be happy to do so.
>
> [THE STATE]: Yes, sir.
>
> THE COURT: Anything that the Court failed to address, [Defense counsel]?
>
> [DEFENSE COUNSEL]: No, Your Honor. I do appreciate your consideration in this regard.

The trial court then, in accordance with the State's request for specific findings, Petitioner's acquiescence, and N.C. Gen. Stat. § 14-208.12B(d), entered a written order stating the following:

> In addition to the Findings of Fact and Conclusions of Law announced in Open Court and reflected in the Order to Register, the Court makes these specific:
>
> Findings of Fact
>
> The [c]ourt hereby incorporates into its findings the Exhibits presented by the State containing the printed federal statutes and annotations in effect at the time of the [Petitioner's] conviction under [the federal exploitation statute], as well as the North Carolina Statutes in effect at the time of the [Petitioner's] petition.
>
> Conclusions of Law
>
> The [c]ourt finds based upon the foregoing, that the federal statutes, [the federal exploitation statute] and related statutes providing definitions for same, in effect at the time of the petitioner's conviction are substantially similar to [the state exploitation statute] and related statutes providing definitions for same.

(emphasis omitted).

The trial court's order complies with N.C. Gen. Stat. § 14-208.12B. Under that statute, if the trial court determines the petitioner's federal conviction is "substantially similar" to a "reportable conviction," the trial court "shall order the person to register as a sex offender" and "shall prepare a written order" that is filed with the clerk of court. *Id.* § 14-208.12B(d). Read together, the trial court's "written order" "shall order the person to register as a sex offender." *Id.* The order in this case does just that.

The trial court's order also complies with Civil Procedure Rule 52. The trial court reviewed the petition, held a hearing where it received into evidence copies of the relevant statutes, and considered the parties' arguments before determining, as a matter of law, that Petitioner's federal conviction is "substantially similar" to a "reportable conviction." *See State v. Hanton*, 175 N.C. App. 250, 254 (2006) ("[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law. . . ."). The trial court then issued an order requiring Petitioner to register as a sex offender. The hearing was akin to a hearing on a dispositive motion, like a Rule 12(b)(6) motion to dismiss, where the trial court considers as a matter of law "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679 (2022) (citation omitted). Thus, like an order on a Rule 12(b)(6) motion, the order here did not require written findings of fact and conclusions of law unless they were requested by a party. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2); *see also Taylor*, 382 N.C. at 679-80 ("Assuming . . . that there could ever be a need for the making of findings and conclusions in an order granting or denying a [Rule 12(b)(6)] motion to dismiss," neither party requested factual findings or conclusions of law to be made in the trial court's order, and therefore, pursuant to Rule 52(a)(2), the "trial court is not required to make factual findings and conclusions of law to support its order[.]") (citations omitted).

At the hearing, the State specifically requested that the trial court make a written finding "that the federal law in effect at the time of [Petitioner's] conviction is what is, in fact, substantially similar to North Carolina law" and incorporate the State's exhibits in the written order by reference. The trial court agreed and asked Petitioner if there was "[a]ything that the [c]ourt failed to address[?]" Petitioner responded, "No, Your Honor. I do appreciate your consideration in this regard." The trial court entered a written order containing the findings requested by the State and agreed to by Petitioner.

Although Petitioner generally argues in his brief that the "conclusions of law" were insufficient, Petitioner ultimately asserts that the order "fails to find that [Petitioner's]'s conviction under [the federal exploitation statute] is 'substantially similar to a reportable conviction' as required by N.C. Gen. Stat. § 14-208.12B(d)." This is not accurate. The order specifically finds that Petitioner's conviction under the federal exploitation statute is "substantially similar" to the state exploitation statute, which is a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4)(a).

Accordingly, as the trial court's written order did not "fail[] to contain all of the conclusions of law required under N.C. Gen. Stat. § 14-208.12B(d)," Petitioner's argument is meritless.

B. Date for North Carolina "Reportable Conviction"

Petitioner next argues that the State did not meet its burden of proof because it "failed to present the trial court with any evidence of [the state exploitation statute] from 2002, the date of the offense."

The State must prove "by a preponderance of the evidence" that the person's "federal conviction is for an offense, which if committed in North Carolina," is "substantially similar" to either a "sexually violent offense" or an "offense against a minor." N.C. Gen. Stat. § 14-208.12B(c); N.C. Gen. Stat. § 14-208.6(4)(a). The trial court "may review copies of the relevant . . . federal criminal law and compare the elements of the . . . federal offense to those purportedly similar to a North Carolina offense." *Id.* § 14-208.12B(c).

The trial court's review of a petition to obtain a determination as to whether a person is required to register as a sex offender is limited to a determination of whether the person's "federal conviction is substantially similar to a reportable conviction." *Id.* § 14-208.12B(a). A "reportable conviction" is defined as "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses . . . ." *Id.* § 14-208.6(4)(a).

A plain reading of N.C. Gen. Stat. § 14-208.12B shows that the version of the North Carolina statute that the State must present to the trial court is the version in effect at the time of the hearing on the petitioner's petition. *See id.* § 14-208.12B(a) ("The review under this section is limited to determine whether or not the person's out-of-state or federal conviction *is* substantially similar to a reportable conviction. . . .") (emphasis added).

Here, the matter came on for hearing on 21 March 2024. At the hearing, the State presented to the trial court the 2023 version of the state exploitation statute —the version in effect at the time of the hearing.[2] Accordingly, the State did not fail to meet its burden of proof by not "present[ing] the trial court with any evidence of [the state exploitation statute] from 2002, the date of the offense."

C. Substantial Similarity

Petitioner next argues that the trial court erred by concluding that the federal exploitation statute under which Petitioner was convicted is substantially similar to the state exploitation statute.

Whether a federal conviction "is for an offense that is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the [federal] offense to those of the North Carolina offense." *In re McIlwain*, 283 N.C. App. at 380 (quotation marks and citation omitted). "We do not look beyond the elements of the offenses to consider the underlying facts of a defendant's out-of-state [or federal] conviction or the legislative purpose of the respective statutes defining the offenses." *Id.* (quotation marks and citation omitted). It is not required "that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713 (2008).

"Certain activities relating to material involving the sexual exploitation of minors" are governed by 18 U.S.C. § 2252, which provides, in pertinent part,

> (a) Any person who—
>
> . . . .
>
> (4) either—
>
> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, . . . knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction [if]
>
> . . . .

2. Although changes were made to the statute in 2024, they were not effective until 8 July 2024; therefore, the 2023 version was the correct version in effect at the time of the March 2024 hearing.

> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(4)(A) (2002).

In comparison, a person commits the North Carolina offense of third degree sexual exploitation of a minor if "knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." N.C. Gen. Stat. § 14-190.17A(a) (2023).

In addition to the elements of the offenses themselves, the statutes contain various terms that are used to define the elements. 18 U.S.C. § 2256, for example, contains the following definitions:

> (1) "minor" means any person under the age of eighteen years;
>
> (2) . . . "sexually explicit conduct" means actual or simulated—
>
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the genitals or pubic area of any person
>
> . . . .
>
> (5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image[.]

18 U.S.C. § 2256 (2002). Similarly, the North Carolina General Statutes contain the following definitions:

> (2) Material. – Pictures, drawings, video recordings, films or other visual depictions or representations, but not material consisting entirely of written words.
>
> (3) Minor. – An individual who is less than 18 years old and is not married or judicially emancipated.
>
> . . . .
>
> (5) Sexual activity. – Any of the following acts:
>
> a. Masturbation, whether done alone or with another human or an animal.
>
> b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.
>
> c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.
>
> d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.
>
> . . . .
>
> f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.
>
> g. The lascivious exhibition of the genitals or pubic area of any person.

N.C. Gen. Stat. § 14-190.13 (2023).

These offenses are substantially similar. Both offenses include elements of the defendant's knowledge and the defendant's possession. The element of the North Carolina statute that the defendant possess "material that contains a visual representation of a minor engaging in sexual activity" is substantially similar to the element of the federal statute that the defendant possess "matter which contain[s] any visual depiction" when "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct[.]" N.C. Gen. Stat. § 14-190.17A(a); 18 U.S.C. § 2252(a)(4)(A).

Furthermore, the terms that are used to define the elements of both the federal and North Carolina statutes are also substantially similar. 18 U.S.C. § 2256 defines "minor" as "any person under the age of eighteen years," and N.C. Gen. Stat. § 14-190.13 defines "minor" as "[a]n individual who is less than 18 years old and is not married or judicially emancipated." Although these provisions do not "precisely match," they are substantially similar in meaning. *Sapp*, 190 N.C. App. at 713; *see In re McIlwain*, 283 N.C. at 384 (comparing a Texas statute defining "minor" as "any child younger than 18 years of age" with North Carolina's statute defining "minor" as any child under the age of eighteen and not married or judicially emancipated) (quotation marks and citations omitted). Likewise, the federal statute's definition of "sexually explicit conduct" is substantially similar to the North Carolina statute's definition of "sexual activity," and the federal statute's definition of "visual depiction" is substantially similar to the North Carolina statute's definition of "material." *See* 18 U.S.C. § 2256; N.C. Gen. Stat. § 14-190.13.

Petitioner makes several specific arguments as to why the trial court erred in concluding that these statutes are substantially similar. First, he argues that the two offenses have different mental states. This argument is misguided. Although the precise wording of the statutes differ, both require that the defendant possess material that he knows contains explicit content. *See* 18 U.S.C. § 2252(a)(4)(A); N.C. Gen. Stat. § 14-190.17A(a).

Petitioner also argues on appeal, although not at trial, that these offenses are not substantially similar because they have different defenses. Even if we assume the argument is preserved, *see State v. Womble*, 277 N.C. App. 164, 174–75 (2021) (explaining that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts") (brackets and citation omitted), in determining whether two offenses are substantially similar, the trial court is not to "look beyond the elements of the offenses." *In re McIlwain*, 283 N.C. App. at 380 (citation omitted). The varying availability of defenses, therefore, has no impact on substantial similarity.

Accordingly, "the subtle distinctions [between the two statutes] do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct"—the possession of material involving the sexual exploitation of minors. *State v. Riley*, 253 N.C. App. 819, 827 (2017). The trial court therefore did not err by concluding that the federal exploitation statute is substantially similar to the state exploitation statute.

D. Void for Vagueness

Petitioner finally argues that the trial court's order should be reversed because the "substantial similarity" test under N.C. Gen. Stat. § 14-208.6(4)(c) is unconstitutionally vague.

"In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *State v. Mello*, 200 N.C. App. 561, 564 (2009) (citation omitted). "We presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Evans*, 73 N.C. App. 214, 217 (1985) (citations omitted).

The Fourteenth Amendment to the United States Constitution "requires that laws be sufficiently clear to provide notice of what is prohibited and provide minimum guidelines to those who enforce such laws." *Mello*, 200 N.C. App. at 567 (citation omitted). Generally, "[a] statute is 'void for vagueness' if it forbids or requires doing an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Worthington*, 89 N.C. App. 88, 89 (1988) (citations omitted).

"A statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law." *N.C. Cemetery Comm'n v. Smoky Mountain Mem'l Parks, Inc.*, 293 N.C. App. 270, 275 (2024) (citation omitted). "When evaluating whether a person of ordinary intelligence could determine what conduct is prohibited, only a reasonable degree of certainty is necessary, mathematical precision is not required." *Mello*, 200 N.C. App. at 567 (cleaned up). Rather, the Constitution merely "requires that the statute [] prescribe boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 186 (2004) (quotation marks and citation omitted).

N.C. Gen. Stat. § 14-208.6(4)(c) provides that a "[r]eportable conviction" includes "[a] final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section." N.C. Gen. Stat. § 14-208.6(4)(c) (2025).

Here, Petitioner argues,

> The test for whether two statutes are substantially similar relies on subjective judgment and lacks clear, objective standards, leading to arbitrary and inconsistent

> enforcement. Without clear rules, the test leaves too much discretion to judges who may impose their own subjective opinions about what constitutes "substantial similarity." This raises concerns about fair notice and equal protection under the law.

Although the test for substantial similarity does not follow a "bright-line rule" and instead requires "flexibility," *State v. Graham*, 379 N.C. 75, 84 (2021), our substantial similarity test comports with due process requirements.

In determining whether two statutes are substantially similar, a strict comparison of the statutory elements is required. *In re McIlwain*, 283 N.C. App. at 380. It is well settled that a court may not "look beyond the elements of the offenses" and may not consider "the legislative purpose of the respective statutes defining the offenses." *Id.* (quotation marks and citation omitted). Furthermore, the substantial similarity test neither fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" nor "fails to provide explicit standards for those who apply the law." *N.C. Cemetery Comm'n*, 293 N.C. App. at 275 (citation omitted). The mere fact that two statutes need not be identical does not render the test unconstitutionally vague. The test "prescribe[s] boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *Rhyne*, 358 N.C. at 186 (quotation marks and citation omitted).

And as applied specifically to the facts of this case, the substantial similarity test comports with the requirements of the Fourteenth Amendment. The Guilford County Sheriff's Office provided Petitioner with notice of his requirement to register as a sex offender in North Carolina based upon his prior federal conviction, and Petitioner was given an opportunity to petition for a judicial determination of his requirement to register—an opportunity that Petitioner took. An examination and comparison of the elements of 18 U.S.C. § 2252(a)(4)(A) and N.C. Gen. Stat. § 14-190.17A reveals that the statutes are substantially similar.

Accordingly, the "substantial similarity" test under N.C. Gen. Stat. § 14-208.6(4)(c) is not unconstitutionally vague.

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

STATE v. BARTHEL

[301 N.C. App. 466 (2025)]

STATE OF NORTH CAROLINA
v.
WILLIAM J. BARTHEL, DEFENDANT

No. COA25-159

Filed 5 November 2025

Constitutional Law—First Amendment—public-forum doctrine—vulgar protest banner at public meeting—unlawful removal—resistance using reasonable force

Defendant's convictions for disrupting an official meeting and resisting a public officer were vacated where defendant's speech—consisting of silently holding a vulgar banner criticizing a county commissioner while standing at the back of a commissioners' board meeting during a public comment period—was protected under the First Amendment and where defendant's resistance to being unlawfully removed from the meeting room was done with reasonable (mostly verbal) and not excessive force. The content of defendant's banner, despite being offensive, did not constitute fighting words designed to provoke violence and instead consisted of criticism of an elected official's job performance that aligned with the stated purpose of the limited public forum. Further, law enforcement officers' directive to defendant to take the banner down because of its message and not in response to an actual disruption constituted impermissible viewpoint discrimination and was therefore unreasonable.

Appeal by defendant from judgment entered 1 August 2024 by Judge Gary M. Gavenus in Superior Court, Avery County. Heard in the Court of Appeals 26 August 2025.

Attorney General Jeff Jackson, by Solicitor General Nicholas S. Brod, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for defendant-appellant.

STROUD, Judge.

Defendant William J. Barthel appeals his convictions for disrupting an official meeting and resisting a public officer. He argues that the First Amendment protects his silent display of a crude banner criticizing a county commissioner at a board meeting. We agree. The

First Amendment shielded his right to stand silently at the back of the boardroom with his vulgar banner during the public comment period. Because his arrest was unlawful, Defendant had the right to resist it without using excessive force. He used reasonable force. We therefore vacate both convictions.

I. Background

The State's evidence tended to show that on 16 January 2024, the Avery County Board of Commissioners (Board) gathered for a "special meeting" in the Commissioners' Boardroom at the Avery County Administrative Complex in Newland, North Carolina. Defendant arrived with a rolled-up banner under his arm. He went to the back of the boardroom and stood silently as the meeting began.

The meeting proceeded without incident through the Pledge of Allegiance. The Board's first order of business was a public comment period. A commissioner began reading the public comment rules. But before the comment period could even begin, Defendant unzipped his jacket, revealing a black t-shirt that bore a vulgar slogan: "Eat Pussy and Protest." At the same time, Defendant unfurled his banner.

The banner featured Commissioner Cindy Turbyfill's photograph and the phrases: "I'm not a gynecologist, but I know a cunt when I see one!!" and "Cindy Turbyfill, Avery County's Most Unprofessional Employee." During this display, Defendant remained silent. He merely stood near the boardroom's back wall holding his message aloft, blocking no one's view of the meeting.

Only seconds after Defendant displayed his banner, Captain Mike Watson and Deputy Caleb Hicks, the two law enforcement officers providing security, intervened. Watson approached first, asking Defendant to "please take [the banner] down" because of "what was written on [it]." When Defendant refused, Watson called Hicks for backup. Commissioner Tim Phillips, the Board's chairman, soon announced that Defendant "need[ed] to leave."

Defendant demanded to know why he was being removed, invoking his constitutional rights. Hicks tried "calmly" urging Defendant's cooperation—but, as Hicks testified, Defendant "would not listen." Hicks even offered to let Defendant read the statute "for disruption of an official meeting." Defendant "refus[ed]." When Watson finally instructed Hicks to handcuff Defendant, he "kept tensing up his body" and refused to let Watson or Hicks "have his arms."

The evidence showed that the confrontation disrupted the meeting—but only after Watson asked Defendant to take down his banner and leave. Hicks testified that he could hear everything fine until Watson approached Defendant. Eventually, the officers "physically . . . remove[d]" Defendant from the boardroom into the hallway. Once there, the standoff continued. Defendant refused to leave and kept asking if he was "being trespassed under threat of arrest." His language to the two officers grew increasingly profane. At one point, when Hicks handed Defendant a copy of the disruption statute he had requested, Defendant screamed "get off me, my detention is now unlawful" and separated from Watson's grasp. He then demanded Watson's and Hicks's "name[s] and badge number[s]."

Defendant began walking backwards toward the elevator, "act[ing] like he was going to leave." He continued his profanity-laced confrontation with the officers. Then, more officers arrived. And as the elevator started opening, when Defendant was just a few inches away from the elevator doors, they arrested him and took him into custody.

The State charged Defendant with disrupting an official meeting and resisting a public officer. *See* N.C. Gen. Stat. §§ 143-318.17 (2023) (Disruptions of official meetings), 14-223(a) (2023) (Resisting officers). After he was convicted on both charges in district court, Defendant appealed to superior court.

The case proceeded to a two-day jury trial. When the State rested its case, Defendant moved to dismiss both charges.[1] As to disrupting an official meeting, he argued that his arrest violated his First Amendment rights under *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the United States Supreme Court held that the defendant could not be convicted for disturbing the peace by wearing a jacket displaying "Fuck the Draft" in a California courthouse. *Id.* at 16. Because "the content of [his] banner itself . . . was the disruption," Defendant said that *Cohen* barred his conviction.

As for resisting a public officer, Defendant claimed that "every person has the right" to both "resist an unlawful arrest" and "us[e] such force as reasonably appears to be necessary to prevent the unlawful arrest." Citing *State v. Allen*, 14 N.C. App. 485, 491, 188 S.E.2d 568, 573 (1972), he argued that evidence of nothing more than "[m]ere[ ] remonstrating with an officer in behalf of another, or criticizing an officer

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1. Before trial, Defendant filed a Memorandum of Law in Support of Defendant's Motion to Dismiss. His arguments at trial largely tracked those in his written memorandum.

while he is performing his duty" could not support his conviction. The trial court denied both motions.

At the close of all the evidence, Defendant renewed his motions to dismiss and elected not to be heard further. The court again denied the motions. It distinguished *Cohen*, explaining that

> *Cohen* dealt with just the statement, and excuse my language, Fuck the Draft. That's what it dealt with. What specifically they said in *Cohen* . . . is not a direct personal insult, and therefore it was protect[ed] speech because it wasn't a personal insult.
>
> In this particular case, you had a direct personal insult on that banner. Not only was it insulting for anybody who was in that room, it had the picture of the person who it was directed to. So no, it isn't a free speech issue here at all, not at all.

The jury found Defendant guilty on both counts. The court sentenced him to thirty days incarceration on each count, to run consecutively, but suspended both sentences for eighteen months supervised probation. Defendant timely appealed.

II. Discussion

Defendant raises three challenges to his convictions. First, he argues that his arrest and conviction under North Carolina General Statute Section 143-318.17 for disrupting an official meeting violated his First Amendment rights. Second, he claims that he "had a right to resist an unlawful arrest" premised on a First Amendment violation. And third, he insists that insufficient evidence supports his conviction under North Carolina General Statute Section 14-223(a) for resisting a public officer because officers arrested him "immediately" when "the elevator door[s] opened," denying him any "chance to get on the elevator."

We address Defendant's arguments after outlining our standard of review.

A. Standard of Review

This Court reviews the denial of a motion to dismiss to determine whether "substantial evidence" (1) supports "each essential element of the crime" and (2) shows "that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quoting *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015)). Substantial evidence means the "amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* This Court views that evidence "in the light most favorable to the State," giving it "every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.*

"[W]hether the State presented substantial evidence of each essential element of the offense is a question of law," so it receives *de novo* review. *Id.* at 250, 839 S.E.2d at 790 (quoting *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018)). We also review constitutional questions *de novo*. *State v. Fryou*, 244 N.C. App. 112, 125, 780 S.E.2d 152, 161 (2015).

B. Disrupting an Official Meeting

We start with Defendant's conviction for disrupting an official meeting.

Section 143-318.17 states that a "person who willfully interrupts, disturbs, or disrupts an official meeting and who, upon being directed to leave the meeting by the presiding officer, willfully refuses to leave the meeting is guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 143-318.17. Defendant argues that his arrest and conviction under this provision rested "solely on the content of his protected speech." But because the First Amendment protects offensive and disparaging epithets, he contends that his speech "could not serve as the basis for his arrest and conviction."

Defendant brings an as-applied challenge to Section 143-318.17, not a facial challenge. He thinks that Phillips[2] and Watson violated the First Amendment by applying the statute to his particular conduct. *See Cmty. Success Initiative v. Moor*e, 384 N.C. 194, 213, 886 S.E.2d 16, 32 (2023) (explaining that an as-applied challenge "represents a plaintiff's protest against how a statute was applied in the particular context in which [the] plaintiff acted or proposed to act" (citation omitted)). Our analysis thus examines whether Phillips and Watson applied Section 143-318.17 consistently with the First Amendment.

The State asserts that Defendant's arrest did not violate the First Amendment for three reasons. First, his banner was a lewd, insulting attack directed at a commissioner. Second, the Board's meeting was a

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2. Commissioner Phillips, as the Board's chairman, told Defendant to leave after Watson approached Defendant. There's some dispute in the evidence about exactly when and whether Defendant heard Phillips' directive. Viewing the evidence in the light most favorable to the State, we assume that both Phillips and Watson directed Defendant to leave. *See State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020).

limited public forum where the State has "greater discretion to restrict speech." Third, Defendant disrupted the meeting. But the State's own brief essentially acknowledges that Watson's reaction—not the banner itself—caused the disruption: "Video and photograph evidence supports that Defendant displayed lewd, insulting speech on the banner he brought into the Board of Commissioners meeting. *The speech evoked a reaction from Captain Watson, causing a disruption to the meeting.*" (Emphasis added.)

Despite this admission, the State maintains that it could lawfully remove Defendant because his "personal attack" was "unrelated to the public business being conducted" and "sure to trigger a disruptive response." We disagree.

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. That proscription, extended to the States through the Fourteenth Amendment, broadly means that the State cannot restrict speech "because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. American Civ. Liberties Union*, 535 U.S. 564, 573 (2002)). Even speech that "induces a condition of unrest," "creates dissatisfaction with conditions as they are," or "stirs people to anger" gets protection. *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). After all, the right to free speech exists, in part, "to invite dispute." *Id.* at 408.

Still, the First Amendment has limits—it does not grant the public unlimited access to State property for speech activities. Just as a private owner can set rules for her land, so too can the State "preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). The First Amendment does not guarantee speakers access to "every type of Government property" regardless of "the nature of the property" or the potential "disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985); *see also USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."). Put another way, context matters—a public-school classroom presents different free speech considerations than a town square, and the State's regulatory authority varies accordingly.

The Supreme Court balances these competing interests—free speech rights versus the State's control over its property—through the public-forum doctrine. Under that doctrine, the "right of access to public property" and the limits on that right "differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44 (1983). We apply the public-forum doctrine in three steps. First, we determine whether the First Amendment protects Defendant's speech. *Cornelius*, 473 U.S. at 797. If yes, we identify the forum type, because the State's power to limit access "depends on" what type of forum it is. *Id.* Finally, we assess whether the State's reasons for exclusion "satisfy the requisite standard." *Id.*

1. Protected Speech

We begin with the threshold question: whether the First Amendment protects Defendant's display at the Board's meeting.

The State says no. It argues that Defendant's banner was a "personal attack" that could have led "almost inevitably" to "a responsive defense or counter-attack." This kind of insulting conduct, the State claims, "has the real potential to disrupt the orderly conduct of the meeting." And according to the State, it did just that—Defendant's actions "disrupt[ed] . . . decorum" and "impede[d] the conducting of public business." "Defendant's insults . . . prompted a reaction from . . . Watson that immediately disrupted the meeting." The State also hints that Defendant's words fall into the narrow "fighting-words" category—speech that the First Amendment does not protect.

Defendant counters that his display falls outside "any exception to First Amendment protection." He distinguishes his case from other fighting-words precedents, noting that his banner contained "merely printed words," not the "words and disorderly conduct" found in those other cases. And even if his words "*may* constitute fighting words," Defendant asserts, criticizing "a public official in her official, public capacity" merits "the highest First Amendment protection."

Defendant has the better argument. His words do not qualify as fighting words because there was "no likelihood" that Commissioner Turbyfill "would make an immediate violent response." *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). And offensive as they were, Defendant's "personal insults" describing a commissioner as a "cunt" and "unprofessional employee" remain, under these facts, mere "distasteful mode[s] of expression." *Cohen*, 403 U.S. at 21. Although his words were crude and offensive, Defendant was expressing his disagreement with or disapproval of a public official. The First Amendment protects this speech.

a. Fighting Words

The First Amendment generally bars the State "from proscribing speech" and "expressive conduct" based on "disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted). But that protection is "not absolute," for the Supreme Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). The Court has carved out narrow exceptions for speech with "such slight social value" that "any benefit" is "clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

The State, for instance, can punish speech "directed to inciting or producing imminent lawless action" that "is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It can proscribe "true threats." *See Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). And relevant here, it can regulate fighting words—those "personally abusive epithets" that are "inherently likely to provoke [a] violent reaction." *Cohen*, 403 U.S. at 20 (citation omitted).

The fighting-words doctrine emerged in *Chaplinsky v. New Hampshire*. There, the defendant, a Jehovah's Witness, was arrested after he called an officer "a God damned racketeer" and "a damned fascist." *Chaplinsky*, 315 U.S. at 569. The incident occurred after a crowd became unruly while the defendant was distributing religious literature. *Id.* at 569-70. The Supreme Court upheld his conviction. In doing so, it established that certain words fall outside First Amendment protection—those "which by their very utterance inflict injury" or "tend to incite an immediate breach of the peace." *Id.* at 572. Such utterances are "no essential part of any exposition of ideas" and have "such slight social value" that any benefit is "clearly outweighed by the social interest in order and morality." *Id.*

The Court crafted a test: would "men of common intelligence" understand these as "words likely to cause an average addressee to fight"? *Id.* at 573. Some words, the Court explained, are "by general consent" fighting words "when said without a disarming smile." *Id.* Under this standard, calling an officer a "damn racketeer" and "damn Fascist" were, in the Court's view, "epithets likely to provoke the average person to retaliation." *Id.* at 574.

Since *Chaplinsky*, the Supreme Court has steadily narrowed the fighting-words doctrine. It hasn't "upheld a conviction under th[at] doctrine in 80 years." *Counterman v. Colorado*, 600 U.S. 66, 77 n.4 (2023).

Cohen v. California marked the first narrowing. There, the defendant wore a jacket emblazoned with "Fuck the Draft" in a courthouse. *Cohen*, 403 U.S. at 16. The Court reversed his conviction, ruling that the jacket's message did not constitute fighting words because it was not aimed at anyone in particular. *Id.* at 26. "No individual actually or likely to be present," the Court reasoned, "could reasonably have regarded the words" as "a direct personal insult." *Id.* at 20. Fighting words must be "directed to the person of the hearer." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

A year after *Cohen*, the Court further limited the doctrine's application. In *Gooding v. Wilson*, Georgia had convicted the defendant for using "opprobrious words or abusive language" that might breach the peace. 405 U.S. at 519 (quoting Georgia Code Ann. § 26-6303). The majority opinion didn't describe the facts, but Justice Blackmun's dissent did. *Id.* at 534-37 (Blackmun, J., dissenting). The defendant had screamed at officers trying to "restore access to a public building:" "White son of a bitch, I'll kill you"; "You son of a bitch, I'll choke you to death"; and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 534 (Blackmun, J., dissenting).

The Supreme Court held that Georgia's statute swept too broadly, imposing criminal liability on otherwise protected speech. *Id.* at 528. As the Court observed, one Georgia court had upheld convictions for saying "God damn" and for calling someone a liar. *Id.* at 525. Another Georgia court had suggested that fighting words could breach peace "at some future time, when the person to whom they were address[ing]" was "no longer hampered by physical inability, present conditions, or official position." *Id.* at 526 (citation omitted). Expanding the definition this way—where there was "no likelihood that the person addressed would make an immediate violent response"—effectively "license[d] the jury to create its own standard in each case." *Id.* at 528 (quoting *Herndon v. Lowry*, 301 U.S. 242, 263 (1937)). So the Court made clear that fighting words must threaten "an immediate violent response." *Id.*

These principles control here. The fighting-words doctrine requires both the right words and the right circumstances to create a genuine threat of immediate violence.

We start with immediacy. There was "no likelihood" that Commissioner Turbyfill "would make an immediate violent response" to Defendant's banner. *Id.* The evidence does not establish whether she even attended the meeting, but giving the State the benefit of every reasonable inference, we assume that she did. She didn't testify at trial, and the State presented no evidence indicating her response (if any) to the banner. Watson, however, testified that the moment Defendant "started unrolling" the banner, Watson made "contact" with him. Hicks's bodycam footage confirms this: When Defendant unfurled his banner at the back of the boardroom, none of the attendees—even those seated closest to him and visible in the video—turned around or reacted until Watson stepped in.[3]

Next, we consider the words themselves. The State never identifies exactly which words it considers fighting words, referring only to a "personal attack" and the "nature of the words themselves" that disrupted the meeting's "decorum and civility." From context, the State appears to target both phrases on Defendant's banner: "I'm not a gynecologist, but I know a cunt when I see one" and "Cindy Turbyfill, Avery County's Most Unprofessional Employee."

Start with the easier phrase. Certainly, calling someone an "unprofessional employee" may be unpleasant to that person, but this language contains no profanity and falls nowhere near the fighting-words standard. That leaves the profane phrase—indirectly calling Commissioner Turbyfill a "cunt"—as the State's likely fighting-words candidate because it was "directed to the person of the hearer" (or here, the reader).[4] *Cohen*, 403 U.S. at 20 (quoting *Cantwell*, 310 U.S. at 309). But the fighting-words doctrine requires more than unpleasant or unwelcome words "directed" at the person who sees or reads them. It demands words that are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.* (citing *Chaplinsky*, 315 U.S. at 568).

Precedent demonstrates that Defendant's words fall short of this exacting standard. The Supreme Court has set the bar high. Consider *Gooding*, where the defendant screamed death threats at officers face-to-face: "I'll kill you," "I'll choke you to death," and "I'll cut you all

3. The State says that "Defendant's insults . . . prompted" Watson's reaction "that immediately disrupted the meeting." But that misses the point. Fighting words must threaten "an immediate violent response" from "the person addressed"—here, Commissioner Turbyfill. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). In this respect, Watson's reaction is irrelevant.

4. Again, we assume that Commissioner Turbyfill was at the meeting and could see and read the banner.

to pieces." *Gooding*, 405 U.S. at 534 (Blackmun, J., dissenting). These were not mere insults—they were direct threats of violence, delivered during a heated face-to-face confrontation. Yet the Court found even those words protected.

Our State Supreme Court has found fighting words only once—where a white man "loudly and repeatedly" called a Black patron the n-word, intending to "provoke a confrontation." *In re Spivey*, 345 N.C. 404, 408, 480 S.E.2d 693, 695 (1997). The Court explained why this qualified; "No fact is more generally known than that a white man who calls a black man" that word "within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate." *Id.* at 414, 480 S.E.2d at 699. Three factors thus converged: the slur's unique historical capacity to provoke violence, its repeated use, and evidence the speaker specifically "intended" to provoke confrontation. *Spivey* was a "classic" fighting words case—the rare instance where words are so inherently provocative that violence becomes predictable. *Id.* at 415, 480 S.E.2d at 699.

Defendant's banner does not approach the fighting-words standard. His crude language lacks the direct menace of *Gooding*'s face-to-face death threats—or, more bluntly, the defendant's threats to kill, choke, and dismember officers. It also lacks the historical violence-inducing quality of *Spivey*'s racial slurs, words with a clear capacity to provoke immediate physical retaliation. Even Defendant's delivery undermines any fighting-words claim. Defendant stood silently at the back of the boardroom with his sign. No verbal confrontation occurred. No face-to-face encounter designed to provoke violence transpired. His words, however offensive, were just "distasteful mode[s] of expression." *Cohen*, 403 U.S. at 21.

We do not suggest that only death threats or racial slurs can constitute fighting words. But these cases illustrate the high bar: words must be so inherently inflammatory, delivered in such provocative circumstances, that immediate violence becomes likely. Defendant's silent display of a banner with insults and the word "cunt" directed at a particular person falls well below that threshold.

b. Criticism of an Elected Official

Because Defendant's words are not fighting words, we now determine whether the First Amendment protects his speech.

The First Amendment shields offensive speech. If there's "a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. That protection becomes greater still when citizens criticize their government. The "First Amendment interest in fostering speech" is "particularly substantial" when someone critiques how "an elected official has chosen to carry out" her duties. *State v. Taylor*, 379 N.C. 589, 606, 866 S.E.2d 740, 754 (2021); *see also Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.*, 377 N.C. 384, 385, 858 S.E.2d 795, 797 (2021) (acknowledging the defendants' First Amendment rights "to petition the government when speaking at . . . public zoning hearings"). Such criticism "safeguards our democracy by keeping elected representatives accountable." *Id.*

Defendant's banner did exactly that—it criticized a public official's job performance. The banner disparaged Commissioner Turbyfill and used a single crude word. But the Supreme Court has been clear: A State cannot ban speech simply because it offends. *Johnson*, 491 U.S. at 414; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("Much that we encounter offends our esthetic, if not our political and moral, sensibilities[,] . . . [but] the Constitution doesn't permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."). It cannot require citizens to be polite when criticizing their representatives. And it cannot arrest someone for expressing displeasure with an elected official, however bluntly expressed.

The First Amendment draws no distinction between refined political discourse and coarse personal attacks on elected officials. Defendant's speech is protected.

2. Limited Public Forum

Having concluded that Defendant engaged in protected speech, we turn to where it occurred. *Cornelius*, 473 U.S. at 797.

The State contends that the Board meeting was a limited public forum—a space that the government has "opened for expressive activity by part or all of the public" on a temporary basis. *Durham Cnty. Dep't of Soc. Serv. v. Wallace*, 295 N.C. App. 440, 453, 907 S.E.2d 1, 11 (2024) (quoting *Int'l Soc. for Krishna Consc. v. Lee*, 505 U.S. 672, 678 (1992)). It asserts that by "reserv[ing] time for public participation" during its meeting at a government facility, the Board created such a forum. We agree.

Courts divide "government property into three categories." *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 679 n.11 (2010). Traditional public forums—parks, streets, and sidewalks—are places that "have immemorially been held in trust for the use of the public" and "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45 (citation omitted). Designated public forums are spaces that have not "traditionally been regarded as a public forum" but which the State has "intentionally opened up for that purpose." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). These include municipal auditoriums or public theaters that the State has deliberately made available for expression. Limited public forums are the most restrictive: government property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* at 470. Examples include public meetings where speakers must address only agenda items, or student forums that exclude outside organizations.[5]

Here, the Board created a limited public forum. Anyone from the "general public" could speak, but they could only address "any agenda item under consideration by the [B]oard." This content-based restriction makes the forum limited rather than designated or traditional. Defendant does not dispute this classification. He argues instead that the public-forum doctrine does not apply at all—that we should skip straight to whether the Board engaged in content-based "censorship."

That reverses the analysis. The defining feature of a limited public forum is that a State may impose content-based restrictions there. *Summum*, 555 U.S. at 470 ("[A limited public] forum . . . is limited to use by certain groups or dedicated solely to the discussion of certain subjects."). The State could, for instance, limit speakers at a zoning hearing to comments about the specific development proposal under consideration. These content limits define the forum itself. So the question is not whether the restriction is content-based—in limited forums, it often is. The question is whether it's "reasonable and viewpoint neutral." *Id.* As the Supreme Court has explained, applying strict scrutiny to content-based restrictions in this context "would, in practical effect, invalidate a defining characteristic of limited public forums." *Martinez*, 561 U.S. at 681 (citation omitted).

The Board's forum served a specific purpose. The evidence shows that the Board's public comment period exists to "allow[ ] members of

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5. The key distinction between a limited public forum and a designated public forum turns on restrictions: If the government limits who can speak or what topics they can address, it has created a limited forum, not a designated one. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015).

the public the opportunity to offer comments and suggestions for the efficient and effective administration of government." Every public comment period serves this same basic function—creating "a forum for public discourse and decisionmaking." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1799 (1987).

And Defendant's speech fell within these content boundaries. The Board's rules didn't prohibit displaying banners during public comment, and the evidence does not indicate that either Phillips or Watson objected to banners or comments about commissioners generally. Though one word was offensive, Defendant's banner commented on the "efficient and effective administration of government" by critiquing the commissioner's alleged "unprofessional" performance. His speech thus aligned with the forum's stated purpose.

3. Legal Standard for Limited Public Forums

We now assess whether the State's "justifications" for removing Defendant from the meeting "satisfy the requisite standard." *Cornelius*, 473 U.S. at 797.

In a limited public forum, the State need not "allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). But it cannot "discriminate against speech on the basis of its viewpoint," and any "restriction must be 'reasonable in light of the purpose served by the forum.' " *Id.* (quoting *Cornelius*, 473 U.S. at 806). We first examine whether Watson and Phillips applied Section 143-318.17 in a viewpoint-neutral manner, and if not, whether their restriction was nonetheless reasonable.

a. Viewpoint Discrimination

The State claims that Watson removed Defendant for the "crude, personal attack that disrupted the meeting," not for his opinion about Commissioner Turbyfill. Defendant disagrees: In his view, Watson targeted the banner because he disagreed "with [its] message." Defendant contends that a banner praising Commissioner Turbyfill as "a fantastic person and county employee" never would have prompted his removal.

Viewpoint discrimination targets particular perspectives on a topic —barring criticism while allowing praise, or vice versa. Phillips and Watson's restriction did just that: they objected to words that expressed negative views about a commissioner through personal "attack[s]" or "insults." This constitutes viewpoint discrimination.

Viewpoint discrimination occurs when the State targets “not subject matter, but particular views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (citing *R.A.V.*, 505 U.S. at 391). It is “an egregious form of content discrimination.” *Id.* The State thus violates the First Amendment “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* (citing *Perry*, 460 U.S. at 46).

Here, Watson testified that he asked Defendant to remove the banner because of “what was written on [it].” The State does not argue that it would have barred *any* banner mentioning a commissioner. In fact, it specifically claims that “Watson would have taken the same action” if “another person had silently displayed words on a banner that attacked a [c]ommissioner—*but used similarly inappropriate and offensive language to deploy personal insults*.” (Emphasis added.) Watson, the State insists, “was not motivated by a ‘desire to suppress a particular point of view.’ ”

This restriction, however, amounts to viewpoint discrimination because Watson’s actions targeted Defendant’s perspective, not the subject matter. By restricting only “inappropriate and offensive language to deploy personal insults” about commissioners, the State reveals that Watson’s actions turned on the “particular views taken by [a] speaker[ ] on a subject,” not the subject itself. *Id.* (citing *R.A.V.*, 505 U.S. at 391). Defendant’s banner assessed a commissioner’s professionalism—which is commentary on the “efficient and effective administration of government” that the forum was designed to accommodate. The State would allow positive assessments of a commissioner’s performance but forbids negative ones expressed in crude terms. This distinction—allowing praise while barring criticism based on offensive language—is impermissible viewpoint discrimination.

Even assuming Phillips and Watson would have removed any banner using offensive language (whether it praised or criticized a commissioner), this restriction still fails the reasonableness test.

b. Reasonableness

The State asserts that Phillips and Watson reasonably applied Section 143-318.17 because Defendant’s “conspicuous, eye-catching banner with vulgar insults” destroyed the meeting’s decorum. In the State’s view, officers may act prophylactically, removing speakers before any actual disruption occurs to preserve order. Even though Defendant stood silently in the back of the boardroom, as the State acknowledges, it argues that his "personal attack" still disrupted the meeting because it was "unrelated to any topic being discussed."[6]

The State's decision to restrict speech in a limited public forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Courts assess reasonableness by examining the forum's "function" and "all the surrounding circumstances." *Martinez*, 561 U.S. at 685 (quoting *id.* at 809). To be sure, the State may enforce rules preserving "the civility and decorum necessary to further the [limited public] forum's purpose of conducting public business." *Steinburg v. Chesterfield Cnty. Plan. Comm'n*, 527 F.3d 377, 385 (4th Cir. 2008); *see also State v. Barber*, 281 N.C. App. 99, 108, 868 S.E.2d 601, 607 (2021) ("[E]ven if our General Assembly . . . [is] a limited public forum, the General Assembly would still be allowed to enforce rules limiting the volume of visitor speech in the . . . areas where staff carry on the work of our legislative branch."). But Watson didn't enforce meeting rules; instead, he censored offensive speech.

Section 143-318.17 prohibits conduct that "interrupts, disturbs, or disrupts an official meeting." N.C. Gen. Stat. § 143-318.17. But the evidence shows that Defendant's banner caused no disruption, until Watson intervened. Defendant stood at the back where his banner blocked no one's view, and Hicks's testimony suggests that he could hear the meeting clearly until Watson's confrontation. The bodycam footage also tends to show that no attendees noticed the banner until Watson acted—they sat facing forward, away from Defendant, with no one near him. Simply put, the meeting proceeded normally until Watson created the very disruption he claimed to prevent.

The lack of actual disruption reveals what drove Watson's decision: the offensive words themselves. He removed Defendant, as Watson himself testified, because of "what was written on the banner"—not because banners were prohibited or because the display disturbed attendees. The State admits that it was the "nature of the words themselves" that triggered removal, despite being "silently communicated." And at oral argument, the State's counsel confirmed that Watson enforced "a ban on (1) profanity, (2) a personal attack, and (3) a banner." Oral Argument at 12:16, *State v. Barthel* (No. 25-159) (Aug. 26, 2025), https://www.youtube.com/watch?v=YK97U_m5BMg (last visited September 5, 2025).

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6. This is wrong. As discussed above, the banner fell within the public comment period's content restrictions. Defendant's commentary on a commissioner's job performance relates to the "efficient and effective administration of government."

While the State can impose content-based restrictions in a limited public forum, those restrictions must serve the forum's purpose—here, facilitating public comment on government business. *Cornelius*, 473 U.S. at 806. The State can limit speakers to agenda items, enforce time caps, or prohibit actual disruptions. But it cannot ban offensive words or criticism of public officials under the guise of maintaining order. Such restrictions, even if the words used are unpleasant, constitute viewpoint discrimination.

What is more, the State's approach grants officials unlimited discretion to silence speech. If officials can remove speakers based solely on offensive language or "personal insults"—even when any disturbance results from the official's intervention rather than the speech itself—then government can suppress unpopular speech according to speculative concerns. Officials could silence speakers based on predicted reactions from anyone at the meeting, not just the criticism's target. Indeed, the State's brief makes this clear: It would prohibit criticism of any commissioner using "inappropriate and offensive language to deploy personal insults" because such words are "necessarily likely to disturb the peace." *Johnson*, 491 U.S. at 408. But the Supreme Court has, time and again, rejected this approach.

Take *Cohen*. There, the Court warned against States "indulg[ing] the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen*, 403 U.S. at 26. Otherwise, the Court said, "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* States, however, have "no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.* at 25.

This principle reflects free speech's essential purpose. The First Amendment serves its "principal function" when it "invites dispute," even when speech "induces a condition of unrest" or "stirs people to anger." *Johnson*, 491 U.S. at 408-09 (quoting *Terminiello*, 337 U.S. at 4). Maintaining meeting decorum represents a legitimate government interest. But Watson and Phillips went too far. They invoked Section 143-318.17 to remove Defendant without any actual "interrupt[ion], disturb[ance], or disrupt[ion]." N.C. Gen. Stat. § 143-318.17. In doing so, they targeted Defendant's critical viewpoint about a public official—precisely the kind of discrimination the First Amendment forbids. *R.A.V.*, 505 U.S. at 392 (ruling that the government cannot impose "selective limitations upon speech"). Watson and Phillips acted based on "the offensive content of [Defendant's] particular message," not any genuine disruption. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

In sum, Defendant's removal fails the reasonableness test. He silently displayed a banner criticizing a commissioner's job performance at the back of the boardroom—a banner that blocked no one's view and caused no observable disruption to the proceedings. Removing him served no legitimate purpose of facilitating orderly public comment. Rather, it accomplished only one thing: censoring speech the officials found offensive. Even in a limited public forum, such censorship exceeds the constitutional bounds of reasonable regulation.

We therefore vacate Defendant's conviction under Section 143-318.17.

C. Resisting a Public Officer

Finally, we turn to Defendant's conviction for resisting a public officer under Section 14-223(a).

Defendant advances two arguments. First, he had a right to resist an unlawful arrest that was "premised" on protected First Amendment activity. Second, the evidence cannot support his conviction because he was arrested "immediately as the elevator door opened," giving him no chance to comply with the officers' orders. Defendant characterizes his confrontation with Watson and Hicks before "reaching the elevator" as "simply remonstrating." The State, however, maintains that sufficient evidence supports Defendant's conviction under the five-element test this Court stated in *State v. Carter*, 237 N.C. App. 274, 765 S.E.2d 56 (2014) for Section 14-223(a) violations. We disagree.

Section 14-223(a) makes it a "Class 2 misdemeanor" to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge an official duty." N.C. Gen. Stat. § 14-223(a). To convict, the State must prove:

> 1. that the victim was a public officer;
>
> 2. that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> 3. that the victim was discharging or attempting to discharge a duty of his office;
>
> 4. that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> 5. that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

Carter, 237 N.C. App. at 279, 765 S.E.2d at 60 (citation omitted). The offense's third element "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *Id.* (quoting *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008)); *see also State v. Mobley*, 240 N.C. 476, 478, 83 S.E.2d 100, 102 (1954) ("The offense of resisting arrest, both at common law and under the statute, [Section] 14-223, presupposes a lawful arrest.").

North Carolina law recognizes that "every person has the right to resist an unlawful arrest." *Mobley*, 240 N.C. at 478, 83 S.E.2d at 102; *see also*, *e.g.*, *State v. Sanders*, 303 N.C. 608, 622, 281 S.E.2d 7, 15 (1981) (same); *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970) (same). When officers make an unlawful arrest, they stand "in the position of a wrongdoer and may be resisted by the use of force, as in self-defense." *Id.* (citations omitted). But this right has limits. A person "may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty." *Id.* at 479, 83 S.E.2d at 102.

The State does not dispute this right or argue that Defendant used force beyond what was "reasonably. . . necessary to prevent" his unlawful arrest. *Id.* Instead, it assumes that the arrest was lawful and contends that sufficient evidence supports Defendant's conviction.

That assumption is wrong. An arrest violating the First Amendment does not satisfy Section 14-223(a)'s third element, which (again) "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *Carter*, 237 N.C. App. at 279, 765 S.E.2d at 60 (quoting *Sinclair*, 191 N.C. App. at 489, 663 S.E.2d at 870). Here, we have already concluded that Defendant's arrest was unlawful, and that the evidence taken in the light most favorable to the State does not show that he used force beyond what was reasonable in the circumstances.

Defendant's resistance was almost entirely verbal. He repeatedly asserted his right to speak, asked if he was being trespassed, and used profanity as officers removed him from the boardroom into the hallway. The only physical resistance was that Defendant "kept tensing up his body" and refused to let Watson or Hicks "have his arms" for handcuffing. The record contains no evidence—and the State does not posit—that Defendant took any offensive physical action against the officers or used excessive force. Because his arrest violated the First Amendment, he had the right to resist it using reasonable force. He remained within those bounds.

So we vacate Defendant's conviction under Section 14-223(a).

III. Conclusion

For the reasons explained above, we vacate Defendant's convictions for disrupting an official meeting and resisting a public officer.

VACATED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
JEFFREY SCOTT COOK

No. COA24-867

Filed 5 November 2025

Appeal and Error—preservation of issues—embezzlement—jury instruction—argument not preserved

In a prosecution for criminal embezzlement and related charges—arising from defendant's use of his business partner's personal information to open unauthorized credit cards, resulting in more than $200,000 in suspicious transactions—defendant failed to preserve for appellate review his argument that the trial court erred in failing to give a tailored jury instruction on embezzlement where defendant failed to raise any objection to the instruction when it was emailed to the parties before the jury charge, when it was given to the jury, or later, when the trial court asked the parties (outside of the jury's presence) for any additions or corrections.

Appeal by Defendant from judgments entered 18 December 2023 by Judge Sarah E. Kirby-Turner in Cleveland County Superior Court. Heard in the Court of Appeals 28 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Hunter E. Fritz, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

COLLINS, Judge.

This appeal arises out of a criminal prosecution for embezzlement of more than $100,000, in violation of N.C. Gen. Stat. § 14-90. Defendant Jeffrey Scott Cook argues that the trial court committed prejudicial error by omitting certain language from the jury instructions. Because Defendant failed to preserve his argument for appellate review, we dismiss his appeal.

I. Background

In 2007, Defendant and David Self started a furniture construction and selling business named Sugar Hill Custom Upholstery, LLC ("Sugar Hill"). The pair were equal owners and managers of the company and informally divided their labor such that Defendant managed the business' finances. Later, Jarrod Dubesko joined the company as a one-third co-owner.

The trio opened a credit card account with Chase Bank in Self's name, as Dubesko and Defendant lacked good credit. Each of the co-owners received their own Chase credit card and agreed that the cards would only be used for gas and supplies and would be paid in full each month.

Despite the business' growth, Defendant adamantly refused to hire an accountant; avoided or postponed meetings to review finances; and when meetings did occur, Defendant only reviewed Sugar Hill's bank account balance – not its complete financial records.

In mid-2016, Self was unexpectedly called by Citibank and American Express regarding credit cards for Sugar Hill's use that were applied for or opened in Self's name with his personal information. Self discovered that Defendant had used Self's information, without Self's knowledge or authorization, to apply for these accounts and approximately ten to twelve other credit cards. Among these was an American Express credit card for Sugar Hill with a delinquent balance of roughly $25,000. This outstanding balance was a surprise to Self and a violation of Sugar Hill's policy of paying its sole Chase credit card account balance in full each month.

In January 2017, Self asked Brandi Miller, an accountant, to review Sugar Hill's financial records to see if she could "identify any problems." Miller identified numerous red flags in Sugar Hill's financial records, including roughly $2 million in unpaid payroll taxes and nearly $206,000 in transactions conducted through Sugar Hill's accounts and the American Express credit card that appeared personal or unrelated to legitimate business expenses. Neither Self nor Dubesko authorized or knew about these transactions.

Miller reviewed the transactions with Defendant, Self, and Dubesko. Defendant admitted that the flagged transactions were payments for his own personal expenses using Sugar Hill's funds but claimed he made the payments to compensate for often not receiving a paycheck.

These facts prompted Defendant's 15 April 2019 indictment for embezzlement of property (based on the nearly $206,000 in suspicious transactions), malfeasance of corporation officers and agents, and identity theft. This matter came on for jury trial on 11 December 2023.

During the charge conference on a Friday, the trial court stated its intent to use North Carolina Pattern Jury Instruction Crim. 218.15A for the embezzlement charge. The State requested the embezzlement instruction be tailored so that the second element – the described property – referred to "money belonging to Sugar Hill Custom Upholstery, LLC" as alleged in the indictment. The trial court agreed.

At the end of the charge conference, during which multiple instructions were proposed and modified, the trial court announced, "I will work on those. And once I have them written, obviously cleaned up with all the brackets removed, I will . . . email those to both of you because I will, in my discretion, be sending back a copy."

Before the trial resumed the following Monday, the trial court emailed to counsel for both parties all the jury instructions the trial court agreed to give. The second element of the emailed embezzlement instruction did not include the State's requested language regarding Sugar Hill Custom Upholstery, LLC.

At no point did Defendant object to the emailed embezzlement instruction. Outside of the presence of the jury, the trial court asked the parties if the emailed jury instructions "needed to be corrected." Defendant acknowledged receipt of the emailed instructions and raised no objections.

During the jury charge, the trial court read the emailed instructions to the jury. Defendant did not object to any part of the instructions, including the embezzlement instruction, either during the jury charge or later, outside of the presence of the jury, when asked by the trial court for any additions or corrections.

Later that day, the jury found Defendant guilty of all three charges, and the trial court sentenced Defendant accordingly. Defendant gave oral notice of appeal.

II. Discussion

On appeal, Defendant solely contests the jury instruction for the embezzlement charge. Defendant argues that the trial court committed prejudicial error by failing to give the State's requested embezzlement instruction.

Defendant has failed to preserve this issue for appellate review.

To preserve an omission from the jury charge for appellate review, a party must "object[] thereto before the jury retires to consider its verdict . . . provided that opportunity was given to the party to make the objection out of the hearing of the jury . . . ." N.C. R. App. P. 10(a)(2). Nonetheless, a party's "request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently *promised but not given*, notwithstanding any failure to bring the error to the trial judge's attention . . . ." *State v. Ross*, 322 N.C. 261, 265 (1988) (emphasis added).

Here, the instruction the trial court ultimately agreed to give was not the instruction the State requested at the charge conference but was, instead, the instruction emailed to the parties. At the charge conference on Friday, the State requested the pattern instruction on embezzlement be tailored in a certain way. At that point, the trial court agreed to do so but told the parties it would "work on" the instructions and email them to the parties. The trial court specifically indicated, "I will, in my discretion, be sending back a copy."

On Monday, before the trial resumed, the trial court emailed the parties the instructions the trial court agreed to give. The embezzlement instruction differed from the State's requested instruction. Defendant did not bring the difference to the trial court's attention or object in any way. The embezzlement instruction given was identical to the emailed instruction. Defendant again failed to object. "Both parties were given draft copies of the proposed jury instructions which contained the language that defendant now argues was improper." *State v. Gillard*, 386 N.C. 797, 847 (2024). Because Defendant failed to timely object to the instruction he now challenges, Defendant's challenge to the given instruction is not preserved for our review.

Defendant relies on three cases to support his argument that the State's requested embezzlement instruction was preserved: *State v. Keel*, 333 N.C. 52 (1992); *State v. Barrow*, 216 N.C. App. 436 (2011); and *State* *v. Castaneda*, 196 N.C. App. 109 (2009). Those cases are distinguishable because, unlike here, the requested instruction in each of those cases was promised but not given.

In *Keel*, the trial court promised to give pattern jury instructions requested by the State and not objected to by the defendant. 333 N.C. at 56-57. But the trial court gave the jury a modified version of the pattern instructions, pulling language from the pattern jury instructions of a separate criminal offense. *Id.* The defendant's challenge was preserved for appeal, despite his failure to object, because the trial court promised but did not provide requested pattern instructions. *Id.* This Court applied *Keel* to *Barrow* and *Castaneda*, and we similarly found that jury instructions were preserved for appeal where the trial court's given instruction deviated from its promised instruction. *Barrow*, 216 N.C. App. at 445; *Castaneda*, 196 N.C. App. at 115-16.

Here, unlike in those cases, the trial court emailed the parties the instructions it agreed to give. The trial court gave the embezzlement instruction to the jury exactly as written in the emailed instructions. Accordingly, the embezzlement instruction was not preserved under *Keel*. *See Gillard*, 386 N.C. at 847 (finding *Keel* inapplicable where the trial court gave the parties copies of the jury instructions it promised to – and later did – provide to the jury).

Defendant argues, in the alternative, that his challenge to the embezzlement instruction is preserved because the emailed instruction was a "deviation from the instruction[] the court promised to give" and the trial court's email did not "indicat[e] it had walked back its decision to" use the State's requested instruction. Defendant cites no legal support for this assertion, and we can find none.

Furthermore, Defendant has failed to timely assert plain error. "In criminal cases, an issue that was not preserved . . . may be made the basis of an issue presented on appeal when . . . specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). This issue must be "presented and discussed in a party's brief" or it will be "deemed abandoned." N.C. R. App. P. 28(a). If the issue is omitted in the party's principal brief, it is abandoned and cannot be revived via their reply brief. *McLean v. Spaulding*, 273 N.C. App. 434, 441 (2020).

Defendant discusses plain error in his reply brief but omitted it in his principal brief. Defendant has therefore waived a plain error review of his appeal.

III. Conclusion

Because Defendant failed to preserve for appeal his challenge to the jury instruction and failed to timely assert plain error, we dismiss his appeal.

DISMISSED.

Judges ARROWOOD and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
ALEXANDER GANDARILLA DE LOSSANTOS

No. COA24-1038

Filed 5 November 2025

1. Sentencing—second-degree murder—aggravating factor—taking advantage of a position of trust or confidence—sufficiency of evidence

During sentencing on a conviction for second-degree murder—arising from defendant having entered the bedroom of his seventeen-year-old recent girlfriend unexpectedly in the middle of the night and shot her three times during an argument over the victim's new relationship—defendant's guilty plea to the statutory aggravating factor of having taken advantage of a position of trust or confidence was supported by sufficient evidence. First, although defendant and the victim had a typically volatile teenage relationship, the victim's behavior on the night of her murder—interacting with defendant after his surprise appearance in her bedroom, then leaving for the bathroom and returning, all without telling him to leave or seeking help from the adults in the home—demonstrated that a position of trust or confidence existed between defendant and the victim. Second, defendant exploited that position to effectuate the crime by using his knowledge of the victim's household to: park in a location where his vehicle could not be seen from the home, enter through a door he knew was usually left unlocked, and reach the victim's bedroom without being detected.

2. Constitutional Law—effective assistance of counsel—advice to accept an open plea to aggravating factors—dismissed without prejudice

Defendant's claim that he received ineffective assistance when, after being convicted for second-degree murder, his trial counsel advised him to accept an open plea to certain aggravating factors was dismissed without prejudice because the claim, which touched on trial strategy, could not be resolved on the cold record.

Appeal by defendant from judgment entered 27 April 2022 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 21 May 2025.

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

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

FREEMAN, Judge.

Defendant appeals from judgment entered upon a jury verdict finding him guilty of second-degree murder. On appeal, defendant argues: (1) the trial court's finding of the aggravating sentencing factor that defendant took advantage of a position of trust or confidence to commit the crime was not adequately supported by the evidence, and (2) his trial counsel rendered ineffective assistance by advising him to accept an open plea to aggravating sentencing factors. After careful review, we conclude the trial court did not err in finding the position of trust or confidence aggravating factor and we dismiss defendant's ineffective assistance of counsel claim without prejudice.

I. Factual and Procedural Background

On the evening of 15 July 2020, defendant, who was eighteen years old at the time, was drinking alcohol at a friend's house near downtown Apex. At some point in the evening, defendant posted a photo of a girl he "was going to meet up with" to Snapchat and defendant's recent ex-girlfriend, seventeen-year-old Alexia Carrilo-Vicencio, began messaging defendant on Snapchat about the photo. Alexia was upset with defendant and asked him what he was doing in Apex.

Around 1:00 a.m., defendant left his friend's house and began driving to his home in Raleigh. When defendant "was about to hit the highway," he changed his mind about going home and decided to go "over to Alexia's house to apologize" because he knew he "messed up by posting another girl." Defendant parked by the garage, the place he always parked when visiting Alexia's home, because it could not be seen from the front of the house and "was like a blind spot."

Defendant entered the home "the same way [he] always" did during his relationship with Alexia, through an unlocked sliding glass door at the back of the home. Defendant was carrying a loaded 9mm handgun in his waistband, a gun he "always" carried on him because he feared Alexia's stepfather seeing him and because defendant "was selling drugs" and "had to protect [him]self." Alexia did not know defendant was visiting her home that evening.

Defendant proceeded through the home and opened another door that was "always open" on his way to Alexia's bedroom. When defendant reached Alexia's bedroom door, he paused outside it because he heard Alexia speaking to one of her friends on the phone. Defendant overheard Alexia, who was unaware of defendant's presence outside her bedroom door, tell her friend that she had engaged in a relationship "with one of [defendant's] best friends." Defendant then entered Alexia's bedroom.

Alexia, who was "surprised when she saw [defendant] inside her house," got up from her bed and leaned against her doorframe. Defendant kissed Alexia on the forehead, and Alexia left defendant alone in her bedroom while she went to use the restroom. Alexia returned after about two minutes, and defendant began arguing with her about what she told her friend. Defendant then punched Alexia in the face and shot her three times.

The sound of the gunshots woke Alexia's stepfather, Terrence James, who rushed to Alexia's bedroom and saw defendant kneeling over Alexia's body. Mr. James called 911 and waited outside for the police to arrive. Around 2:15 a.m., Officer Hector Alonso of the Angier Police Department arrived at the home and spoke with Mr. James outside. Mr. James informed Officer Alonso that Alexia was in her bedroom but that he did not know where defendant was, so Officer Alonso retrieved a shotgun from his patrol car and entered the home to clear the scene for medical personnel to enter.

Upon entering the home, Officer Alonso heard Alexia moaning and located Alexia lying face down on the floor of her bedroom. Officer Alonso observed shell casings and some of Alexia's teeth on the floor beside her. Medical personnel transported Alexia to a nearby hospital where she later succumbed to her injuries. Defendant, who had fled the scene prior to law enforcement's arrival, was arrested in Mexico two months later.

On 29 September 2020, a Wake County grand jury indicted defendant on one count of murder and on 18 April 2022, defendant's matter came on for trial in Wake County Superior Court. On 27 April 2022, the jury found defendant not guilty of first-degree murder but guilty of the lesser-included offense of second-degree murder.

During the sentencing phase, defendant pleaded guilty to two aggravating factors: using a deadly weapon at the time of the crime and taking advantage of a position of trust or confidence to commit the crime. The trial court accepted defendant's plea to the factor that defendant took advantage of a position of trust or confidence and determined that the evidence supported such factor beyond a reasonable doubt.[1] The trial court found two mitigating factors, found that the aggravating factors outweighed the mitigating factors, and sentenced defendant to an aggravated sentence of 300 to 372 months in prison.

Defendant did not timely appeal but filed a petition for writ of certiorari in this Court on 17 November 2023. On 19 March 2024, this Court allowed defendant's petition for writ of certiorari to review the 27 April 2022 judgment of the Wake County Superior Court.

II. Jurisdiction

This Court has jurisdiction to consider defendant's appeal pursuant to our 19 March 2024 order allowing defendant's petition for writ of certiorari. *See* N.C.G.S. § 15A-1444(g) (2023); N.C. R. App. P. 21.

III. Standard of Review

We review alleged sentencing errors to determine "whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Patterson*, 269 N.C. App. 640, 645 (2020) (cleaned up). "Whether the sentence is supported by sufficient evidence is a question of law we review de novo." *Id.* (cleaned up).

IV. Discussion

On appeal, defendant contends: (1) the trial court's finding of the aggravating sentencing factor was not supported by sufficient evidence, and (2) his trial counsel rendered ineffective assistance by advising him to accept an open plea to the aggravating factors. We address each argument in turn.

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1. The trial court did not consider the aggravating factor that defendant used a deadly weapon at the time of the crime as it determined such factor was "an element of the crime."

A. Aggravating Factor

[1] Defendant first argues the trial court's finding of the aggravating sentencing factor that defendant took advantage of a position of trust or confidence to murder Alexia was not supported by sufficient evidence.[2] Specifically, defendant contends there was "not a factual basis to support either the claim that [defendant] and Alexia occupied a position of trust with respect to one another" or, if a position of trust or confidence did exist, "that [defendant] exploited such a position to murder Alexia."

"The State has the burden of proof to establish the existence of an aggravating factor beyond a reasonable doubt." *Patterson*, 269 N.C. App. at 645 (citing N.C.G.S. § 15A-1340.16(a) (2019)). Where, as here, a defendant admits "to the existence of an aggravating factor," such admission "must be consistent with the provisions of G.S. 15A-1022.1." N.C.G.S. § 15A-1340.16(a1) (2023). Accordingly, prior to accepting a defendant's admission to an aggravating factor, the trial court must "determine that there is a factual basis for the admission." N.C.G.S. § 15A-1022.1(c) (2023). The trial court may base this determination "on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information." *Id.*

> This determination [of a factual basis] may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2023). "[T]he trial judge has wide latitude in determining the existence of aggravating and mitigating factors, for it is 'he [or she] who observes the demeanor of the witnesses and hears the testimony.' " *State v. Canty*, 321 N.C. 520, 524 (1988) (quoting *State v. Ahearn*, 307 N.C. 584, 596 (1983)).

One of the statutory aggravating factors is that the "defendant took advantage of a position of trust or confidence, including a domestic

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2. In the sentencing context, defendant's plea and stipulation to this aggravating factor does not preclude appellate review of whether such factor was supported by sufficient evidence. *See State v. Khan*, 366 N.C. 448 (2013); *State v. Bacon*, 228 N.C. App. 432 (2013).

relationship, to commit the offense." N.C.G.S. § 15A-1340.16(d)(15). "A finding of this aggravating factor depends on 'the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other.' " *State v. Helms*, 373 N.C. 41, 44 (2019) (quoting *State v. Daniel*, 319 N.C. 308, 311 (1987)).

Our courts "have upheld a finding of the 'trust or confidence' factor in very limited factual circumstances." *Id.* "Specifically, we have upheld this aggravating where the relationship was between the defendant and the victim[.]" *Id.* A relationship in which the victim trusted the defendant "in the same way she might trust any adult acquaintance" is "insufficient to support this aggravating factor." *Id.* Further, the mere existence of a recent or ongoing romantic relationship, standing alone, is insufficient. The defendant must "utilize that position of trust or confidence . . . in some way to effectuate the offense." *State v. Myers*, 238 N.C. App. 133, 139 (2014). In other words, this aggravating factor may be properly supported where "[b]ut for the relationship between defendant and the victim, . . . the crime[ ] against the victim could not have been carried out[.]" *State v. Wiggins*, 159 N.C. App. 252, 268 (2003).

Defendant relies on *State v. Myers*, *State v. Marecek*, and *State v. Arnold*, to support his contentions that: (1) no position of trust or confidence existed between defendant and Alexia, and (2) even if such position did exist, there was insufficient evidence to support the aggravating factor because there must be "deception and exploitation of trust to establish sufficient evidence for the aggravating factor in a relational setting."

In *Myers*, the defendant and the victim had been married for eighteen years and shared a home together. 238 N.C. App. at 139. The victim was shot "while not directly facing" the defendant, and the State argued that this aggravating factor was satisfied because the victim "had no reason to distrust" the defendant "immediately before he fired the gun." *Id.* This Court disagreed and concluded the aggravating factor was not supported because "there [wa]s no evidence that [d]efendant asked [the victim] to face away from him before firing the pistol, or that he otherwise utilized his position of trust or confidence . . . to effectuate her death." *Id.*

In *State v. Marecek*, the victim had "discovered some letters that she thought indicated her husband," the defendant, "was having an affair with a woman in Czechoslovakia." 152 N.C. App. 479, 482 (2002). The couple planned to go on a trip to Fort Fisher, and the victim indicated to a friend "that she did not want to go" and stated that "she was afraid she might not return." *Id.* at 483. The defendant murdered his wife on the trip, and at sentencing, the trial court found the aggravating factor that the defendant took advantage of a position of trust of confidence to commit the crime. *Id.* at 513. This Court concluded the trial court erred in finding this factor because the evidence "suggest[ed] that [the victim] distrusted defendant and feared him" and because "[t]here was no evidence showing that defendant exploited his wife's trust in order to kill her." *Id.* at 514.

In contrast, our Supreme Court held there was sufficient evidence to support the trial court's finding of the aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense in *State v. Arnold*, 329 N.C. 128, 144 (1991). There, the defendant and a man she had a relationship with planned her husband's murder and she was later convicted of second-degree murder and conspiracy to commit murder. *Id.* at 130–32. On appeal, the defendant's conviction for second-degree murder was vacated but her conviction for conspiracy and the trial court's finding of the aggravating factor were upheld. *Id.* at 130–31, 144. Our Supreme Court determined such finding was supported by evidence that the victim believed the defendant had "come to her senses and ended her relationship" with the other man. *Id.* at 144 (cleaned up).

Here, defendant first argues that no position of trust or confidence existed between defendant and Alexia because, as in the relationship at issue in *Marecek*, there was evidence of hostility and distrust between them. We disagree. Although the evidence in this case demonstrated a relatively volatile, but not entirely atypical, teenage romance that included breakups and reconciliations, Alexia's behavior on the night of her murder did not evidence distrust of defendant.

When defendant showed up unannounced and uninvited at her bedroom door in the middle of the night, Alexia was surprised to see him but did not exhibit any behavior manifesting distrust or fear. Rather than asking defendant to leave, calling for help, or attempting to hide or flee, Alexia allowed defendant to kiss her on the forehead, left the room to use the restroom, and then willingly returned to her bedroom to rejoin defendant. This behavior, coupled with defendant's intimate knowledge of Alexia's home and his habitual use of clandestine methods to access her bedroom, satisfies us that a position of trust or confidence existed between defendant and Alexia.

Defendant next contends there was insufficient evidence that he exploited a position of trust or confidence to commit the crime because the cited cases establish there must be "deception and exploitation of trust" to support this aggravating factor. Again, we disagree. Though the statutory language and our precedent require a defendant to exploit or take advantage of the relationship to commit the offense, "deception" is not required.

Defendant appears to argue that, based on *Arnold*, this aggravating factor can only be properly found where there is some sort of "carefully planned deceit" of the victim. This argument is foreclosed by the fact that this aggravating factor can apply to sentencing for many felony convictions, including crimes—like second-degree murder—that do not require premeditation or "carefully planned deceit." Our precedent establishes that the relevant question is not whether the defendant carefully planned to use the position of trust or confidence to *deceive* the victim, but whether the defendant "utilize[d] that position of trust or confidence . . . in *some way* to effectuate the offense." *Myers*, 238 N.C. App. at 139 (emphasis added); *see also Wiggins*, 159 N.C. App. at 268–69 (concluding that the factor was properly supported where "[b]ut for the relationship between defendant and the victim, . . . [t]he crimes against the victim could not have been carried out[.]").

Here, the evidence establishes that, but for the position of trust or confidence that existed between defendant and Alexia, the crime could not have been carried out as it was. Defendant "utilize[d] that position of trust or confidence . . . to effectuate the offense," *Myers*, 238 N.C. at 139, by parking in a "blind spot" he knew of due to his relationship with Alexia and taking advantage of his knowledge of the home's layout and the family's habits to proceed through the home without alerting its inhabitants. If Alexia only trusted defendant "in the same way she might trust any adult acquaintance," *Helms*, 373 N.C. at 44, she would have reacted with fear and panic when he showed up unannounced at her bedroom door around 2:00 a.m.

Instead, because she trusted defendant, she let him enter her room without raising the alarm. Alexia's trust in defendant allowed him to remain undetected by the other members of her family until her stepfather was awoken by the sound of defendant fatally shooting Alexia. This evidence was sufficient to support a finding that "defendant took advantage of a position of trust or confidence . . . to commit the offense," N.C.G.S. § 15A-1340.16(d)(15), and the trial court did not err in finding this aggravating factor.

B. Ineffective Assistance of Counsel

[2] Defendant next argues that his trial counsel rendered ineffective assistance by advising him to accept an open plea to the aggravating factors that he used a deadly weapon at the time of the crime and took advantage of a position of trust or confidence to commit the crime. Specifically, defendant contends his counsel rendered ineffective assistance because: (1) "[p]leading guilty to aggravating factors without some form of agreed-upon benefit is not a reasonable tactical decision," and (2) defendant was prejudiced as "the jury could have found that Alexander did not take advantage of a position of trust or confidence to murder Alexia."

"The Sixth Amendment to the United States Constitution guarantees to all defendants the right to counsel in criminal proceedings." *State v. Oglesby*, 382 N.C. 235, 242 (2022). "The right to counsel necessarily encompasses 'the right to effective assistance of counsel.' " *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions." *State v. Thompson*, 359 N.C. 77, 115 (2004). "A defendant must first show that his defense counsel's performance was deficient, and second, that counsel's deficient performance prejudiced his defense." *Id.*

> Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal. A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by the defendant to trial counsel at a full evidentiary hearing on the merits of the ineffective assistance of counsel claim.
>
> . . .
>
> [O]ur review is limited to the record before us, without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief. Particularly where [d]efendant's arguments concern potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.

State v. Allen, 262 N.C. App. 284, 285–86 (2018) (cleaned up).

Here, the first prong of defendant's ineffective assistance of counsel claim—whether his counsel's performance was deficient—involves "potential questions of trial strategy and counsel's impressions," *id.* at 286, that we are unable to definitively answer based on the record before us. The transcript sheds no light on any discussions between defendant and his trial counsel regarding defendant's open plea to the aggravating factors beyond defendant's statement to the trial court that he was satisfied with his attorney's legal services. Accordingly, we dismiss defendant's ineffective assistance of counsel claim without prejudice.

V. Conclusion

After careful consideration of defendant's arguments on appeal, we conclude the evidence in this case established a sufficient factual basis to find the aggravating factor that defendant took advantage of a position of trust or confidence to commit the second-degree murder of Alexia and that the trial court did not err in finding such factor. We dismiss defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART, DISMISSED IN PART.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
JAMES AARON GLENN

No. COA23-1103

Filed 5 November 2025

Constitutional Law—right to jury trial—substitution of jurors—review of evidence prior to substitution—instruction to start deliberations anew

There was no error in defendant's judgments entered after a jury found defendant guilty of several sexual offenses involving a minor where, despite defendant's contention that his constitutional right to a "properly constituted jury of twelve" was violated, the court did not err by substituting an alternate juror after deliberations had begun, pursuant to N.C.G.S. § 15A-1215(a), to remove a juror who had created an unsafe environment. The trial court properly instructed the newly constituted jury to disregard all previous deliberations and to begin deliberations anew. Further, although the jury's request to review one of the State's exhibits was granted prior to the juror substitution, all jurors, including the alternate juror, had heard testimony regarding the substance of the text messages that made up the requested exhibit and were thus operating with the same set of facts.

Appeal by defendant from judgments entered 21 February 2023 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 12 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Megan Shook, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ZACHARY, Judge.

Defendant James Aaron Glenn appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of one count each of statutory rape of a child under 15, second-degree forcible rape, statutory sex offense with a child under 15, and second-degree sex offense, and two counts of taking indecent liberties with a child. On appeal, Defendant contends that he was denied his constitutional right to "a properly constituted jury of twelve." After careful review, we conclude that Defendant received a fair trial, free from error.

I. Background

Defendant's case came on for jury trial on 13 February 2023 in Forsyth County Superior Court. After the jury began its deliberations, it sent a note to the trial court requesting, *inter alia*, to review State's Exhibit 6, which had been admitted into evidence but not published to the jury. The court heard from both counsel. The next morning, the court excused the alternate juror from the courtroom and returned the jury to the courtroom. Over the objection of defense counsel, the jurors were permitted to review State's Exhibit 6.

Shortly after the jury resumed its deliberations, the court was informed that there was "an issue with one of the jurors"—namely, Juror #8. The trial court discussed the matter with Juror #8 and then with the jury foreperson (Juror #7), who indicated that the jury was making progress toward a verdict. However, during a break in deliberations, the trial court was approached by a deputy who relayed that "some of the jurors [we]re feeling uncomfortable and unsafe" with Juror #8.

The court interviewed Jurors #6 and #9 individually. Juror #6 stated: "I'm not comfortable being in the room with [Juror #8]" and responded affirmatively when the court asked whether she would be "operating under a fear of retaliation or any bodily harm" while in the jury room with Juror #8. Juror #9 reported that Juror #8 was "borderline belligerent," used "tremendous profanity," made "accusations against other jurors," and engaged in "inappropriate" and "volatile" behavior. Juror #9 also stated that if Juror #8 returned to the jury room, she would have "continued fear" for her safety and that of her fellow jurors, and that her ability to produce an "honest" conviction would be hampered.

With the assent of counsel, the trial court excused Juror #8 and substituted the alternate juror. The court instructed the jury to begin deliberations anew and the newly constituted jury retired to the jury room.

The jury returned verdicts finding Defendant guilty of all charges. After consolidating Defendant's convictions for statutory rape of a child under 15, second-degree forcible rape, and one count of taking indecent liberties with a child, the trial court sentenced Defendant to a term of 330 to 456 months' imprisonment in the custody of the North Carolina Department of Adult Correction. The court then consolidated Defendant's remaining convictions and imposed a consecutive term of 330 to 456 months' imprisonment. The trial court also entered an order requiring Defendant to register as a sex offender and to enroll in satellite-based monitoring for ten years.

Defendant entered oral notice of appeal.

II. Discussion

Defendant argues that he was denied his constitutional right to "a properly constituted jury of twelve" because 1) the trial court "substituted an alternate juror after deliberations had begun," and 2) the alternate juror "had not seen the same evidence as the remaining eleven jurors," that is, State's Exhibit 6.

A. Preservation

The State argues that because Defendant did not object to the alternate juror's substitution or raise any argument regarding the constitutionality of N.C. Gen. Stat. § 15A-1215(a) at trial, "Defendant's constitutional challenge to [N.C. Gen. Stat.] § 15A-1215(a) is unpreserved." However, our Supreme Court recently held that "issues related to the structure of the jury that found [the] defendant guilty [a]re preserved notwithstanding [the] defendant's failure to object at trial." *State v. Chambers*, 387 N.C. 521, 524, 915 S.E.2d 96, 99 (2025). Accordingly, we address the merits of the parties' arguments.

B. Substitution of an Alternate Juror

Defendant first contends that "[t]he trial court erred by denying [his] state constitutional right [under Article I, Section 24] to have his guilt determined by a properly constituted jury of twelve when it substituted an alternate juror after deliberations had begun." Defendant argues that N.C. Gen. Stat. § 15A-1215(a), which permits such a substitution, "is unconstitutional both on its face and as applied in this case."

1. Standard of Review

"The standard of review for alleged violations of constitutional rights is de novo." *State v. Boyd*, 297 N.C. App. 624, 629, 912 S.E.2d 178, 183 (citation and italics omitted), *disc. review denied*, 387 N.C. 607, 915 S.E.2d 168 (2025); *see also Chambers*, 387 N.C. at 524, 915 S.E.2d at 98. "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Colt*, 289 N.C. App. 395, 408, 889 S.E.2d 236, 247 (2023) (citation and italics omitted).

2. Analysis

Subsection 15A-1215(a) governs the substitution of alternate jurors before a verdict is rendered:

> The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury . . . . When the jurors are ordered kept together, the alternate jurors must be kept with them. . . . If at any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. If an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury's deliberations.

N.C. Gen. Stat. § 15A-1215(a) (2023).

Article I, Section 24 of the North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. "At common law, a jury was comprised of twelve people, . . . and our precedent has long recognized that this common law requirement was engrafted into Article I, Section 24's right to a jury trial." *Chambers*, 387 N.C. at 526, 915 S.E.2d at 99 (citation omitted).

Our Supreme Court has held that § 15A-1215(a) does not violate Article I, Section 24. As our Supreme Court has explained, although the subsection "contemplates the substitution of alternative jurors," its constitutionality is preserved by the provision of "two critical safeguards that ensure that the twelve-juror threshold remains sacrosanct." *Id.* at 526, 915 S.E.2d at 100. "Not only does subsection 15A-1215(a) provide that '*in no event* shall more than twelve jurors participate in the jury's deliberations'; it also requires trial courts to instruct juries to 'begin deliberations anew' if an alternate juror is substituted after jury deliberations have begun." *Id.* (cleaned up). This requirement ensures that "the ultimate verdict is rendered by the constitutionally requisite jury of twelve." *Id.* at 527, 915 S.E.2d at 100.

In the instant case, the trial court instructed the jury to begin deliberations anew, as required by N.C. Gen. Stat. § 15A-1215(a). Accordingly, the court's substitution of an alternate juror after the jury had commenced deliberations did not violate Defendant's constitutional right to a jury of twelve.

C. Review of State's Exhibit 6

Defendant also contends that the substitution of the alternate juror violated his constitutional right to "a properly constituted jury" because "eleven of the final twelve jurors saw trial evidence that the substituted twelfth juror did not."

1. Standard of Review

"Where [an] error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error. The State bears the burden of showing that the error was harmless beyond a reasonable doubt." *State v. Wilson*, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009) (citation omitted); *see also State v. Wilson*, 192 N.C. App. 359, 369, 665 S.E.2d 751, 756 (2008) ("[A] violation of Article I, Section 24 is subject to harmless error review where the error did not affect the numerical structure of the jury, but rather resulted in jurors acting on unequal instructions from the trial court in reaching a verdict."). "An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *Wilson*, 363 N.C. at 487, 681 S.E.2d at 331 (citation omitted).

2. Analysis

After initial deliberations commenced, the jury sent a note to the trial court requesting to review, among other evidence, State's Exhibit 6, which had been admitted during trial but had not been published to the jury. The trial court heard from counsel, excused the alternate juror from the courtroom, and allowed the jury to review State's Exhibit 6 over defense counsel's objection.

After the jury reviewed the exhibit and resumed its deliberations, the court was informed that there was "an issue" with Juror #8. In the presence of counsel, the trial court interviewed some of the jurors who confirmed that Juror #8 was creating an "uncomfortable and unsafe" environment in the jury room. Both attorneys stated they had no objection to excusing Juror #8, substituting the alternate juror, and instructing the jury to begin deliberations anew. After the court excused Juror #8 and substituted the alternate juror, it delivered the following instruction to the jury:

> Members of the jury, the alternate has been substituted for the excused juror. You should not speculate about the reason for the substitution. The law of this state grants . . . [D]efendant the right to a unanimous verdict reached only after full participation of the 12 jurors who ultimately return a verdict.
>
> That right may only be assured if the jury begins deliberations anew. Therefore, you must restart your deliberations from the beginning. This means *you should disregard entirely any deliberations taking place before the alternate juror was substituted and consider freshly the evidence as if the previous deliberations had never occurred.*

(Emphasis added).

On appeal, Defendant maintains that "no rational juror would interpret the trial court's above-cited instruction as an order to disregard the factual contents of State's Exhibit #6." Yet, Defendant's argument overlooks the critical fact that, during the trial, all of the jurors—including the alternate—heard testimony regarding the substance of the text messages that comprised State's Exhibit 6. The alternate juror simply did not participate in a review of the exhibit. Thus, the jurors were neither required nor "order[ed] to disregard the *factual contents* of State's Exhibit #6"; all of the jurors were operating with the same set of facts. (Emphasis added).

Furthermore, the trial court explicitly instructed the jurors to "disregard entirely any deliberations taking place before the alternate juror was substituted and consider freshly the evidence as if the previous deliberations had never occurred." "Our system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Hauser*, 271 N.C. App. 496, 498, 844 S.E.2d 319, 322 (2020) (citation omitted). "Accordingly, we presume that [D]efendant's jury obeyed the trial court's direction to restart deliberations entirely, disregarding any discussion of the case that took place while Juror #[8] was a member of the jury." *Chambers*, 387 N.C. at 527, 915 S.E.2d at 100.

Defendant has not demonstrated "an at-trial violation of his rights under the North Carolina Constitution" due to the substitution of the alternate juror. *Wilson*, 192 N.C. App. at 369, 665 S.E.2d at 756. We therefore conclude that Defendant's constitutional right to a jury of twelve was not violated, and his arguments to the contrary are overruled.

III. Conclusion

For the foregoing reasons, we discern no error in the trial court's judgments.

NO ERROR.

Judges HAMPSON and MURRY concur.

STATE OF NORTH CAROLINA
v.
JOHNNIE DENISE HICKMAN, Defendant

No. COA24-893

Filed 5 November 2025

Search and Seizure—search pursuant to general administrative tax warrant—no valid search warrant—unconstitutional search

In a prosecution for drug trafficking in which the trial court denied defendant's motion to suppress evidence collected pursuant to a general administrative tax warrant, the trial court erred by determining that the tax warrant gave agents from the North Carolina Department of Revenue inherent authority to enter defendant's private residence to search for property of value. Where the agents were operating solely under the tax warrant, issued pursuant to N.C.G.S. § 105-242, and not under a jeopardy tax warrant (requiring immediate assessment and collection) or a valid search warrant, their entry into defendant's home without consent constituted a violation of her Fourth Amendment right to be free from unreasonable search and seizure, and any exceptions to the exclusionary rule were either not preserved for appellate review or were inapplicable. Therefore, the court's suppression order was reversed and defendant's judgment was vacated.

Appeal by defendant from judgment entered 12 February 2024 by Judge Reggie E. McKnight in McDowell County Superior Court. Heard in the Court of Appeals 13 August 2025.

Michele Goldman, for defendant-appellant.

Attorney General Jeff N. Jackson, by Special Deputy Attorney General John R. Green, Jr., for the State.

FLOOD, Judge.

Defendant Johnnie Denise Hickman appeals from the trial court's order, arguing the trial court erred by denying her motion to suppress, where a general administrative tax warrant did not grant the North Carolina Department of Revenue ("DOR") the authority to search her private property. Upon careful review, we conclude a search conducted solely pursuant to a general administrative tax warrant issued under N.C.G.S. § 105-242 violates the Fourth Amendment. We therefore reverse the trial court's order denying the motion to suppress and vacate the judgment.

I. Factual and Procedural Background

On 17 November 2022, the DOR issued a Warrant for Collection of Taxes (the "Tax Warrant") against Defendant for her failure to pay taxes on her prior possession of illegal drugs that she sold. The Tax Warrant was issued in McDowell County—where Defendant then lived—and provided, in relevant part, that pursuant to N.C.G.S. § 105-242, the McDowell County Sheriff's Office was "hereby ordered and commanded to levy upon and sell the real and personal property of the said taxpayer found within your county[.]" Two DOR agents (the "DOR Agents") met with Detective Matthew Smith of the McDowell County Sheriff's Office and went to Defendant's address.

Upon arriving at Defendant's address, the DOR Agents and Detective Smith noticed that both a house and a camper were located on the property. Defendant's mother, Jewel Robinette, informed the DOR agents and Detective Smith that she owned the house and camper, but that Defendant lived in the camper. Ms. Robinette then escorted the DOR Agents to the camper. Ms. Robinette knocked on Defendant's door; Defendant "came to the front door of the camper[,]" "closed the camper door behind her[,] and stepped outside." The DOR Agents then explained they had this Tax Warrant against Defendant, which "was a warrant for any property of value." The DOR Agents subsequently asked Defendant if she had anything of value and, noticing she was wearing a necklace, asked Defendant for the necklace, which she gave them. The DOR Agents then asked if she "had any money," to which Defendant responded she "had some in [her] purse"; DOR Agents then "advised [her] to go get [the money]." Defendant testified that when she went inside to retrieve her purse, the DOR Agents were "pushing at my back to come in behind me."

According to Ms. Robinette, as the DOR Agents began searching Defendant's residence, Ms. Robinette told everyone "to leave" and to "[g]et out of [her] camper[,]" but "they wouldn't leave."

Detective Smith testified that, while the DOR Agents were searching the camper, he "stood at the front door of the camper." The DOR agents "ask[ed] [Defendant] to move to the kitchen area, and they opened up a cabinet," which revealed "a large Tupperware with a crystal-like substance" that Detective Smith could see from where he was standing at the front door. Detective Smith then asked Defendant to step outside; after Defendant complied, he detained her.

While he waited with Defendant, Detective Smith contacted Lieutenant Kirk Hensley, Lieutenant Chris Taylor, and Detective Paul Alkire for assistance. Upon arrival, Lieutenant Hensley asked Defendant to sign a "consent-to-search form" so the officers could "search the residence[,]" which Defendant signed. The officers joined the search of the residence with the DOR Agents, who had continued searching for things of value throughout this time. The officers subsequently seized what Lieutenant Taylor described as a "plastic container with a crystal-like substance believed to be methamphetamine, a glass dish, and . . . some digital scales."

Defendant was indicted on 5 September 2023 and charged with trafficking in methamphetamine by possession of 400 grams or more of a mixture containing methamphetamine. On 28 December 2023, Defendant filed a pre-trial motion to suppress the evidence, alleging the search was unconstitutional, as the DOR Agents "entered her home without a search warrant, and without consent, and refused to leave after being told to leave the home[.]"

On 12 February 2024, the trial court held a hearing on Defendant's motion, including hearing testimony from Detective Smith, Ms. Robinette, and Defendant regarding the events described above. After the hearing, the trial court entered an order denying Defendant's motion to suppress. In its order, the trial court found the Tax Warrant gave the "DOR Agents . . . the authority to collect and seize personal and real property belonging to [Defendant] and, inherently, to enter her residence in order to search for and collect her property for the purposes of sale[,]" and that they "had the authority . . . to search anywhere that items of value belonging to [] Defendant could be found, including inside drawers and cabinets." The trial court concluded the DOR Agents and Deputy Smith "had legal authority to enter [] Defendant's residence and search for items of value pursuant to the [Tax Warrant] and N.C.G.S. § 105-242."

After trial, on 14 February 2024, the jury found Defendant guilty, and the trial court sentenced Defendant to 175 to 227 months' confinement. Defendant gave an oral notice of appeal, and subsequently filed a petition for writ of certiorari ("PWC").

II. <u>Jurisdiction</u>

This Court has jurisdiction to hear an appeal from a final judgment of a superior court, pursuant to N.C.G.S. §§ 7A-27(b)(1) and

15A-1444(a) (2023). Defendant, in a precautionary manner, filed a PWC. Orally, defense counsel appealed "*on* the motion to suppress," which may have "injected some ambiguity in his notice of appeal as to whether [Defendant] was appealing from the judgment or from the order denying the motion to suppress." We, however, do not find this ambiguous, such that, taken in context, it was clear Defendant was appealing from the judgment and the denial of the motion to suppress. We therefore deny Defendant's conditional PWC and proceed to a review of the merits.

III. Standard of Review

This Court reviews a trial court's denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68 (2011) (citation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* at 168 (cleaned up). "Likewise, the standard of review for questions concerning constitutional rights is de novo." *State v. Hales*, 282 N.C. App. 178, 183 (2022) (citation omitted). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Biber*, 365 N.C. at 168 (citation and internal quotations omitted).

IV. Analysis

On appeal, Defendant argues the trial court erred "when it held that the [Tax Warrant] gave [DOR Agents] 'inherent' authority to enter [Defendant]'s residence to search for property to satisfy her tax obligations." Specifically, Defendant contends that "[b]ecause the DOR agents entered [Defendant's] property without a search warrant, consent, or any recognized exception to the warrant requirement, their search was unlawful." The State counters that the entry by the DOR agents was proper under the authority of the Tax Warrant. We agree with Defendant.

A. Fourth Amendment Protections

The Fourth Amendment of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, "protect[s] private citizens against unreasonable searches and seizures." *State v. Johnson*, 378 N.C. 236, 244 (2021); U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued on probable cause, although the language of the North Carolina Constitution differs from that of the United

States Constitution." *State v. Allman*, 369 N.C. 292, 293 (2016); *see also* N.C. Const. art. 1, § 20.

The United States Supreme Court has held that "the [Fourth] Amendment's protection applies in the civil context as well" as in the criminal context. *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 67 (1992). "[T]he reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the [Fourth] Amendment applies." *Id.* at 69. "As we have observed on more than one occasion, it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' " *Id.* at 69 (citing *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 530 (1967)).

B. Levy Power

The United States Supreme Court has held "the existence of the levy power is an essential part of our self-assessment tax system and [] it enhances voluntary compliance in the collection of taxes that this Court has described as 'the lifeblood of government, and their prompt and certain availability an imperious need.' " *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 350 (1977) (citing *Bull v. U.S.*, 295 U.S. 247, 259 (1935)).

North Carolina law provides for a tax on certain narcotics:

> Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary [of Revenue] shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary [of Revenue]. . . . If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary [of Revenue] shall collect the tax, penalty, and interest pursuant to the jeopardy collection procedures in [N.C.]G.S. [§] 105-241.23 [(2023)] or the general collection procedures in [N.C.]G.S. [§] 105-242 [(2023)], including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary [of Revenue] a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary [of Revenue] shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest.

N.C.G.S. § 105-113.111 (2023). A "dealer" is defined, in relevant part, as "[a] person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight." N.C.G.S. § 105-113.106(3) (2023).

If a dealer "does not pay a tax within 30 days after it is collectible . . . the Secretary [of Revenue] may take either of the following actions to collect the tax:"

> (1) Issue a warrant directing the sheriff of any county of the State to levy upon and sell the real and personal property of the taxpayer found within the county for the payment of the tax and the cost of executing the warrant and to return to the Secretary [of Revenue] the money collected, within a time to be specified in the warrant but not less than 60 days from the date of the warrant. The procedure for executions issued against property upon judgments of a court apply to executions under a warrant.
>
> (2) Issue a warrant to any revenue officer or other employee of the [DOR] charged with the duty to collect taxes, commanding the officer or employee to levy upon and sell the taxpayer's personal property found within the State for the payment of the tax. Except as otherwise provided in this subdivision, the levy upon and sale of personal property by an officer or employee of the Department is subject to and must be conducted in accordance with the laws governing the sale of property levied upon under execution.

N.C.G.S. § 105-242(a) (2023).

Our statutes further provide that if the Department of Revenue determines there is an urgency for the collection of taxes, it may issue a jeopardy tax warrant that allows for the "immediate assessment and collection of the taxes[.]" *See* N.C.G.S. § 105-241.23(a) (2023) ("The Secretary may . . . immediately assess and collect any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment and collection are necessary in order to protect the interest of the State. In making a jeopardy collection, the Secretary . . . is not required to wait any period of time . . . .").

Here, the Secretary issued the Tax Warrant against Defendant pursuant to the general tax warrant collection procedures set out in N.C.G.S.

§ 105-242, rather than pursuant to a jeopardy tax warrant. The purpose behind the general tax warrant is to "collect a tax" without the urgency. *See* N.C.G.S. § 105-241.24.

C. *G.M. Leasing*

Defendant argues that, under *G.M. Leasing*, a search warrant adhering to the Fourth Amendment is required before entering a person's private property to search, as entry is improper based solely pursuant to a general tax warrant issued under N.C.G.S. § 105-242 (2023). *See G.M. Leasing*, 429 U.S. at 358.

In *G.M. Leasing*, the petitioner was assessed to owe income taxes in the amounts of $406,099.34 and $545,310.59 for the years 1970 and 1971, respectively. *Id.* at 342. Officers of the Internal Revenue Service ("IRS"), with the help of a locksmith and acting without a warrant, searched the petitioner's cottage and seized books and records, which the respondents "hoped to examine . . . to see if they contained stock certificates or information concerning the location of other assets." *Id.* at 346. On appeal, the United States Supreme Court analyzed whether the "intrusion into the privacy of [the] petitioner's" cottage to seize petitioner's books and records was "justified on the ground that [the] petitioner's assets were seizable to satisfy tax assessments." *Id.* at 352–54. The IRS argued "that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws." *Id.* at 354. The Court, however, disagreed.

In recognizing both the enunciated "Power to lay and collect Taxes" of the Federal Government within the United States Constitution, *see* Const., Art. I, § 8, cl. 1, and "that the First Congress . . . provided that certain taxes could be 'levied by distress and sale of goods of the person or persons refusing or neglecting to pay[,]' " *see* Act of Mar. 3, 1791, c. 15, § 23, 1 Stat. 204, the Court explained that this power to collect taxes "relates to warrantless *seizures* rather than to warrantless *searches*." *Id.* at 354 (emphasis added). *G.M. Leasing* also drew a clear line between seizures from areas protected by the Fourth Amendment, such as homes, and seizures from public areas, such as streets. In *G.M. Leasing*, the Supreme Court carefully distinguished between the agents' seizure of some of the petitioner's automobiles from public parking areas and the agents' warrantless search of the cottage. The Court explained:

> It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . situated on private

> premises *to which access is not otherwise available for the seizing officer.*
>
> Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance.

Id. at 354–55 (emphasis added).

The Court then addressed the applicable federal tax statute, which "authorize[d] 'distraint and seizure by any means.' " *Id.* at 356 (referencing 26 U.S.C. § 6331(b)). The Court explained, "[r]ead narrowly, [the statute] authorizes the use of every means to deprive the taxpayer of use, enjoyment, or title to property (*e.g.*, transferring title, asportation, immobilization)[,]" but that the statute "does not refer to warrantless intrusions into privacy." *Id.* at 356–57. Although the IRS argued for a warrantless intrusion into privacy for the sake of tax collection, the Court was "unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure." *Id.* at 357–58. Instead, the Court held that "[t]he intrusion into [the] petitioner's [cottage] is [] governed by the normal Fourth Amendment rule that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant[,]" and concluded the warrantless search of the petitioner's books and records to satisfy tax assessments was in violation of the Fourth Amendment. *Id.* at 358–59 (citation modified). Thus, *G.M. Leasing* established that searches for purposes of tax collection must be authorized by a search warrant if consent is not given. *See id.* at 357–58; *see also Sachs v. U.S. ex rel. I.R.S.*, 59 F. App'x 116, 119 (6th Cir. 2003) (explaining that "*G.M. Leasing* recognizes a Fourth Amendment violation based on the privacy concerns that accompany a *physical intrusion*" (emphasis added)); *Miri v. Clinton*, No. 11-15248, 2014 WL 3752468, at *3 (E.D. Mich. July 30, 2014) (holding that a search warrant was required for a tax collection under *G.M. Leasing*, due to the Court's holding that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid *search warrant*") (citation omitted) (emphasis added)); *In re Stoltz*, 745 F. Supp. 643, 646 (D. Colo. 1990) ("[A] warrant is required before the government may search a taxpayer's premises for seizable assets[.]").

Here, as in *G.M. Leasing*, there was a "massive intrusion on privacy" through the search of the taxpayer's private residence "to which access is not otherwise available for the seizing officer." 429 U.S. at 354–55. Unlike in *G.M. Leasing*, where the tax statute explicitly provided agents authority to "distrain[] and seiz[e] by any means[,]" *see* 429 U.S. at 356, the statute here, N.C.G.S. § 105-242, provides the authority only "to levy upon and sell," *see* N.C.G.S. § 105-242 (failing to include the term "search"). Both statutes, however, "do[] not refer to warrantless intrusions into privacy[,]" meaning that a search warrant is required. *Id.* at 356; *see also* N.C.G.S. § 105-242. As the Court stated in *G.M. Leasing*, "one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants[.]" 429 U.S. at 355.

The State asserts this Court should uphold the lower court's decision because N.C.G.S. § 105-242 "has never been ruled unconstitutional." In considering the State's assertion, however, we do not hold N.C.G.S. § 105-242 unconstitutional, but rather hold that the statute authorizes only the action "to levy and sell."

Notwithstanding the clear Fourth Amendment mandate set forth in *G.M. Leasing*, the State further argues the search here was not "warrantless," and it was reasonable pursuant to the Tax Warrant, in and of itself. Specifically, the State reasons that "collecting taxes is an important government interest[,]" and argues that "[a]lthough not issued by a magistrate or judge, the [T]ax [W]arrant here certainly met the objective reasonableness standard of the Fourth Amendment given all the processes offered by our statutes."

While "[o]ur cases have consistently recognized [] the government's interest in collecting its revenues[,]" *see Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc.*, 54 N.C. App. 272, 274 (1981), we discern nothing in our statutes or precedential caselaw that indicates the State's interest in collecting taxes outweighs the Fourth Amendment's search warrant requirement before searching one's private property. Under *G.M. Leasing*, our Supreme Court explained that it is "unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure[,]" and instead, "a search of private property without proper consent is unreasonable unless it has been authorized by a valid *search* warrant." 429 U.S. at 357–58 (emphasis added) (citation and internal quotations omitted). Additionally, our Supreme Court has held that "[s]earches conducted by governmental officials in the absence of a judicial warrant are presumptively unreasonable." *State v. Julius*, 385 N.C. 331, 336 (2023) (citation omitted).

Extending from the State's flawed argument that the search based on the Tax Warrant was reasonable is the State's assertion that "those involved here acted under the objectively reasonable, good faith belief that the tax warrant was valid." Accordingly, the State argues the exclusionary rule should not apply under a good faith exception or the plain view exception even if this Court rules the Tax Warrant's application in this circumstance violated the Fourth Amendment.

The exclusionary rule was created as "a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. U.S.*, 564 U.S. 229, 231–32 (2011). When, however, the State does not present exclusionary rule arguments before the trial court but has the opportunity to do so at a suppression hearing, those arguments are deemed waived on appeal. *See State v. Romano*, 369 N.C. 678, 693 (2017) ("The State also argues that . . . the good faith exception and the inevitable discovery and independent source exceptions to the exclusionary rule are applicable in this case. A review of the record reveals that the State did not advance these arguments at the suppression hearing; accordingly, the issues are waived and are not properly before this Court."); *see also* N.C. R. App. P. 10. Thus, because the State did not present before the trial court any arguments regarding good faith, this argument is waived, and we do not address the issue of the good faith exception under North Carolina law.[1]

Here, the State's sole argument before the trial court as to the exclusionary rule was the plain view exception.[2] The plain view doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a *search*. *See State v. Alexander*, 233 N.C. App. 50, 55 (2014) ("We therefore hold, as an initial matter, that the trial court erred in applying the plain view doctrine to the question whether [the officer] performed a lawful search when she observed the contents of the trailer from the front porch of the mobile home. The plain view doctrine applied only to the question whether [the officer's] warrantless seizure of the copper coils was

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1. The North Carolina Supreme Court recently held and clarified in *State v. Rogers*, No. 377PA22, 2025 WL 2942785 (N.C. Oct. 17, 2025), that there is a good faith exception in North Carolina, thus overturning *State v. Carter*, 322 N.C. 709 (1988), which had previously held there was no good faith exception under our state constitution. Our decision here does not hinge on this change of law.

2. In the suppression hearing, the State referenced consent, not as an exception to the exclusionary rule, but only to explain that Defendant signed a consent to search form after she was detained by the officer.

permissible under the plain view doctrine."); *Texas v. Brown*, 460 U.S. 730, 738 (1983) (" '[P]lain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. 'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." (citation omitted)).

Here, because we have concluded a general tax warrant—alone—does not provide justification to search one's private residence, there was no prior justification under the Fourth Amendment; accordingly, there was no extension of that justification, and the plain view doctrine exception does not apply. *See Brown*, 460 U.S. at 738. Exclusionary rule exceptions advanced by the State other than plain view are deemed waived on appeal. *See Romano*, 369 N.C. at 693; N.C. R. App. P. 10 ("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.").

We acknowledge the State's expressed policy concerns as to allowing a person's drug possession conviction to be overturned; however, a graver concern would be to allow the shifting winds of policy to alter the course of firmly established law. *See State v. Ballance*, 229 N.C. 764, 767 (1949) ("[T]he law must be characterized by stability if men are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of stare decisis which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar case." (citation omitted)); *Harper v. Hall*, 384 N.C. 292, 322–23 (2023) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws[.]" (citation omitted)).

Despite the State's arguments asking that we circumvent clearly established Fourth Amendment jurisprudence set by the United States Supreme Court, we decline to contravene foundational constitutional principles. *See State v. McDowell*, 310 N.C. 61, 74 (1984) (holding that state courts should treat "decisions of the United States Supreme Court as binding"). Here, *G.M. Leasing* instructs that "a search of private property[, even for tax collection purposes,] without proper consent is unreasonable unless it has been authorized by a valid search warrant." 429 U.S. at 358 (citation omitted). The Tax Warrant here authorized the government agents "to levy upon and sell the real and personal property of the said taxpayer[,]" but did not convey the power to search one's private residence. Therefore, we hold the application of N.C.G.S. § 105-242, in this circumstance—to intrude into a person's private residence and to conduct a search pursuant to a tax warrant, without a valid search warrant—violates the Fourth Amendment. *See id.* at 357. In so holding, we recognize our state constitution's protection of its citizens from "[g]eneral warrants[,]" which "are dangerous to liberty and shall not be granted." N.C. Const. art. 1, § 20; *see also State v. Carter*, 322 N.C. 709, 724 (1988) ("It must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution."). Our holding is limited to general tax warrants under N.C.G.S. § 105-242; under our de novo review, we reverse the order denying Defendant's motion to suppress and vacate the judgment. *See State v. Cabbagestalk*, 266 N.C. App. 106, 115 (2019) (reversing the trial court's denial of the defendant's motion to suppress and vacating the judgment that was based exclusively on the evidence that had come in subject to the motion to suppress).

V. Conclusion

Upon careful review, we conclude a search conducted solely pursuant to a general administrative tax warrant, issued under N.C.G.S. § 105-242, violates the Fourth Amendment where there is no valid search warrant obtained. We therefore reverse the order denying Defendant's motion to suppress and vacate the judgment.

REVERSED AND VACATED.

Judges STROUD and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
RICHARD DAVID JOHNSON

No. COA24-1126

Filed 5 November 2025

1. Constitutional Law—right to impartial jury—requests for individual voir dire and jury questionnaire—denied—abuse of discretion analysis

After a criminal defendant was convicted of fourteen sex-related crimes against a minor, he failed to demonstrate on appeal that the trial court violated his right to an impartial jury or abused its discretion by denying his request to conduct a voir dire of prospective jurors individually or in small groups on topics relating to child pornography and sexual acts with minors. The record showed that, in denying this request, the trial court made a reasoned decision, indicating that it had considered the circumstances of this particular case along with the sensitive topics at issue and determined that defense counsel would have the opportunity to ask about those topics in a regular voir dire. Further, the trial court did not abuse its discretion by preventing defendant from submitting a juror questionnaire asking jurors whether they had ever watched child pornography or performed a sexual act on a child; again, the court made a reasoned decision, indicating its agreement with the State that such questions were inappropriate for voir dire.

2. Appeal and Error—preservation of issues—denial of motion for appropriate relief—order not appealed from—petition for certiorari denied

In an appeal from criminal judgments entered after defendant was convicted of fourteen sex-related crimes against a minor, the Court of Appeals lacked jurisdiction to review defendant's argument challenging the denial of his post-trial motion for appropriate relief (MAR)—based on a juror's statement that he had been bullied by the other jurors into voting "guilty" on all counts—where defendant failed to file notice of appeal from the order denying his MAR, as required under N.C.G.S. § 15A-1422(b). Although defendant did file a petition for a writ of certiorari, the language in section 15A-1422(b)—permitting appellate review of the denial of an MAR "only" in "an appeal regularly taken"—seemingly precluded certiorari review of his argument. In any event, defendant failed to show merit or extraordinary circumstances justifying issuance of a writ, since Evidence Rule 606(b) forbade the juror at issue from impeaching his own verdict through evidence of what happened in the jury room during deliberations.

Appeal by Defendant from judgments entered 20 September 2023 and order entered 9 October 2023 by Judge Paul A. Holcombe, III, in Anson County Superior Court. Heard in the Court of Appeals 9 September 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Caden William Hayes, for the State-Appellee.

Caryn Strickland for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon fourteen guilty verdicts of sex-related crimes against a minor. Defendant argues that the trial court abused its discretion during jury selection by denying Defendant's request for individual or small group *voir dire* and a juror questionnaire. Defendant also argues that the trial court erred by denying his post-trial motion for appropriate relief ("MAR").

Defendant has failed to show that the trial court abused its discretion in denying his *voir dire* requests. Defendant has failed to invoke this Court's jurisdiction to review the denial of his MAR: Defendant failed to file a notice of appeal from the order denying his MAR and N.C. Gen. Stat. § 15A-1422(b) appears to preclude appellate review of that order by writ of certiorari. Even if appellate review by certiorari is not precluded, Defendant has failed to show merit or extraordinary circumstances to justify our issuing a writ of certiorari. Accordingly, we find no error in the trial court's judgments, dismiss Defendant's purported appeal from the trial court's order denying his MAR, and deny Defendant's petition for writ of certiorari.

I. Background

Defendant was tried on indictments alleging four counts of statutory sex offense with a child, four counts of indecent liberties with a child, four counts of disseminating obscenity to a minor under age thirteen, and two counts of third-degree sexual exploitation of a minor. Prior to trial, Defendant filed a written motion for individual or small group *voir dire*. He also orally moved for permission to give potential jurors a questionnaire at *voir dire*. The trial court denied the motions.

After deliberating for thirty minutes, the jury returned guilty verdicts on all charges.[1] The trial court sentenced Defendant to a consolidated active term of 300 to 420 months' imprisonment for certain convictions and a consecutive, consolidated term of 300 to 420 months' imprisonment for the remaining convictions. Defendant gave oral notice of appeal in open court.

Following the trial, one of the jurors came forward. He stated that, during the trial, he realized he knew Defendant. He believed Defendant was not guilty and tried to explain why, but "no one listened." The jurors "were talking about having kids and how they didn't want that to happen to their kids." He said that they "would have gotten mad at [him]" if he had voted not guilty.

Defense counsel timely filed an MAR because the jurors had engaged in "bullying; suggestiveness; and undue pressure" and "rendered a decision based upon their status as 'parents' and not as impartial fact finders." The trial court denied the MAR. Defendant did not file a notice of appeal from the order denying the MAR. Additional facts underlying the procedural issues are included in the analysis below.

II. Analysis

[1] Defendant first argues that the trial court violated his right to an impartial jury and abused its discretion by denying his request for individual or small group *voir dire* and a juror questionnaire.

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict." *State v. Rodriguez*, 371 N.C. 295, 311-12 (2018) (citations omitted)). "[C]ounsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge." *State v. Fullwood*, 343 N.C. 725, 732 (1996) (citing N.C. Gen. Stat. § 15A-1214(c) (1988)). "As part of the jury selection process, the trial court must allow counsel an opportunity 'to inquire into the ability of the prospective jurors to follow the law,' with 'questions designed to measure prospective jurors' ability to follow the law being within the proper context of *voir dire*.' " *Rodriguez*, 371 N.C. at 312 (brackets and citations omitted).

1. The facts underlying Defendant's convictions are not relevant to the procedural issues on appeal.

Nonetheless, "[t]he trial judge has broad discretion to regulate jury *voir dire*." *Fullwood*, 343 N.C. at 732 (citation omitted). To that end, "the extent and manner of the inquiry [allowed to counsel] rests within the trial court's discretion." *State v. Locklear*, 349 N.C. 118, 142 (1998) (citation omitted). "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Rodriguez*, 371 N.C. at 312 (quotation marks and citations omitted).

A. *Voir Dire*

1. *Individual or small group* voir dire

Defendant argues that the trial court abused its discretion by denying his motion for individual or small group *voir dire*. Defendant specifically argues that because this was a child sex abuse and child pornography case, individual or small group *voir dire* "on sensitive topics relating to child pornography and sexual acts involving minors" was necessary "so as not to taint the entire potential [juror] population."

"A trial judge may, in his discretion and for good cause shown, order that jurors be selected one at a time." *State v. Lee*, 335 N.C. 244, 267 (1994) (citations omitted). "An abuse of discretion is shown only where the court's ruling 'was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Id.* (citations omitted).

Prior to trial, Defendant submitted a written "Motion for Individual Voir Dire on Sensitive Topics Relating to Child Pornography and Sexual Acts Involving Minors," requesting the trial court to allow counsel "to voir dire the prospective jurors individually, separate and apart from the other . . . to prevent the jury panel from hearing questions being asked individual jurors with regard to the sensitive areas." The motion alleged, "Unless individual voir dire is allowed on certain subjects, the answers of some jurors might be tainted by being exposed to their fellow jurors' answers and by seeing which answers result in persons being dismissed from jury service."

At the hearing on the motion, Defendant argued as follows:

> Your Honor, what our fear would be is that if all of the potential jurors were allowed to sit in the courtroom before being in before being brought into the box, they are going to be exposed to a lot of the case themes and theories and elements of the case during voir dire, during the jury selection process.

> So what we will be asking Your Honor is to do questionnaires in the morning for tomorrow, so that we could just kind of get a basic understanding of what we're dealing with in this pool. So we can even make the determination do we even need to call more people in. Your Honor, this case did get some publicity. We're dealing with people who are lifetime residents of this area so that's also going to pose a challenge, let alone the sensitive nature of the topic.
>
> So what we would be proposing, Your Honor, is that maybe it's a 20-, 30-, 40-question juror questionnaire that we're able to give out in the morning where we can tailor some questions between myself and the State to kind of start weeding this down a bit so that when we do bring jurors in, we can kind of get a better handle on what's going on. We are also specifically asking, Your Honor, and I don't know if the Court is willing to entertain this, but maybe even individual or small group voir dire would be appropriate in this instance, so as not to taint the entire potential population. I do understand just logistically alone, I don't know exactly how this courthouse is laid out and it doesn't appear to be a lot of places where a big mass of people could be held, which also creates an issue that if we allow people to go wait in their cars or wait outside, somebody is likely to not come back and so that, again, could create more hurdles here.

When asked by the trial court, "Have you prepared this proposed jury questionnaire?" Defendant responded, "I have started, Your Honor. I have not presented it to the State yet, but I have started preparing some questions." The trial court then ruled on the written motion for individual *voir dire* as follows:

> [T]he written motion does not mention anything about a jury questionnaire. . . . And, obviously, we don't have that as of yet. I'm denying your request for individual voir dire. In my discretion, I don't believe that that is necessary in this particular case. You're entirely correct these are sensitive topics, but you'll be able to inquire about that. As far as doing a questionnaire, I will reserve judgment for that until I see the proposed questions. I'm not necessarily opposed to doing that . . . .

In denying Defendant's motion, the trial court indicated that it had considered the circumstances in this particular case, including the sensitive topics at issue and the possibility of juror questionnaires, and concluded that defense counsel would have the opportunity to inquire about those topics. As the trial court's decision to deny Defendant's motion for individual *voir dire* was a reasoned decision, Defendant has failed to show that "the court's ruling was manifestly unsupported by reason . . . ." *Lee*, 335 N.C. at 267 (quotation marks and citations omitted). Accordingly, Defendant has failed to show the trial court abused its discretion in denying the motion.

To the extent Defendant's suggestion that "maybe even individual or small group *voir dire* would be appropriate in this instance" can be considered a motion for small group *voir dire*, Defendant failed to obtain a ruling on the motion and thus failed to preserve this issue for our review. *See* N.C. R. App. P. 10(a) ("In order to preserve an issue for appellate review, a party must . . . obtain a ruling upon the party's request, objection, or motion.").

2. Juror questionnaire

Defendant also argues that the trial court abused its discretion by not allowing a juror questionnaire. Defendant specifically argues that, because this was a child sex abuse and child pornography case, a juror questionnaire would be "the best way to get the truth out of the jurors in terms of their prior experiences."

Defendant's proposed juror questionnaire contained forty-one questions, including the following:

> Do you watch pornography:
>
> If so, how often:
>
> Have you ever been recorded having sexual intercourse:
>
> Have you ever recorded someone having sexual intercourse:
>
> Have you ever been paid to perform sexual acts or favors:
>
> . . . .
>
> Have you ever engaged in sexual acts with an adult while you were under age:
>
> If so, did you ever report this sexual contact:
>
> Have you engaged in therapy to address sexually explicit desires or fantasies:

> . . . .
>
> Have you ever engaged in sexual acts against you[r] will:
>
> If so, did you report the acts and/or contact:
>
> . . . .
>
> Have you ever watched child pornography:
>
> Have you ever watched pornography and had a question as to the age of the parties participating:
>
> Have you ever been shown or received pornography in which you believe there were children performing sexual acts:
>
> If so, what did you do next:
>
> . . . .
>
> Have you ever been accused of performing a sexual act on a child:
>
> If so, when:

Defendant argued that "because we're dealing with such sensitive topics, we want jurors to be able to be candid about their prior experiences, and I think that it will be a little bit easier for them to do that if they were able to just write their answers and submit that . . . ." The State responded that "some of those questions are asking the jurors to write on paper if they've committed a crime" and that having the jurors answer these questions in writing "doesn't necessarily mean they're going to be honest on that paper any more than they're going to be honest being asked the question right here in Court."

The trial court announced, "In my discretion, the Court having reviewed that is going to deny the request to utilize a juror questionnaire." The trial court "agree[d] with the State that several of these questions are just not appropriate in terms of what [it] would allow in terms of the voir dire." The trial court also compared the proposed questionnaire with "one that we have used in murder cases" and determined that "it was clear that these are not questions of a general type nature to allow one to receive quickly the – the sorts of general information that one typically wants to -- to receive."

In support of his argument that the trial court abused its discretion in this case, Defendant cites to several federal district court orders granting the defendant's request for a questionnaire and individual voir dire and an opinion of this Court which indicated that questionnaires were used. *See State v. Ridgeway*, 185 N.C. App. 423, 429 (2007) ("In this case, the jury selection process effectively screened out any jurors who might have been influenced by pretrial publicity. Juror questionnaires were utilized and each potential juror was questioned about media exposure and potential prejudice."). But a federal or state trial court's discretionary decision to allow a questionnaire and/or individual voir dire in another case does not indicate that the trial court's discretionary decision not to do so in this case was manifestly unsupported by reason. *Lee*, 335 N.C. at 267.

It is apparent from the transcript that the trial court made a reasoned decision to Defendant's request for a juror questionnaire. Defendant has thus failed to show that "the court's ruling was manifestly unsupported by reason . . . ." *Id.* (quotation marks and citations omitted). Accordingly, Defendant has failed to show the trial court abused its discretion in denying the request. *See id.*

B. Motion for Appropriate Relief

[2] Defendant next argues that the trial court erred by denying his MAR. We first address our jurisdiction to address the merits of this issue. Defendant brought his MAR pursuant to N.C. Gen. Stat. § 15A-1414. An appeal from the denial of an MAR under this statute is governed by N.C. Gen. Stat. § 15A-1422(b), which provides, "The grant or denial of relief sought pursuant to [N.C. Gen. Stat. §] 15A-1414 is subject to appellate review *only in an appeal regularly taken.*" N.C. Gen. Stat. § 15A-1422(b) (2023) (emphasis added). To perfect an appeal pursuant to N.C. Gen. Stat. § 15A-1422(b), a defendant must file notice of appeal from the order denying his MAR "within the time [and] in the manner . . . provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a)(2) of the Rules of Appellate Procedure requires notice of appeal to be filed within fourteen days after entry of the order denying a defendant's MAR. *See* N.C. R. App. P. 4(a)(2).

In this case, Defendant concedes that he failed to file a notice of appeal from the order denying his MAR. Defendant argues that he was not required to file a notice of appeal from this order because he had already "properly given oral notice of appeal in open court after final judgment was entered," in compliance with N.C. R. App. P. 4(a)(1), which allows an appeal in a criminal case to be taken by "giving oral notice of appeal at trial." N.C. R. App. P. 4(a)(1). Defendant's argument is not correct. *See State v. Slaughter*, 285 N.C. App. 529, 533 (2022) (explaining that a defendant seeking to appeal the denial of an N.C. Gen. Stat. § 15A-1414

MAR must file a separate notice of appeal from that denial order); *State v. Hagans*, 188 N.C. App. 799, 805-06 (2008) (same). Defendant's various arguments as to why *Slaughter* and *Hagans* are not binding on this Court are unavailing. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue . . . a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, this Court is without jurisdiction to review Defendant's challenge to the denial of his MAR, and that portion of Defendant's appeal is dismissed.

Defendant has filed a petition for writ of certiorari asking this Court to address the merits of his challenge to the denial of his MAR, should we determine that his failure to timely file a notice of appeal divested us of jurisdiction. However, "[t]he grant or denial of relief sought pursuant to [N.C. Gen. Stat. §] 15A-1414 is subject to appellate review *only* in an appeal regularly taken." N.C. Gen. Stat. § 15A-1422(b) (emphasis added). This language appears to preclude appellate review by writ of certiorari. *See State v. Thomsen*, 369 N.C. 22, 26 (2016) (noting that N.C. Gen. Stat. § 15A-1422(b) limits the Court of Appeals' jurisdiction to review MARs in other ways). Even if, however, appellate review by certiorari is not precluded, Defendant has failed to show merit or extraordinary circumstances to justify our issuing a writ of certiorari.

This Court may issue a writ of certiorari "in aid of its own jurisdiction," N.C. Gen. Stat. § 7A-32(c) (2023), to permit review of a judgment of the trial tribunal "when the right to prosecute an appeal has been lost by failure to take timely action," N.C. R. App. P. 21(a)(1). "[A] writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below" and "only if there are extraordinary circumstances to justify it." *Cryan v. Nat'l Council of YMCA of the United States*, 384 N.C. 569, 572 (2023) (cleaned up). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Id.* at 573 (citation omitted).

Here, Defendant's MAR was based on a statement from a juror who came forward post-trial, explaining that he was pressured to vote guilty because the other jurors "rendered a decision based upon their status as 'parents' " and engaged in "tactics of bullying; suggestiveness; and undue pressure." The trial court denied the motion, citing N.C. Gen. Stat. § 8C-1, Rule 606(b) (forbidding jurors from impeaching their own verdict by providing evidence of what happened in the jury room during deliberations), N.C. Gen. Stat. § 15A-1240 (same), and *State v. Corbett*, 269 N.C. App. 509, 519 (2020) (applying the "no impeachment rule").

Defendant essentially concedes that Rule 606(b) and N.C. Gen. Stat. § 15A-1240(a) preclude his argument. Defendant argues, however, that "[g]iven the trial court's improper restrictions on *voir dire*, . . . the normal safeguards used to justify the 'no impeachment' rule do not apply here." As the trial court did not abuse its discretion by denying Defendant's *voir dire* requests, Defendant's argument based on the trial court's "improper restrictions on *voir dire*" is meritless. Accordingly, Defendant has failed to show merit or extraordinary circumstances to justify our issuing a writ of certiorari. *See Cryan*, 384 N.C. at 572. Accordingly, in our discretion, we deny Defendant's petition. *See id.* at 573.

III. Conclusion

For the reasons above, we find no error in in the trial court's judgment, dismiss Defendant's purported appeal from the trial court's order denying his MAR, and deny Defendant's petition for writ of certiorari.

NO ERROR IN PART; DISMISSED IN PART; AND DENIED IN PART.

Judges TYSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
JERRY WAYNE STEPHENS, JR., DEFENDANT

No. COA24-590

Filed 5 November 2025

1. Probation and Parole—jurisdiction—to revoke probation—expiration of probationary period—applicability of default rule

In an appeal from four judgments revoking defendant's probation and activating his sentences for crimes corresponding to four different file numbers, three of those judgments were vacated where the probationary period for each had already expired—since none of those judgments specified when probation would begin, meaning that the default statutory rule requiring probation to run concurrently with the active sentences applied—and, therefore, the trial court lacked jurisdiction to revoke defendant's probation under those three file numbers. On the other hand, the court did have jurisdiction to revoke defendant's probation under the fourth file number where, when originally entering the sentence, the court checked the box indicating that probation would begin after defendant's release from incarceration, which in turn meant that the revocation occurred within the valid probationary period.

2. Probation and Parole—probation revocation—willful absconding—sufficiency of notice

In a probation revocation proceeding, the State gave defendant adequate notice that it sought revocation on the ground that defendant had willfully absconded from supervision. Although the probation violation reports did not explicitly mention the term "absconding" or otherwise identify the probation condition defendant had allegedly violated, this was not statutorily required; rather, it was sufficient that the allegations in the reports described the conduct constituting the violation (in this case, defendant left a substance abuse treatment program and failed to report his whereabouts for more than nine days).

3. Probation and Parole—revocation—willful absconding—sufficiency of evidence

A judgment revoking defendant's probation was affirmed on appeal because the trial court had not abused its discretion in finding that defendant willfully absconded from supervision. Specifically, the evidence showed that defendant left a substance abuse treatment program that he was required to attend (per conditions set by the recovery court) without authorization, failed to notify his probation officer that he had left the program, and—despite knowing that he was subject to heightened supervision conditions—kept his whereabouts unknown for over nine days, during which local law enforcement officers made several unsuccessful attempts to contact him. Further, defendant failed to demonstrate an inability to comply with the terms of his probation where, although he claimed that he left the treatment program because of another participant who was still using drugs and that he did not take his phone with him when he left, defendant later admitted that the other participant had already been kicked out of the program before defendant left, and that his ex-wife—with whom he was staying—did have a phone he could have used to call his probation officer.

4. Appeal and Error—preservation of issues—anticipatory bond condition—order not appealed from

In an appeal from criminal judgments revoking defendant's probation and activating his sentences for various crimes, the Court of

Appeals lacked jurisdiction to review defendant's argument that the trial court erred in setting an anticipatory bond as a condition of his probation, since this condition was added in a separate order modifying defendant's probation, from which defendant did not appeal.

Appeal by defendant from judgments entered 31 July 2023 by Judge Jerry R. Tillett in Superior Court, Dare County. Heard in the Court of Appeals 29 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Miranda S. Holley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's judgments revoking his probation and activating his sentence. The trial court lacked jurisdiction to revoke Defendant's probation in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013 because it did not enter its judgments until after Defendant's probationary period had expired. We therefore vacate those judgments. But we affirm Defendant's judgment in file number 15CRS051041 because the violation reports sufficiently alleged absconding as the grounds for Defendant's probation violation, and the trial court did not abuse its discretion in finding that Defendant willfully absconded from supervision.

I. Background

In 2015 and 2017, the State indicted Defendant for various crimes involving drug use, breaking and entering, and larceny after breaking and entering. Although these charges included file numbers that were and were not subjects of this appeal, we limit our discussion to those file numbers Defendant included in his notice of appeal: 15CRS051041, 15CRS051200, 15CRS051330-36, and 17CRS000013. Defendant pled no contest to all the relevant charges on or about 31 July 2017. The trial court sentenced Defendant to an active sentence in certain file numbers not subject to this appeal. For each file number in this appeal, the court suspended his ten-month to twenty-one-month active sentence and placed him on supervised probation for thirty-six months. On the Judgment Suspending Sentence for file number 15CRS051041, the trial court checked box 3 in the "suspension of sentence section," indicating that "[t]his period of probation shall begin when . . . [D]efendant is released from incarceration." The court did not check this box on the remaining nine appealed judgments. During sentencing, the trial court stated that the "sentences will run consecutively in each case, probation concurrently."

After Defendant's release from prison, the State filed probation violation reports with the trial court on 4 October 2021. The reports alleged that Defendant tested positive for illicit substances. On or about 31 May 2022, the trial court modified Defendant's probation in the appealed charges, extended his probation for eighteen months, and ordered him to comply with recovery court. The court issued orders for Defendant's arrest on or about 10 July 2023 after Defendant failed to comply with the recovery court's requirements. Additional probation violation reports, dated 24 July 2023, alleged that Defendant: owed arrearages "in the amount of $35,000.00"; failed to notify his probation officer of his whereabouts; and failed to submit to urine testing (as well as other similar violations regarding Defendant's supervision). The same judge who originally sentenced Defendant and extended his probation presided over Defendant's probation revocation hearing on 1 August 2023.

The trial court entered judgments that same day finding that Defendant willfully violated his probation and checked the box stating that the court revoked Defendant's probation for "willful violation of the condition(s) that he[ ] not commit any criminal offense . . . or abscond from supervision." The trial court revoked Defendant's probation and activated his sentence. On 7 August 2023, Defendant entered written notice of appeal in the above-referenced file numbers.

II. Analysis

Defendant presents two arguments regarding the trial court's jurisdiction to revoke his probation. First, as to the judgments in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013, Defendant argues that the trial court lacked jurisdiction to revoke his probation after the probationary period expired. Second, Defendant claims the trial court was without jurisdiction to revoke his probation in file number 15CRS051041 because the violation report failed to provide him "adequate notice" of the State's intent to revoke his probation for absconding from supervision.

Defendant also argues that the trial court abused its discretion in finding he willfully absconded from supervision and further erred in setting an anticipatory bond as a condition to his probation. For the following reasons, we vacate Defendant's judgments in file numbers

15CRS051200, 15CRS051330-36, and 17CRS000013, but affirm the judgment in file number 15CRS051041.

A. Expiration of Probationary Period

[1] We first address whether "the trial court lacked jurisdiction to revoke [Defendant's] probation because the probationary period had expired[,]" as it is dispositive for several of the probation violations. We agree with Defendant that his probation expired in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013 before the judgments revoking his probation were entered and thus vacate those judgments.

> The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*. It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Tincher, 266 N.C. App. 393, 395, 831 S.E.2d 859, 861-62 (2019) (citations, quotation marks, and brackets omitted).

North Carolina General Statute Section 15A-1346 provides for "commencement of probation" and states:

> (a) Commencement of Probation.--Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences.--If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. *If not specified, it runs concurrently.*

N.C. Gen. Stat. § 15A-1346 (2023) (emphasis added).

In *Tincher*, the defendant's "probation was revoked in both file 06 CRS 51515 and file 06 CRS 51521" and the defendant "did not challenge the revocation of probation in 06 CRS 51515." 266 N.C. App. at 395, 831 S.E.2d at 862. The defendant agued "the revocation in 06 CRS 51521 was erroneous because the 06 CRS 51521 [j]udgment did not state that the probation was to run concurrently with the 06 CRS 51515 [j]udgment's probation or consecutively with the 06 CRS 51525 [j]udgment's active sentence." *Id.* Just as in this case, the defendant relied on North Carolina General Statute Section 15A-1346 to argue his "probation ran concurrently with his active prison sentence already in effect in 06 CRS 51525." *Id.* at 395-96, 831 S.E.2d at 862. We noted that "the boxes on Lines 3 and 4, which specify when the period of probation would begin, are not marked or checked," which meant that the default rule that probation runs concurrently applied. *Id.* at 396, 831 S.E.2d at 862.

The State in *Tincher* argued that the plea agreement—which the defendant, his counsel, and the State signed—"contained language requiring the probationary period to run at the expiration of the active sentence in file 06 CRS 51525." *Id.* at 397, 831 S.E.2d at 862. The State in *Tincher* also argued

> the trial court provided additional language to show its intent to have the probationary period imposed in the 06 CRS 51521 [j]udgment run consecutively with [the d]efendant's active sentence by marking a box in the 06 CRS 51521 [j]udgment that states, "this sentence shall run at the expiration of sentence imposed in file number 06 CRS 51515." Thus, the State asserts that the trial court's failure to mark an additional box in the 06 CRS 51521 [j]udgment altering the probationary period was a clerical error.

Id. at 397, 831 S.E.2d at 862-63 (brackets omitted). The plea agreement in *Tincher* did not mention that the probationary period was to run consecutively and thus did not "reflect any intention for the probation to run consecutively . . . or to alter the default rule under [North Carolina General Statute Section] 15A-1346." *Id.* at 397, 831 S.E.2d at 863. As to whether there was a clerical error, we explained that

> even assuming the [r]ecord . . . showed a clerical error, we have limited authority in correcting clerical errors. If the correction of a clerical error affects the substantive rights of a party or if the correction corrects a substantive error, the Court is without authority to make a change. Furthermore, we have repeatedly rejected attempts to

> change the substantive provisions of judgments under the guise of clerical error.

Id. (citations and quotation marks omitted). We concluded "even assuming *arguendo* the trial court intended [the d]efendant's probations to run consecutively—the error was substantive and changing the 06 CRS 51521 [j]udgment would retroactively extend [the d]efendant's sentence. Therefore, we lack[ed] the authority to change" the judgment and vacated the order revoking the defendant's probation. *Id.* at 398, 831 S.E.2d at 863.

Defendant relies on *Tincher* to argue that vacating the order is required. The State, however, contends *Tincher* is not controlling because "the 2018 hearing transcript is controlling and shows that any error in the written judgment controls." The State argues the trial court's failure to check the boxes on the remaining judgments was a clerical error, and the intent of the trial court to have Defendant's sentences run consecutively can be found in the hearing transcripts. Specifically, the State cites *In re J.C.*, 236 N.C. App. 558, 562, 783 S.E.2d 202, 205 (2002), to assert "[i]f there is a discrepancy between the written order and the oral pronouncements, the transcript controls." The State maintains that the trial court's statement during sentencing that "the sentences will run consecutively in each case, probation concurrently[,]" is controlling over the clerical errors within the written judgments.

The State also notes that since one of the judgments marked the box stating "[t]his period of probation shall begin when . . . [D]efendant is released from incarceration"—even though the remaining judgments did not mark this box—the trial court meant to mark the box on all the judgments but the clerk simply made a mistake. The State also distinguishes this case from *Tincher* since none of the judgments in *Tincher* marked the box indicating probation would run consecutively to the active sentence. *See id.* Defendant argues that the one judgment with the marked box was a clerical error since the remaining judgments did not specify probation would run consecutively.

In *State v. Harwood*, this Court was presented with a similar issue where

> each of the five judgments in which the 2009 trial court placed defendant on supervised probation, the 2009 trial court failed to either check the box to order that the probation would begin upon [the] defendant's release from incarceration or check the box to order that the period of probation would begin at the expiration of another sentence.

243 N.C. App. 425, 430, 777 S.E.2d 116, 120 (2015). We noted that by not checking either box five times, it was "strongly suggest[ed] that the trial court did not make a mistake but rather intended for [the] defendant's probation to run concurrently with his incarceration." *Id.* This Court concluded

> this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend [the] defendant's period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment. Because this provision is substantive, we lack authority to change it under Rule 60(a).

Id. The State also argued comments made by the trial court at sentencing showed the trial court intended for defendant's probation to run concurrently. *See id.* The trial court stated "I want you to know that I have imposed a very strenuous and very serious probation period for you. I do that out of a sincere desire to see you walk on a very straight and narrow path." *Id.* We concluded not only were these statements "not inconsistent with the judgments on their face[,]" but also that "even if the 2009 trial court did make a mistake, we cannot change a substantive error." *Id.* at 431, 777 S.E.2d at 120 (citation omitted).

We disagree with the State that the transcript indicates the trial court's intention to have the probationary sentence run consecutive to the active sentence. In rendering its ruling, the trial court stated "sentences will run consecutively in each case, probation concurrently." Even though the trial court said "probation concurrently[,]" the State argues the trial court "was stating that the multiple active sentences would not be concurrent with each thereby 'specifying' that probation would begin after incarceration." However, specifying the active sentences would be consecutive but the probation would run concurrently hardly specifies probation was meant to run after the active sentences expired. The trial court did not clearly state during sentencing that it would not be using the default rule and thus probation would start after the active sentences. We disagree with the State's interpretation of the transcript.

Even if the transcript was clear, in *Harwood* we concluded the "trial court's comments to [the] defendant . . . were not inconsistent with the judgments on their face" and then immediately clarified that "even if the . . . trial court did make a mistake, we cannot change a substantive error." *Harwood*, 243 N.C. App. at 431, 777 S.E.2d at 120 (citation omitted). And we applied this logic in *Tincher*, even though that case did not involve a transcript, concluding "even assuming *arguendo* the trial court intended [the d]efendant's probations to run consecutively—the error was substantive and changing the 06 CRS 51521 Judgment would retroactively extend [the d]efendant's sentence. Therefore, we lack the authority to change it." *Tincher*, 266 N.C. App. at 398, 831 S.E.2d at 863.

We are not convinced we should depart from our reasoning in *Tincher* and *Harwood* and thus conclude the trial court intended Defendant's probation to run concurrently in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013 with the active sentence. However, in the judgment with file number 15CRS051041, the box indicating the probationary sentence would begin after the active sentence was checked. This is unlike *Tincher* and *Harwood* where the trial court did not check that box on any of the relevant file numbers. *See id.* at 396-97, 831 S.E.2d at 862; *see also Harwood*, 243 N.C. App. at 427, 777 S.E.2d at 118. Defendant argues this was a clerical error since the trial court indicated probation was to run concurrently. The State does not address how this Court should determine the effect of the single checked box if we were to determine the trial court did not indicate probation was to run after the active sentence at the sentencing hearing. The case cited by Defendant, *State v. Lawing*, 12 N.C. App. 21, 182 S.E.2d 10 (1971), merely supports the general proposition that clerical errors may be remanded to the trial court. But in *Lawing*, the clerical error was in the judgment being appealed. *Id.* at 23, 182 S.E.2d at 11-12. Here, the underlying judgments Defendant claims include clerical errors were never appealed. Defendant has appealed the judgments revoking his probation, not the original judgments entering the probation sentences. The error he alleges is a clerical error in the original judgments, which are not before us on appeal.

Defendant has presented no authority which allows us to remand a judgment for correction of a clerical error where that judgment was never appealed, nor can we find any such authority. Defendant did not timely appeal the judgment in file number 15CRS051041 and even assuming *arguendo* that judgment included a clerical error, we have no authority to correct it. *See State v. Pennell*, 367 N.C. 466, 471-72, 758 S.E.2d 383, 387 (2014) ("[The] defendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment. As such, [the] defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise proper, . . . we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence. The proper procedure through which [the] defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [North Carolina General Statute Section] 15A-1415(b) or petitioning for a writ of habeas corpus. Our holding here does not prejudice [the] defendant from pursuing these avenues." (citation and footnote omitted)).

We conclude the trial court was without jurisdiction to revoke Defendant's probation in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013. However, as the box in file number 15CRS051041 indicating Defendant's probation would start after his active sentence's completion, and this probation was revoked within the time period after his incarceration but before his probation expired, the trial court still had jurisdiction to revoke probation. We will thus only reach the remaining issues in Defendant's appeal as to file number 15CRS051041.

Regarding the judgment in file number 15CRS051041, Defendant also argues the trial court was without jurisdiction to modify his probation in May 2022 after a February 2022 probation violation report. We reject this argument for the same reasons discussed above; Defendant was released from his active sentence in November 2019. Judgment 15CRS051041 provided his three-year term of probation would begin after his release from incarceration, and the violation report and order were both filed before the original expiration of Defendant's probation in November 2022.

B. Notice of Alleged Absconding Violation

[2] As an additional jurisdictional challenge, Defendant argues that the trial court lacked jurisdiction to revoke his probation in file number 15CRS051041 because he "did not receive adequate notice that the State sought to revoke his probation for absconding" from supervision. We disagree.

As to "whether the probation violation reports sufficiently alleged that defendant absconded supervision[,]" this Court's

> analysis is guided by our [Supreme Court's] discussion in *State v. Moore*, 370 N.C. 338, 807 S.E.2d 550 (2017), in which [the Court] addressed whether a probation violation report sufficiently alleged that the defendant had committed the revocable violation of committing a new criminal offense while on probation as prohibited by [North Carolina General Statute Section] 15A-1343(b)(1).

State v. Crompton, 380 N.C. 220, 225, 868 S.E.2d 48, 51 (2022).

Under North Carolina General Statute Section 15A-1345(e),

> [b]efore revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.

N.C. Gen. Stat. § 15A-1345(e) (2023).

As part of Defendant's regular conditions of probation under North Carolina General Statute Section 15A-1343(b) (2023), Defendant was required to "[n]ot abscond, by willfully avoiding supervision or by willfully making . . . [his] whereabouts unknown to the supervising probation officer."

In the violation report for file number 15CRS051041, the State alleged, *inter alia*:

> Of the conditions of probation imposed in [the] judgment, . . . [D]efendant has willfully violated:
>
> 1. "Report as directed by the [c]ourt, Commission or the supervising officer to the officer at reasonable times and places" in that on or about 7/9/2023, . . . Defendant left his treatment program at Dare Challenge. For over 9 days . . . Defendant failed to report his whereabouts.
>
> . . . .
>
> 2. Condition of Probation "Not be away from . . . [D]efendant's residence during the specificized hours as set by the court or probation officer" in that as of 7/9/2023, . . . Defendant failed to notify this officer of his whereabouts, once he left his treatment program at Dare Challenge. This also violated his condition of curfew, as this officer could not properly check [sic] . . . Defendant at his required curfew time of 7pm-6am, for roughly 9 days.

(Ellipsis omitted and capitalization altered.)

Defendant contends that because the violation report did not explicitly identify "absconding" as grounds for violation but only described his actions constituting the alleged violation, the State failed to provide adequate notice as to the State's intention to revoke probation on those grounds. In Defendant's view, we should interpret the language and requirement of providing a "probationer notice of the hearing and *its purpose*, *including a statement of the violations alleged*[,]" *id.* (emphasis added) as requiring the State to explicitly identify the alleged condition violation. Because the State did not explicitly use the term "absconding" or any variation thereof in the violation report, Defendant contends he did not receive adequate notice of absconding from supervision as grounds for his probation violation.

Our Supreme Court in *State v. Moore*, however, explained this is not the proper interpretation of North Carolina General Statute Section 15A-1345(e). *See* 370 N.C. 338, 341, 807 S.E.2d 550, 552 (2017). In *Moore*, the defendant appealed the trial court's revocation of his probation after the State filed reports alleging he violated certain probation conditions. *See id.* at 339-40, 807 S.E.2d at 551-52. Similar to this case, the defendant in *Moore* argued that "because the probation violation reports did not specifically list the 'commit no criminal offense' condition as the condition violated, the reports did not provide the notice that subsection 15A-1345(e) requires." *Id.* at 340, 807 S.E.2d at 552.

In analyzing the language of Section 15A-1345(e), our Supreme Court explained:

> It follows that the phrase "a statement of the violations alleged" refers to a statement of what a probationer *did* to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated.
>
> In effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used. [The d]efendant would have us insert a requirement into the statute that simply is not there: one that requires the State to provide notice of the specific condition of probation that defendant allegedly violated. This approach would effectively add words to the statute so that the statute would read "a statement of the violations alleged *and the conditions of probation allegedly violated*." But the statute as it actually reads, without the italicized words, requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated.

Id. at 341, 807 S.E.2d at 552-53 (emphasis in original) (citations, quotation marks, and brackets omitted).

Here, the violation report stated "what . . . [Defendant] *did* to violate his conditions of probation." *Id.* (emphasis in original). The report alleged Defendant "left his treatment program at Dare Challenge" and "[f]or over 9 days . . . failed to report his whereabouts." Under our Supreme Court's guidance in *Moore*, this statement sufficiently identifies what Defendant "*did* to violate his conditions of probation." *Id.* (emphasis in original). The probation violation report gave Defendant sufficient notice under Section 15A-1345(e). Use of the word "absconding" was not required since the report alleged Defendant's actions which violated his probation conditions.

C. Probation Violation

[3] Defendant argues the trial court abused its discretion and "erred" in finding he willfully absconded from supervision, violating a condition of his probation. As to Defendant's argument that the State failed to present sufficient evidence to show he had willfully absconded, we review only to determine if the evidence would "reasonably satisfy" the judge in the exercise of his discretion that the violation occurred:

> The alleged violation by the defendant of a valid condition upon which a sentence in a criminal case was suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.

State v. Robinson, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958) (citations omitted).

"Our Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse." *State v. Tennant*, 141 N.C. App. 524, 527, 540 S.E.2d 807, 808 (2000) (citations, quotation marks, and brackets omitted).

"An abuse of discretion will be found when the trial court's ruling is 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Johnson*, 246 N.C. App. 132, 134, 782 S.E.2d 549, 551 (2016) (quoting *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005)).

1. Finding of absconding

Defendant argues that even if he received sufficient notice as to the violation of absconding, the trial court nevertheless abused its discretion in finding that he willfully absconded from supervision because the State's evidence showed his probation officer, Dawn Brickhouse,

> personally did nothing to locate [Defendant] after being told that he had left Dare Challenge. His failure to communicate with her for a 9-day period after 5 years of probation – considering her lack of records related to any attempt to reach him for those 9 days – was insufficient to support a finding of willful absconding.

We first note that the trial court stated its findings regarding absconding in open court:

> the [c]ourt finds that upon numerous requests by . . . [D]efendant, the [c]ourt has repeatedly offered some leniency and attempted amelioration, including placing . . . [D]efendant in drug court, specifically at his request saying he'd never had that opportunity. Thereafter, there were several violations of the terms and conditions of drug court, some of which resulted in periods of incarceration. . . . [D]efendant also was ordered and directed to report in response to a violation to a program of inpatient treatment. . . . [D]efendant was also under a condition that should he leave voluntarily or without authorization or excuse or be involuntarily terminated that he should be immediately arrested. . . . [D]efendant was aware of that condition. . . . [D]efendant removed himself from the ability of officers to supervise directly or indirectly during such period. He was for a period unsupervised, the probation officer could not test, no member of the probation department knew . . . [D]efendant's whereabouts, despite several attempts to locate him. And this was at a time that . . . [D]efendant was under the heightened conditions and scrutiny of having been previously adjudicated in violation of conditions of probation and placed in a recovery paradigm.
>
> [The c]ourt finds that this is the functional equivalent of failing to make himself reasonably available for supervision and otherwise known as absconding.

To revoke a defendant's probation, the State must first "present[] competent evidence establishing a defendant's failure to comply with the terms of probation[.]" *State v. Melton*, 258 N.C. App. 134, 136, 811 S.E.2d 678, 680 (2018) (citation and quotation marks omitted). The burden then shifts to the defendant "to demonstrate through competent evidence an inability to comply with the terms." *Id.* (citation and quotation marks omitted).

This Court in *State v. Melton* explained that "[p]rior to our Legislature's enactment of the Justice Reinvestment Act of 2011 ('JRA'), the term 'abscond' was not defined by statute." *Id.* at 137, 811 S.E.2d at 681 (citation omitted). The JRA was passed as "part of a national criminal justice reform effort which, among other changes, made it more difficult to revoke offenders' probation and send them to prison." *Id.* at 138, 811 S.E.2d at 681 (citation and quotation marks omitted). Now, under North Carolina General Statute Section 15A-1343, a criminal defendant absconds when he "willfully avoid[s] supervision or . . . willfully mak[es] [his] whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). "Under the statutory definition . . . , we have held that a defendant absconds when he willfully makes his whereabouts unknown to his probation officer, and the probation officer is unable to contact the defendant." *Melton*, 258 N.C. App. at 138, 811 S.E.2d at 681 (citation omitted).

In *Melton*, this Court concluded "there was insufficient competent evidence" to support a finding the defendant *willfully* absconded from supervision where "the probation officer could not testify with any specificity and did not have records regarding her attempts to locate [the] defendant during th[e] two-day period" between her missed probation appointments and the absconding allegation. *Id.* at 140, 811 S.E.2d at 683 (emphasis added). Like *Melton*, here, Defendant argues that the testimony of his probation officer, along with the violation reports, lacked "specificity" as to the attempts made to locate or get in contact with Defendant during the nine-day period between him leaving the Dare Challenge treatment program and his arrest.

The State, however, argues the facts in the case are more similar to those in *State v. Trent*, 254 N.C. App. 809, 803 S.E.2d 224 (2017). In *Trent*, this Court affirmed a trial court's finding that the defendant did willfully abscond from supervision when he "accepted an eight-day painting job in Raleigh," but failed to report this job opportunity to his probation officer before leaving his residence. *Id.* at 818, 803 S.E.2d at 230. "As a result, [the defendant's probation officer] was unaware that [the] defendant would not be in Randleman when she made her first unscheduled visit to his residence on 24 April 2016." *Id.*

Here, during the revocation hearing on 31 July 2023, Ms. Brickhouse testified that Defendant was required to attend the Dare Challenge residential treatment program in Wanchese as part of his recovery court conditions, and that Defendant began Dare Challenge "[t]owards the middle of June [2023]. The violation report alleged Defendant left the program "on or about" 9 July 2023. Ms. Brickhouse testified Defendant left the program without permission on 11 July 2023. Per the conditions of the recovery court, Ms. Brickhouse testified Defendant was required to "notify" her when he left the program, but Defendant did not do so. It was undisputed that Defendant did not notify Ms. Brickhouse that he left the residential treatment program. Defendant's testimony confirmed that he did not even attempt to notify her. He testified that he did not notify Ms. Brickhouse when he left Dare Challenge because he left his phone there. He also testified that since he did not have his phone when he left Dare Challenge, he did not have Ms. Brickhouse's phone number.

The facts in this case are distinguishable from those presented in *Melton*. In *Melton*, the defendant had been missing for only two days between her probation appointment and the absconding allegation. 258 N.C. App. at 140, 811 S.E.2d at 683. This Court also determined the defendant had not been subject to "any . . . intermediate punishment" before her sentence's suspension, contrary to the Legislature's intent behind the JRA in "activati[ng] . . . probationary sentences . . . only . . . as a last resort and after the use of the other tools available." *Id.* at 140, 811 S.E.2d at 682. This Court concluded the probation officer's inability to "testify with any specificity" as to attempts to locate the defendant, "*considered together* with the two-day period" and absence of any "intermediate punishment" did "not support a judgment of revocation." *Id.* at 140, 811 S.E.2d at 683. Defendant misconstrues the lack of specific evidence of attempts by the probation officer to locate the defendant as outlined in *Melton* as an all-or-nothing determinative factor in concluding whether a defendant's probation can rightfully be suspended.

Unlike *Melton*, here, Defendant's whereabouts were unknown for nine days between the time of his unauthorized departure from Dare Challenge and his arrest. In addition, the defendant in *Melton* was not subject to additional requirements such as those imposed on Defendant by the recovery court and the Dare Challenge program. The trial court noted the additional requirements imposed on Defendant while at Dare Challenge. While at Dare Challenge, Defendant was "under a condition that should he leave voluntarily or without authorization or excuse or be involuntarily terminated that he should be immediately arrested." Further, "[D]efendant was aware of [this] condition." The trial court found that Defendant "removed himself from the ability of officers to supervise him directly[,]" or "indirectly" through communicating with his probation officer and making his whereabouts known after leaving

Dare Challenge. Ms. Brickhouse testified that after Defendant left Dare Challenge, there were several attempts to locate him by sending local law enforcement officers to his listed residence, but Defendant "was not there." Unlike *Melton*, during Defendant's nine-day absence, he was "under the heightened conditions and scrutiny of having been previously adjudicated in violation of conditions of probation and placed in a recovery paradigm." The trial court did not abuse its discretion by finding that Defendant's actions of leaving Dare Challenge without authorization and failing to inform his probation officer were "the functional equivalent of failing to make himself reasonably available for supervision and otherwise known as absconding."

Under *Melton*, the State here "present[ed] competent evidence establishing . . . [D]efendant's failure to comply with the terms of [his] probation." 258 N.C. App. at 136, 811 S.E.2d at 680 (citation and quotation marks omitted). The burden then shifted to Defendant to "demonstrate through competent evidence an inability to comply with th[os]e terms[ ]" of his probation. *Id.* (citation and quotation marks omitted). At the hearing, Defendant testified he left Dare Challenge prematurely due to another participant who was allegedly using drugs, which made Defendant uncomfortable as he was "clean" at that time. When he left Dare Challenge, Defendant did not take his phone with him and testified he did not "have [Ms. Brickhouse]'s number." When he arrived at his house, the mother of Defendant's children "agreed to help [him] get in contact with probation," but that, "[a]t the same time[,] [he] still did not have a phone." On cross-examination, however, Defendant acknowledged the individual who was using drugs and the main reason he claimed he left Dare Challenge was actually "kicked . . . out" of the program before Defendant left. Also, though Defendant himself did not have a phone, he further acknowledged that his ex-wife, with whom he was staying after leaving Dare Challenge, did have a phone. The trial court did not abuse its discretion by finding Defendant failed to demonstrate his "inability" to comply with his probation terms by failing to notify his probation officer after he left Dare Challenge in violation of his recovery court and probation conditions.

D. Anticipatory Bond

[4] Finally, Defendant argues that the trial court further erred in "setting an anticipatory bond as a condition" of Defendant's probation. But we do not have appellate jurisdiction to address this argument.

In an order modifying Defendant's probation, entered 6 June 2023, the trial court added a condition that "[s]hould . . . Defendant be unsuccessfully discharged from treatment, have a positive/refused drug test, or violate any of the conditions of this [o]rder, [ ]he may be immediately subject to arrest and placed under a $100,000.00 secured bond[.]" Defendant claims the trial court "had no authority to dictate [Defendant] be arrested and held on a specific [anticipatory] bond." However, we will not review this argument as Defendant did not appeal from the 6 June 2023 order and did not preserve the issue for appellate review by this Court.

The anticipatory bond condition Defendant seeks to challenge in this appeal was imposed in an order modifying probation entered in June 2023; the probation revocation order subject to this appeal was entered in August 2023. The June 2023 order is not before this Court.

A similar situation was presented in *State v. Hilbert*, where the trial court had included an additional condition to the defendant's probation, stating that upon the defendant's "[f]irst positive [drug] test[,] he is to be immediately arrested and placed under $100,000.00 cash bond to await the probation violation hearing." 145 N.C. App. 440, 445, 549 S.E.2d 882, 885 (2001). We concluded that the defendant's challenge was not properly preserved for appellate review for two reasons. *Id.* at 445, 549 S.E.2d at 885-86. First, the relevant convictions "were neither included in his [p]etition nor in our order allowing certiorari." *Id.* Second, the "defendant [had] failed to object *at sentencing* to the probationary condition at issue and his present challenge thereto has not been preserved for our review." *Id.* The Court cited Rule 10 of the North Carolina Rules of Appellate Procedure, *id.*, which provides that "[i]n 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. 10(a)(1). We thus concluded that the judgment imposing the anticipatory bond condition was not subject to review.

Here, Defendant makes arguments as to his sentencing and contends that his challenge to the anticipatory bond is automatically preserved under North Carolina General Statute Section 15A-1446, which states:

> (d) Errors based [upon] . . . the following grounds may be the subject of appellate review even though no objection or motion has been made in the trial division:
>
> . . . .

> (18) The sentence imposed was [not allowed] at the time imposed, exceeded the maximum [allowed] by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2023).

But we are considering the appeal of the order revoking Defendant's probation, not the sentence imposed in the original judgment or the June 2023 order modifying his probation. The "sentence imposed," specifically the anticipatory bond condition, was imposed by an order not before this Court. Defendant did not notice appeal or petition for review by certiorari as to the June 2023 order, so this Court does not have appellate jurisdiction to review that order. We recognize that on some "rare occasions" in "exceptional cases," this Court has treated a brief as a petition for certiorari to review a meritorious argument. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020). Here, we decline to consider this issue *sua sponte* by certiorari. In addition, our record would not be sufficient to review Defendant's argument since it would require relevant information from the June 2023 hearing, which we do not have.

Because we have no appellate jurisdiction to review the June 2023 order which imposed the anticipatory bond, we cannot review Defendant's argument regarding the bond.

III. Conclusion

We vacate the judgments revoking Defendant's probation in file numbers 15CRS051200, 15CRS051330-36, and 17CRS000013. The trial court did not have jurisdiction to enter these judgments. However, we affirm the revocation of probation in file number 15CRS051041. The violation report sufficiently alleged absconding as the grounds for Defendant's probation violation, and the trial court did not abuse its discretion in finding Defendant absconded from supervision.

VACATED IN PART; AFFIRMED IN PART.

Chief Judge DILLON and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
WAYNE DOUGLAS WILSON

No. COA24-581

Filed 5 November 2025

Jury—review of gun exhibit—in open court—not part of jury deliberations—no structural error

At a trial for multiple crimes including possession of a firearm by a felon, the trial court did not commit constitutional error per se by allowing the jury to review a gun—which had been admitted into evidence and published to the jury by the State—in open court and in the presence of non-jurors (multiple bailiffs, a probation officer, the court reporter, and the courtroom clerks) with the consent of both parties. The court's decision, which was motivated by general safety concerns, was authorized by statute and within the court's discretion to make. Importantly, although the court mistakenly referred to the jurors' review of the gun as being part of "deliberations" before it allowed the jury to see the exhibit, the transcript showed that the court did not in fact instruct the jury to deliberate in open court. Therefore, the court's mere misstatements did not violate defendant's constitutional right to have the verdicts determined by twelve jurors.

Appeal by defendant from judgments entered 16 June 2023 by Judge Brenda Green Branch in Nash County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Jonathan D. Jones, for the State.

Thomas, Ferguson & Beskind, LLP, by Olivia Warren, for defendant-appellant.

ZACHARY, Judge.

Defendant Wayne Douglas Wilson appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of possession with intent to sell or deliver cocaine, trafficking in cocaine by possession, trafficking in cocaine by manufacture, maintaining a dwelling house that is used to keep or sell a controlled substance, and possession of a firearm by a felon. On appeal, Defendant challenges the constitutionality of the jury deliberations. After careful review, we conclude that Defendant received a fair trial, free from error.

I. Procedural Background

Defendant's case came on for jury trial on 13 June 2023 in Nash County Superior Court. The State proceeded on five charges: possession with intent to sell or deliver cocaine, trafficking in cocaine by possession, trafficking in cocaine by manufacture, maintaining a dwelling house that is used to keep or sell a controlled substance, and possession of a firearm by a felon.

Jury deliberations began on 15 June and continued into the next day. On 16 June, the jury asked to review State's Exhibit Number 14, a gun that had been admitted into evidence and published to the jury. Neither party's counsel objected and the jury was brought into the courtroom to view the gun. The trial court dismissed counsel and Defendant from the courtroom while the jury reviewed the exhibit, and the trial judge left for a short period of time. However, the court reporter, some bailiffs, a probation officer, and the courtroom clerks were present. The jury then returned to the jury room to continue deliberations. After concluding its deliberations, the jury returned verdicts finding Defendant guilty of all charges.

That same day, the trial court entered judgments sentencing Defendant to a term of 12 to 24 months' imprisonment in the custody of the North Carolina Department of Adult Correction for his conviction of possession with intent to sell or deliver cocaine. The court consolidated the remaining convictions and entered a consecutive term of 35 to 51 months' imprisonment.

Defendant gave oral notice of appeal.

II. Analysis

Defendant raises one argument on appeal: whether "[t]he trial court violated Article I, Section 24 of the North Carolina Constitution when it instructed the jury to deliberate on the record with at least seven non-jurors present, including the trial judge herself." He contends that the instruction to deliberate constituted a constitutional error per se, automatically requiring a new trial.

"The standard of review for alleged violations of constitutional rights is de novo." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (italics omitted), *appeal dismissed*, 363 N.C. 857, 694

S.E.2d 766 (2010). "Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Barnes*, 226 N.C. App. 318, 320, 741 S.E.2d 457, 460 (italics omitted), *disc. review denied*, 367 N.C. 219, 747 S.E.2d 549 (2013).

"Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (cleaned up), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "North Carolina courts . . . apply a form of structural error known as error per se." *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 331 (2012). "[E]rror per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *Id.* at 514, 723 S.E.2d at 332.

Our General Statutes outline the requisite procedure for a jury's review of evidence after it has begun deliberations:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2023).

In the instant case, the trial court permitted the jury to reexamine State's Exhibit Number 14 in open court but mistakenly referred to the review as part of the jury's deliberations. The trial court discussed the matter with counsel and, with their consent, allowed the jury to review the exhibit in the courtroom, subject to the following instructions:

> THE COURT: We are back on the record with the matter of [Defendant], with a request from the jury to be able to see the gun . . . . For safety concerns, we would rather have you view the gun here in the courtroom. It's going to be published to you by [the bailiff]. And that way anyone who's not comfortable holding a gun doesn't have to. We'll make sure that we're safe. If you feel you need . . . [to]

pick it up, just make sure that the officer does that for you. Take as long as you -- as long [of a] time as you wish, to make sure you're comfortable.

(State's Exhibit Number 14 is published to the jury.)

(Pause.)

THE COURT: And, Sergeant?

[BAILIFF]: Yes, ma'am?

THE COURT: Let all of them review it. And I'm thinking that we may have the State and the defense . . . step out, because this would be part of their deliberation.

Leave the [bailiff] in here. You-all -- we'll have them to go there. That way, anybody in particular[ ] -- because you're in deliberations now, see? And I don't think that should be soiled by anyone. We'll just leave the officers in here because it is a weapon. Have them . . . step out, just for a few moments so that they can be comfortable. And have the witness step out, as well.

Note that the jury requested to view the gun. This is part of their deliberation, that therefore the defense or the State should not be involved in who views the weapon. Only those in the courtroom who are impartial in this case are here; and that the officers are here to make sure that it is safe, and that the witnesses feel comfortable, if they need to remove the gun, hold the gun, or look at the gun. He can hold it up for you. I want you to have sufficient time to do just that.

And this [c]ourt will step out to give them sufficient time so as not to feel pressure.

(The Presiding Judge exits the courtroom . . . .)

(Assistant District Attorneys, Counsel for . . . Defendant, and . . . Defendant exit the courtroom.)

(Pause.)

(Remaining in the courtroom are the jurors, courtroom clerks, probation officer, bailiffs, and the court reporter.)

(Continued publishing of the exhibit.)

> (Pause.)
>
> [BAILIFF]: Does anyone else want to see it again? You have plenty of time.
>
> . . . .
>
> (The Presiding Judge re-enters the courtroom . . . .)
>
> . . . .
>
> THE COURT: [L]et the record reflect that the Presiding Judge is back in the courtroom; [I] want to question [the jury] to make sure you had ample time, sufficient time to view the gun to your satisfaction for your deliberation.
>
> . . . .
>
> All right, let the record reflect that as part of their deliberation, they wanted to see the gun. They have been allowed to do so. They have been allowed to spend as much time as they feel they needed for their deliberation in order to help them make a proper decision in this case. The [c]ourt will release them back to the jury room now. Please note still that [the] defense attorney is not present. Defendant is not present. The State is not present.
>
> . . . .
>
> (The jury exits the courtroom . . . .)
>
> THE COURT: All right, note that the [c]ourt asked the jurors to come in because there was a gun and because of safety, and the officers are here, and asked the State and the defense to walk out so that those who are more interested and concerned would not be identified by the State or the defense or the [c]ourt as to who had concerns. It should be a secret deliberation, as it was. Thank you.
>
> All right, bring them in. Let the record reflect that all jurors have left the courtroom. Because it was part of their deliberations, the alternates were not present.

On appeal, Defendant maintains that although the trial court initially complied with the statutory procedures, when it "instructed the jury to deliberate on the record with at least seven other parties present" the court violated Defendant's "constitutional guarantee to (1) twelve jurors; (2) in the sanctity; (3) confidentiality; and (4) privacy of the jury deliberation process." (Capitalization omitted). In support of his argument, Defendant relies on *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975). In *Bindyke*, the trial court failed to discharge an alternate juror who then entered the jury room when the jurors retired to deliberate; the alternate remained inside with the jury for three to four minutes. 288 N.C. at 621, 220 S.E.2d at 530. Our Supreme Court held "that the presence of an alternate in the jury room during the jury's deliberations violates" N.C. Const. art. I, § 24 and consequently "constitutes reversible error per se." *Id.* at 627, 220 S.E.2d at 533 (italics omitted).

Here, although the court mistakenly referred to the jurors' review of State's Exhibit Number 14 as part of the jury's "deliberations," it did not—as Defendant claims—instruct the jury to deliberate in open court and thereby disturb "the constitutional sufficiency of a properly functioning jury." *State v. Hamer*, 377 N.C. 502, 508, 858 S.E.2d 777, 782 (2021) (cleaned up).

In approving the jury's request to review State's Exhibit Number 14, the trial court complied with the applicable statutory directives. *See* N.C. Gen. Stat. § 15A-1233(a) ("If the jury after retiring for deliberation requests a review of certain . . . evidence, the jurors must be conducted to the courtroom. The judge in h[er] discretion, after notice to the prosecutor and defendant, . . . may permit the jury to reexamine in open court the requested materials admitted into evidence.").

It is undisputed that, after retiring for deliberations, the jury asked to review the gun, which had been admitted into evidence at trial. The trial court properly notified the State and Defendant of the jury's request; given an opportunity to object on the record, both parties instead consented to the jury's review of State's Exhibit Number 14. In her discretion, the trial court approved the jury's request. Due to general "safety concerns," the trial court determined that the jury's review of the gun would be conducted "here in the courtroom," in the presence of bailiffs. The trial court's decision on this matter was authorized by statute and within the court's discretion.[1]

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1. We further note that with the parties' consent, the trial court also had the discretion to allow the jury to review the gun *in the jury room*, had it opted to do so. *See* N.C. Gen. Stat. § 15A-1233(b) ("Upon request by the jury and with consent of all parties, the judge may in h[er] discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence."). However, given the nature of the evidence in question, the trial court instead allowed the jury to conduct its review of State's Exhibit Number 14 in open court. *See id.* § 15A-1233(a).

Defendant nevertheless contends that, as in *Bindyke*, reversible constitutional error occurred when the trial court permitted the jury's review of the gun to occur in the presence of non-jurors. We disagree.

Unlike *Bindyke*, the instant case does not concern the improper presence of an alternate juror in the jury room during deliberations. *Cf.* 288 N.C. at 627–28, 220 S.E.2d at 533 (holding that "any time an alternate is in the jury room during deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial" (original emphasis omitted)). Indeed, as Defendant repeatedly observes, the jury's review of the gun occurred *in open court* with the consent of both parties. And as explained above, the trial court's mere mention of the term "deliberation" in addressing the jury prior to its review of the gun does not, absent more, constitute error per se. Accordingly, we are not persuaded by Defendant's claim that "the presence of at least seven other parties" in the courtroom—namely, "courtroom clerks, a probation officer, bailiffs, and the court reporter"—during the jury's review of the gun "must 'void the trial' " under these circumstances.

In sum, there was no "participation in the deliberative process of at least seven non-jurors" nor any other violation of the sanctity of the jury deliberations. The transcript demonstrates that the jurors simply reviewed the exhibit without discussion. Thus, unlike the cases involving flaws in the jury deliberations upon which Defendant relies, here, the court's misstatements did not constitute "a violation of . . . [D]efendant's constitutional right to have the verdict determined by twelve jurors," thereby rendering the trial "so fundamentally flawed that the verdict cannot stand." *State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001). Any inaccurate statements by the trial court regarding jury "deliberations" did not constitute error per se.

Finally, it is telling that Defendant does not attempt to demonstrate any prejudice from the court's characterization of the review of State's Exhibit Number 14 as part of the jury deliberations, and we can conceive of none. And there being no showing of error per se, Defendant cannot rely on a presumption of prejudice.

Defendant's arguments are overruled.

III. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges GORE and FREEMAN concur.

VIVIAN TAYLOR, Plaintiff
v.
CURTIS TAYLOR, Defendant

No. COA25-398

Filed 5 November 2025

1. Divorce—alimony—claim denied—dependency status—insufficient findings of fact

An order denying plaintiff wife's claim for alimony was vacated—and the matter was remanded—where the trial court made insufficient factual findings supporting its conclusion that plaintiff was not a "dependent spouse." Specifically, the order contained no findings regarding plaintiff's monthly income or expenses, her accustomed standard of living, or defendant husband's ability to provide support—all factors which the court was required to consider under N.C.G.S. § 50-16.3A(b). Although the court did incorporate prior orders by reference, it could not rely upon a general incorporation of those orders' findings to demonstrate that it had properly considered all statutory factors under section 50-16.3A(b).

2. Contempt—civil—failure to pay post-separation support—insufficient findings of fact

After the trial court in a domestic case denied plaintiff wife's motion for contempt, which alleged that defendant husband had willfully failed to comply with a prior post-separation support order, the order denying plaintiff's motion was vacated—and the matter was remanded—because the court did not include any findings of fact addressing whether the post-separation support order remained in effect, whether defendant had complied with or had the present ability to comply with its terms, or whether defendant's alleged nonpayment was willful—all factors which the court was required to consider under N.C.G.S. § 5A-21(a).

Appeal by defendant from judgment entered 8 April 2024 by Judge W. Turner Stephenson, III in Northampton County Superior Court. Heard in the Court of Appeals 15 October 2025.

Pritchett & Burch, PLLC, by L. Clifton Smith, III, for the plaintiff-appellant.

No brief filed on behalf of the defendant-appellee.

TYSON, Judge.

Vivian Taylor ("Plaintiff") appeals from the trial court's order denying her claim for alimony and motion for contempt. The trial court concluded Plaintiff was not a dependent spouse and further found Curtis Taylor ("Defendant") was not in willful contempt of court for violation of a prior support order. We conclude the trial court failed to make sufficient findings of fact to support its conclusions denying alimony and finding of no contempt and remand for further proceedings.

I. Background

Plaintiff and Defendant were married on 13 February 1986 and separated on 13 April 2019. No children were born of the marriage. On 30 September 2020, the parties reached a memorandum of agreement in open court concerning post-separation support. A Consent Order on Post-Separation Support ("Post-Separation Support Order") was entered 2 November 2020 requiring Defendant to pay Plaintiff $1,500 per month. Although the complete terms of the agreement are missing in the record before us, subsequent motions by Defendant and orders of the trial court provide Defendant was required to pay $1,500.

The matter proceeded to equitable distribution. After a hearing, the court entered an Order on Equitable Distribution of Marital Property on 11 January 2023, distributing the parties' assets and debts. The parties owned a joint Merrill Lynch brokerage account containing approximately $100,000 in savings at the time of separation. By agreement, $20,000 from this account was allocated to cover Plaintiff's agreed-upon interim support needs of $1,500 per month and was credited to Defendant's Post-Separation Support Order obligations equaling approximately thirteen and one-third months of post-separation support payments. Another $20,000 was disbursed from the account and was used to purchase a Toyota automobile for Plaintiff. After these expenditures, approximately $60,000 remained in the joint Merrill Lynch account. The equitable distribution judgment awarded Plaintiff the remaining balance as part of her share of marital property.

Six months later on 20 June 2023, Plaintiff filed a Motion for Contempt against Defendant, alleging willful failure to comply with the court's Post-Separation Support Order. Plaintiff also filed a separate motion for alimony. Defendant filed a *pro se* "Motion for Relief" on 17 February 2022. A hearing was held on 4 October 2023 regarding Plaintiff's alimony motion, Plaintiff's motion for contempt for Defendant's purported failure to make payments pursuant to the Post-Separation Support Order, and Defendant's motion for appropriate relief.

At the hearing, Plaintiff testified Defendant had failed to consistently pay the $1,500 per month for post-separation support, as required by the Post-Separation Support Order. Plaintiff further testified she took early retirement and began drawing Social Security benefits, from which she was receiving about $476 per month with no other current income. Plaintiff used portions of the distributed savings to pay bills and purchased a replacement vehicle for $22,000. At the time of the hearing, Plaintiff retained approximately $45,000 from the joint Merrill Lynch account distribution.

The court denied Plaintiff's request for alimony and found Defendant was not in willful contempt of court for violation of the Post-Separation Support Order. The record before us does not contain an order regarding Defendant's 17 February 2022 Motion for Relief. The trial court found and concluded: (1) Plaintiff is not a dependent spouse; and, (2) Defendant is not in willful contempt of court. Plaintiff filed timely Notice of Appeal.

II. Jurisdiction

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

III. Issues

Plaintiff contends the trial court failed to make sufficient findings of fact: (1) to support its conclusion of law she was not a dependent spouse and the resulting denial of her claim for alimony; and, (2) to support its denial of contempt for failure to make payments pursuant to the Post-Separation Support Order. Plaintiff argues the order should be vacated and the matter remanded for further hearing on the issues.

IV. Denial of Alimony

[1] Plaintiff asserts insufficient findings of fact support the trial court's conclusion she was not a "dependent spouse" and the trial court erred in denying her claim for alimony under N.C. Gen. Stat. § 50-16.3A (2023).

A. Standard of Review

The trial court's decision regarding an award of alimony is generally "left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Williamson v. Williamson*, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citation and quotation marks omitted). A trial court abuses its discretion when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

When the trial court sits without a jury, we review "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Williamson*, 217 N.C. App. at 390, 719 S.E.2d at 626 (citation and internal quotation marks omitted). The trial court's "conclusions of law are reviewable *de novo*." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004).

B. Analysis

N.C. Gen. Stat. § 50-16.1A(2) (2023) defines a dependent spouse as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.3A(a) (2023) further explains alimony "shall" be awarded "to the dependent spouse upon a finding [ ] one spouse is a dependent spouse, [ ] the other spouse is a supporting spouse, and [ ] an award of alimony is equitable after considering all relevant factors[.]" A list of relevant factors is contained in N.C. Gen. Stat. § 50-16.3A(b) (2023).

"A party is 'actually substantially dependent' upon her spouse if she is currently unable to meet her own maintenance and support[,]" and "[a] party 'substantially in need of maintenance and support' if she will be unable to meet her needs in the future, even if she is currently meeting those needs." *Carpenter v. Carpenter*, 245 N.C. App. 1, 4, 781 S.E.2d 828, 832 (2016) (quoting *Barrett v. Barrett*, 140 N.C. App. 369, 370-71, 536 S.E.2d 642, 644 (2000)). "If the trial court determines [ ] a party's reasonable monthly expenses exceed her monthly income, and [ ] she has no other means with which to meet those expenses, it may properly conclude the party is dependent." *Id.* at 4, 781 S.E.2d at 833.

When determining dependency, the trial court examines "the parties' income and expenses in light of their accustomed standard of living." *Helms v. Helms*, 191 N.C. App. 19, 24, 661 S.E.2d 906, 910 (2008). "The trial court must at least make findings sufficiently specific to indicate [ ] the trial judge properly considered each of the factors . . . for a determination of an alimony award." *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) (citations and quotation marks omitted). Unless the trial court is ruling on a "motion for which the Rules of Civil Procedure do not require special findings of fact, the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c) (2023).

If the trial court fails to make such findings, we must remand for entry of additional findings. *See Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 475 (vacating and remanding "to the district court for a redetermination of defendant's dependency and entry of judgment containing findings of fact sufficiently specific to show that the court properly considered the statutory requirements").

Here, the order finding Plaintiff is not a dependent spouse and denying alimony contains no findings regarding Plaintiff's monthly income or expenses, her accustomed standard of living, or Defendant's ability to provide support, each of which is a statutory consideration under NC. Gen. Stat. § 50-16.3A(b) (2023). Although the trial court incorporated prior orders by reference, the "general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors . . . and these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C. Gen. Stat. § 50-16.3A." *Kabasan*, 257 N.C. App. at 467, 810 S.E.2d at 711 (citations, quotation marks, and alterations omitted). Properly admitted evidence and distributions could support the trial judge's ultimate conclusions. The trial court's order is vacated and remanded for entry of additional findings of fact sufficient to support its conclusion regarding an award or denial of alimony and "show [ ] the [trial] court properly considered the statutory requirements." *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 475.

V. Denial of Contempt

[2] Plaintiff argues the trial court failed to make any findings of fact to support its conclusion Defendant is not in willful contempt of court for failure to make payments pursuant to the Post-Separation Support Order. Plaintiff contends the ruling should be reversed and remanded for further hearing on the issue.

A. Standard of Review

"In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978). "When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper." *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012).

B. Analysis

"The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999). To hold a defendant in civil contempt for failing to comply with a court order, the trial court must find the following:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The non-compliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a)(1)-(3) (2023).

"Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Watson v. Watson*, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002)). "With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order." *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000).

Because the purpose of civil contempt is not to punish, but to instead force compliance, a "purging provision is essential to the order." *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984). "A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2023).

"It is well established [ ] the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Groseclose v. Groseclose*, 291 N.C. App. 409, 427-28, 896 S.E.2d 155, 168 (2023) (citation and quotation marks omitted). "In order to imprison a defendant found in civil contempt, the trial judge must find that the defendant has the present ability to comply or to take reasonable measures to enable him to comply with the order." *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983).

Here, the trial court's order merely concludes: "Defendant is not in willful contempt of court." The order does not include findings of fact addressing whether the Post-Separation Support Order remained in effect, whether Defendant had complied with or had the present ability to comply with its terms, or whether his alleged nonpayment was willful. Without such findings, this Court is unable to determine whether the trial court's conclusion Defendant was not in contempt of the Post-Separation Support Order was the result of a reasoned decision. *See Bethea*, 70 N.C. App. at 570-71, 320 S.E.2d at 693; *Oakley v. Oakley*, 165 N.C. App. 859, 864, 599 S.E.2d 925, 929 (2004) ("As there was no determination in the trial court's findings of the defendant's present ability to comply with the terms of the order in question, we reverse and remand to the trial court for further findings of fact consistent with this opinion."). Sufficient evidence of payments and distributions were admitted to support the trial court's findings and conclusions. Upon remand, the trial court shall consider and apply N.C. Gen. Stat. § 5A-21 and make further findings of fact and conclusions consistent therewith. N.C. Gen. Stat. § 5A-21 (2023).

VI. Conclusion

The trial court's order lacks sufficient findings of fact to support its conclusions regarding alimony and contempt. We vacate and remand for entry of additional findings. It is within the trial court's discretion whether to hear additional evidence upon remand. *It is so ordered*.

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 NOVEMBER 2025)

ANSHI HOSP. CHARLOTTE LLC v. ROBINSON No. 25-156	Mecklenburg (24CV029775-590)	Dismissed
BRACKEN v. BRACKEN No. 24-826	Clay (22CVD000088-210)	Vacated and Remanded
FERRIS v. PEELE No. 25-18	Cumberland (23CVS005946-250)	Reversed and Remanded
FLETCHER HOSP., INC. v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 24-994	Office of Admin. Hearings (24DHR001146)	Affirmed
HALL v. JONES LANG LASALLE, INC. No. 25-59	N.C. Industrial Commission (19-023663)	Affirmed in Part, Vacated in Part, and Remanded
HAYNER v. TOWN of MONTREAT No. 24-316	Buncombe (22CVS001457-100)	Reversed
HYLDAHL v. BARNES No. 25-243	Brunswick (22CVS002271-090)	Affirmed
IN RE C.A. No. 25-294	Catawba (24SPC050411-170)	Vacated and Remanded
IN RE E.J.B. No. 25-210	Cabarrus (23JT000126-120)	Affirmed
IN RE J.C.R. No. 25-284	Johnston (24JB010258-500)	Affirmed in part, Dismissed in part
IN RE K.W. No. 25-255	Mecklenburg (24JA000078-590)	Vacated and Remanded
IN RE O.R.L. No. 25-93	Davidson (22JT000161-280)	Affirmed
IN RE W.B.A. No. 25-54	New Hanover (24SPC050095-640)	Vacated and Remanded
J.S. v. SUNSHINE SCHOLARS ACAD., LLC No. 25-383	Craven (24CVS001233-240)	Reversed and Remanded

O'BRIEN v. O'BRIEN No. 24-960	Mecklenburg (19CVD004868-590)	Affirmed in Part; Remanded in Part
RIVERWALK CONDOS. OF WILMINGTON UNIT OWNERS' ASS'N, INC. v. GALLAN HOLDINGS, LLC No. 24-1062	New Hanover (23CVS001661-640)	Dismissed
SLOK, LLC v. COURTSIDE CONDO. OWNERS ASS'N, INC. No. 24-99	Mecklenburg (21CVS018165-590)	Affirmed.
STATE v. FOREMAN No. 24-1039	Lenoir (22CR050595-530) (22CR050611-530)	Remanded
STATE v. GATLING No. 25-63	Mecklenburg (21CR204481-590)	No Error; Remanded.
STATE v. HERNANDEZ-MENDEZ No. 24-873	Wake (21CR205416-910)	No Error
STATE v. JACOME No. 24-420	Wake (20CR218652-910) (20CR219573-910)	No Error
STATE v. JAMES No. 24-1116	Johnston (22CR000795-500) (22CR000796-500)	No Error
STATE v. McKOY No. 25-86	Bladen (20CR050565-080)	No Plain Error
STATE v. McREE No. 24-40	Moore (17CR051809-620)	No prejudicial error in part, dismissed in part.
STATE v. RHODES No. 25-262	Wilkes (22CR357573-960) (22CR357579-960) (22CR357583-960) (22CR357587-960) (22CR357598-960) (22CR357605-960) (22CR357608-960) (22CR357612-960) (23CR000217-960) (23CR000218-960)	Affirmed

STATE v. SANDERS No. 25-223	Guilford (21CR088036-400) (21CR088037-400) (21CR088038-400) (21CR088039-400) (21CR088040-400)	No Error
STATE v. SHAW No. 25-305	Union (22CR051062-890)	No error in part and dismissed in part.
STATE v. STANLEY No. 24-962	Lincoln (19CR052034-540) (19CR052035-540) (19CR052037-540) (19CR052038-540) (19CR052042-540) (20CR000332-540)	No Error
STATE v. TAYLOR No. 25-96	Polk (22CR343043-740)	DISMISSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART; NO ERROR IN PART.
STATE v. WALKER No. 24-1074	McDowell (16CR000739-580) (16CR051362-580)	No Error
STATE v. WILLIAMSON No. 25-206	Durham (21CR054436-310)	No Error in Part; No Plain Error in Part
STREAM REALTY PARTNERS - CHARLOTTE, L.P. v. LEVINE PROPS., INC. No. 24-1052	Mecklenburg (22CVS019843-590)	Reversed and Remanded

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