301 N.C. App.—No. 5 Pages 563-650

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 23, 2026

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

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OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

Filed 19 November 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ARBITRATION AND MEDIATION

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CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning hearing—motion to continue—repeated failure to appear—no extraordinary circumstances or prejudice shown—In a permanency planning review hearing during which reunification plans were eliminated for six of respondent-mother's seven children, the court did not abuse its discretion by denying respondent-mother's motion to continue the hearing, for which she was not present. The court cited respondent-mother's repeated failure to appear in court throughout the juvenile proceedings involving her children—a finding based not on mental impression but on judicial knowledge, since the same judge who held the permanency planning hearing (1) had also presided over several prior hearings for which respondent-mother did not appear, and (2) had received regular court reports detailing the case history for each child. Moreover, respondent-mother failed to demonstrate extraordinary circumstances justifying a continuance where her counsel cited respondent-mother's absence as the sole basis for her motion to continue. For this same reason, respondent-mother failed to show that she was prejudiced by the denial of her motion and waived her arguments on appeal that her constitutional due process rights were violated and that she received ineffective assistance of counsel. **In re L.M., 599.**

CHILD CUSTODY AND SUPPORT

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Non-parent standing—to intervene in custody action—presumption of parent's superior right—overcome—The trial court in a child custody case did not err in allowing the former girlfriend (intervenor) of the minor child's mother (plaintiff) to intervene in the action where intervenor had standing to do so. Although the trial court incorrectly found that intervenor had standing pursuant to N.C.G.S. § 50-13.5(j), which applied only to grandparents seeking custody or visitation rights, intervenor nevertheless had standing pursuant to N.C.G.S. § 50-13.1(a) (allowing any parent, relative, "or other person" to institute a custody action) where the court's findings of fact—including that intervenor had a "parent-like relationship" with the child and had been a source of physical, financial, and emotional support since the child's birth; intervenor and plaintiff continued to co-parent the child even after their relationship ended; and plaintiff "voluntarily ceded paramount decision-making authority over" the child when bringing intervenor into the family unit—supported a conclusion that intervenor had overcome the presumption that plaintiff, as the child's biological parent, had the superior right to care and custody. **Bullins v. Riddle, 569.**

CONTRACTS

Specific performance—option to purchase—no evidence of being ready, willing, and able to close—summary judgment proper—In buyers' action for specific performance of an option to purchase real estate, the trial court properly entered summary judgment in favor of the seller. Even construing ambiguities in the option contract against the seller, there was no genuine issue of material fact that, although the buyers gave their intent to purchase, they were not ready, willing, and able to close on the property even six and a half months after the stated closing date when they commenced this action—a period of time that was not reasonable as a matter of law. Further, despite the buyers' argument, the seller was under no obligation to prepare a new purchase agreement to satisfy a condition of the buyers' chosen lender, and buyers' failure to be ready to close in a reasonable amount of time was not through any breach by the seller. **McCall v. Zhang, 608.**

CRIMINAL LAW

Pattern jury instruction—false, contradictory, or conflicting statements by the accused—no prejudicial error—In a prosecution for crimes including possession of methamphetamine and carrying a concealed gun, where defendant gave conflicting testimony concerning how the illegal items at issue came into his possession, the trial court did not prejudicially err by including in its jury charge Pattern Jury Instruction 105.21, which explained that false, contradictory, or conflicting statements by defendant regarding the commission of a crime may be considered as a circumstance tending to reflect the mental processes of someone with a guilty conscience seeking to divert suspicion or exculpate himself. Specifically, defendant could show no prejudice where: the instruction acknowledged that defendant denied making any false statements and that it was up to the jury to determine whether defendant did make such statements; the trial court clarified that these statements would not create a presumption of guilt and, absent other evidence, would be insufficient to prove defendant's guilt; and, under the law, the jurors were presumed to have followed the court's instructions. **State v. Matthews, 625.**

Possession of a firearm—no instruction on attempt—clear error—new trial—In a prosecution for possession of a firearm by a felon and providing false information to a firearms dealer, in which the jury acquitted defendant of the possession charge but found him guilty of attempted possession of a firearm by a felon and of providing materially false information, defendant was entitled a new trial on the possession charge. The trial court committed prejudicial error by failing to properly instruct the jury on the elements of "attempt," including by stating that the jury would have to find that defendant had the intent to commit the substantive offense and that he had committed an overt act that went beyond mere preparation but fell short of completing the substantive offense. Further, the State made blatant misstatements of law regarding intent, which likely misled the jury concerning which intent it needed to apply for attempt. **State v. Vaughn, 634.**

DRUGS

Possession with intent to sell or deliver—methamphetamine isomers—differentiation not required—The trial court properly denied defendant's motion to dismiss a charge of possession with intent to manufacture, sell, or deliver methamphetamine where the State's evidence gave rise to a reasonable inference that a crystalline substance discovered in defendant's vehicle, which testing confirmed was methamphetamine, was a controlled substance pursuant to N.C.G.S. § 90-95(a)(1). Contrary to defendant's assertion, the State was not required to differentiate between the D-methamphetamine and L-methamphetamine isomers of the drug—one of which defendant contended was legal—because the plain language of the North Carolina Controlled Substances Act explicitly includes both forms of the drug as illegal controlled substances. **State v. Dean, 614.**

Possession with intent to sell or deliver—special jury instructions—methamphetamine isomers—differentiation not required—In a prosecution for possession with intent to manufacture, sell, or deliver methamphetamine, the trial court did not err by denying defendant's request for three special jury instructions, which defendant sought largely based on his contention that, because the State's testing did not delineate between two different isomers of methamphetamine (D- and L-methamphetamine), the State could not prove that the substance found in defendant's vehicle was a controlled substance pursuant to N.C.G.S. § 90-95(a)(1). Contrary to defendant's assertion, the State was not required to differentiate between the isomers because the plain language of the North Carolina Controlled

DRUGS—Continued

Substances Act explicitly includes both forms of the drug as illegal controlled substances. Further, even if defendant was entitled to an instruction that the State must prove the existence of a controlled substance by a "[s]cientifically valid chemical analysis," defendant failed to demonstrate prejudice where the instructions in their entirety adequately explained the State's burden. **State v. Dean, 614.**

FIREARMS AND OTHER WEAPONS

Providing false information to firearms dealer—attempted possession of a firearm by a felon—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss charges of providing false information to a firearms dealer and attempted possession of a firearm by a felon, where the State presented substantial evidence of each offense sufficient to send the charges to the jury, including that defendant: had accepted a plea arrangement in 2002, which resulted in him becoming a convicted felon; sought to purchase a firearm from a pawn shop and placed a firearm on layaway; and completed a federal firearms transaction form (ATF form 4473) when he returned to the pawn shop stating that he had never been convicted of a felony. Although defendant stated that he believed his conviction had been expunged, the weighing of a witness's credibility was within the province of the jury. **State v. Vaughn, 634.**

THREATS

Communicating threats—actual belief that threat would be carried out—insufficiency of evidence—In a prosecution for crimes including two counts of communicating threats, where, as two officers—one male, one female—attempted to arrest defendant and were met with resistance, defendant threatened to kill both officers and their families, the trial court erred in denying defendant's motion to dismiss the charge of communicating threats as to the female officer. Although the male officer testified at trial that he believed defendant's threat, and the evidence showed that it would have been reasonable for the female officer to have believed the threat as well (especially where, after elbowing the male officer and communicating the threat, defendant said "I know where you live," and then accurately described the male officer's former residence and the female officer's current residence), the State presented no evidence that the female officer actually believed defendant would carry out the threat. **State v. Matthews, 625.**

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.

BERRY GLOBAL, INC., AND ITS SUCCESSORS, PETITIONER
v.
COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA25-410

Filed 19 November 2025

Appeal and Error—interlocutory order—denial of motion to present additional evidence—substantial right not shown

In an administrative action arising from a workplace injury—in which petitioner-employer was issued a citation by the North Carolina Commissioner of Labor for a serious safety and health violation, the citation was upheld after a hearing held before the North Carolina Safety and Health Review Commission, and petitioner appealed to the trial court—petitioner's appeal from the trial court's denial of its motion to present additional evidence was dismissed for lack of appellate jurisdiction. Where petitioner knew of the additional evidence at the hearing before the Review Commission—consisting of the investigating compliance officer's handwritten notes—but did not object to its absence and, in fact, objected to the admission of the entire investigative file, petitioner failed to demonstrate the existence of a substantial right that would be lost absent immediate review of the interlocutory order. Further, petitioner could challenge the denial of its motion in an appeal after entry of a final judgment.

Appeal by Petitioner from order entered 23 December 2024 by Judge Clayton D. Somers in Wake County Superior Court. Heard in the Court of Appeals 15 October 2025.

Fisher & Phillips LLP, by Travis W. Vance and Caroline E. Cheek, for Petitioner-Appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General Stacey A. Phipps, for Respondent-Appellee.

COLLINS, Judge.

This appeal arises from an accident that occurred on Petitioner Berry Global, Incorporated's property in which one of Petitioner's employees was severely injured. Petitioner was issued a citation by Respondent, Commissioner of Labor of the State of North Carolina, and after a hearing, the North Carolina Safety and Health Review Commission affirmed the citation. After an appeal to the full Safety and Health Review Commission, Petitioner appealed to the Wake County Superior Court. While that appeal was pending, Petitioner filed a motion to present additional evidence, which the trial court denied.

Petitioner appealed the trial court's denial of its motion to present additional evidence to this Court, arguing that the trial court's order implicates a substantial right because Petitioner's due process right to a fair trial would be violated without this "vital evidence." For the following reasons, we dismiss Petitioner's appeal from the interlocutory order.

I. Background

Petitioner is in the business of manufacturing plastic packaging. In the early morning hours of 23 February 2020, one of Petitioner's employees was injured while cleaning a mold at Petitioner's facility in Monroe, North Carolina.

Following the accident, Respondent's Occupational Safety and Health Division opened an investigation. Compliance Safety and Health Officer Ted Hendrix conducted a "special scope" inspection of Petitioner's worksite, beginning on 27 February 2020. Following this inspection, the Occupational Safety and Health Division issued a citation on 1 April 2020, alleging that Petitioner committed a "serious" violation:

> 29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in the activities covered by this section:
>
> . . . On or about February 23, 2020 an employee sustained injuries requiring hospitalization when a safety chain slipped from a damaged V-block on the Die-Sep Split-N-Tip mold separator, allowing an approximately 4,400-pound mold to fall onto the employee.

Petitioner was fined $5,000.

Respondent filed an action with the North Carolina Safety and Health Review Commission on 2 July 2020 to enforce the citation issued to Petitioner. A hearing was held in April 2022 before the Review Commission, wherein Officer Hendrix testified about the procedures he took during his inspection of Petitioner's worksite. Officer Hendrix testified on direct examination that during his inspection, he interviewed approximately eight employees, including the employee who was injured. He took "formal witness statements" from two employees, wherein the employees hand-wrote on a form any information they would like to be known. Officer Hendrix was then asked by Respondent to explain how he took notes and generated a report for the inspection:

> Q: Did you take notes during your inspection?
>
> A: I did.
>
> Q: And how do you take those notes and enter those?
>
> A: I take them on a notepad, just a plain eight and a half by 11 notepad, and then when I get -- I transfer those -- I basically put those into my written file.
>
> Q: And what do you use to make your written file?
>
> A: A software package called OSHA Express.
>
> Q: Does it generate reports?
>
> A: It does.
>
> Q: Are those reports based on the information that you input in the system?
>
> A: That's the only information. Well, the referral the -- original referral that got called in by the employer was -- is entered into the system by our complaint desk. But everything to do with the inspection part of it is me. There's nothing added. Everything that's in that file is something I generate.
>
> Q: And is this report accurate?
>
> A: It is.
>
> Q: Do you have a copy of that available with you today?
>
> A: I do.

Respondent then moved to admit the investigative case file, which included Officer Hendrix's eighty-four page report, several documents, and photos and videos taken by Officer Hendrix of Petitioner's worksite, into evidence. Petitioner objected to the admission of this report, arguing that the report is "hearsay, irrelevant, and should be – includes documents that are not necessary for this proceeding." Respondent argued that the introduction of the entire investigative file is proper "in part because it is a business record, in part because hearsay is allowed by the commission and should be given due weight, and also under the

Doctrine of Completeness so that you may see everything that is in the official file." Petitioner's objection was overruled, and the file was introduced into evidence. Officer Hendrix further testified that, based upon his inspection and report, he recommended a citation be issued. On cross examination, Petitioner did not ask Officer Hendrix any questions about his handwritten notes.

After the hearing, the Review Commission entered a decision and order affirming the citation on 22 July 2022. Petitioner appealed to the full Occupational Safety and Health Review Commission. The Full Commission issued an order on 28 December 2023 affirming the citations. Petitioner filed a petition for review in Wake County Superior Court on 29 January 2024.

Petitioner then filed a motion to present additional evidence on 16 October 2024, seeking to introduce "evidence recently discovered that the North Carolina Department of Labor, Occupational Safety and Health Division has a long-standing practice of permitting its compliance officers to destroy their handwritten field notes without producing the notes to employers, thereby depriving North Carolina employers of their due process rights." After a hearing, the trial court entered an order on 23 December 2024 denying Petitioner's motion. Petitioner appeals.

II. Appellate Jurisdiction

Petitioner appeals from an interlocutory order. An interlocutory order is one "made during the pendency of an action which do[es] not dispose of the case, but instead leave[s] it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73 (1999) (citation omitted). "Generally, a party has no right of appeal from an interlocutory order." *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 581 (2008) (citation omitted). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655 (1985) (citation omitted).

"An exception exists when the order will deprive the party of a substantial right absent an immediate appeal." *Edwards*, 193 N.C. App. at 581 (citations omitted). Our appellate courts have developed a two-part test to determine whether an order affects a substantial right: first, "the right itself must be substantial," and second, "the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726 (1990) (citation omitted). A substantial right determination "usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642 (1984) (citation omitted). The burden rests upon the appellant to demonstrate that the trial court's order deprives the appellant of a substantial right that will be lost without an immediate appeal. *Dailey v. Popma*, 191 N.C. App. 64, 68 (2008).

Petitioner moved to present additional evidence under N.C. Gen. Stat. § 150B-49, which provides:

> A party or person aggrieved who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken.

N.C. Gen. Stat. § 150B-49 (2025).

Petitioner alleges that approximately four and a half years after the April 2020 hearing before the Review Commission, it discovered Respondent's "long-standing practice" of having compliance officers destroy their handwritten field notes after transferring the content of those notes into the computerized "OSHA Express" system. Petitioner argues that the superior court's refusal to remand the case to the Review Commission to allow Petitioner to introduce this evidence deprives Petitioner of its substantial due process right to a fair trial. We disagree.

Respondent filed an action with the Review Commission to enforce the citation issued to Petitioner as a result of the February 2020 accident and the ensuing investigation by Officer Hendrix. A hearing was held, during which Officer Hendrix testified at length about the procedures he took when taking part in his investigation at Petitioner's worksite. He testified that he interviewed approximately eight employees, took handwritten notes, and then "transferred" those notes to the OSHA Express system to generate a report. Presented as evidence at the hearing was the investigative case file, which included the eighty-four page report, numerous documents, and approximately 100 photographs and videos taken by Officer Hendrix of the worksite.

Petitioner objected to the admission of the entire investigative file, arguing it "includes documents that are not necessary for this proceeding." Officer Hendrix acknowledged on the stand that he took handwritten notes during his inspection of Petitioner's worksite;

however, Petitioner neither objected to the absence of those notes from the file nor asked Officer Hendrix about his handwritten notes on cross examination.

Although "the constitutional right to due process is a substantial right," *Savage Towing, Inc. v. Town of Cary*, 259 N.C. App. 94, 99 (2018) (citation omitted), Petitioner has failed to demonstrate how the trial court's order in this case implicates its due process rights. *See Lopez v. Arnulfo-Plata*, 296 N.C. App. 653, 657 (2024) (affirming that "blanket assertions" and "vague, conclusory statements" are insufficient to show how an order implicates a substantial right) (citations omitted). Through its motion to present additional evidence, Petitioner seeks to introduce more evidence about evidence it did not find to be relevant in the first place. This is not a substantial right. Furthermore, the opportunity to challenge the trial court's order denying Petitioner's motion will not be lost or jeopardized absent immediate appeal as it can be appealed, if necessary, after final judgment is entered.

Accordingly, Petitioner has failed to show that the trial court's order deprives Petitioner of a substantial right that would be lost absent an immediate appeal. This interlocutory appeal is therefore improperly before this Court, and we are without jurisdiction to review the appeal on its merits.

III. Conclusion

For the foregoing reasons, we dismiss Petitioner's appeal for lack of subject matter jurisdiction.

DISMISSED.

Judges GORE and STADING concur.

JENNIFER BULLINS, PLAINTIFF
v.
HAYLEY NICOLE RIDDLE, INTERVENOR
v.
JUSTIN A. TURNER, DEFENDANT

No. COA25-55

Filed 19 November 2025

1. Child Custody and Support—non-parent standing—to intervene in custody action—presumption of parent's superior right—overcome

The trial court in a child custody case did not err in allowing the former girlfriend (intervenor) of the minor child's mother (plaintiff) to intervene in the action where intervenor had standing to do so. Although the trial court incorrectly found that intervenor had standing pursuant to N.C.G.S. § 50-13.5(j), which applied only to grandparents seeking custody or visitation rights, intervenor nevertheless had standing pursuant to N.C.G.S. § 50-13.1(a) (allowing any parent, relative, "or other person" to institute a custody action) where the court's findings of fact—including that intervenor had a "parent-like relationship" with the child and had been a source of physical, financial, and emotional support since the child's birth; intervenor and plaintiff continued to co-parent the child even after their relationship ended; and plaintiff "voluntarily ceded paramount decision-making authority over" the child when bringing intervenor into the family unit—supported a conclusion that intervenor had overcome the presumption that plaintiff, as the child's biological parent, had the superior right to care and custody.

2. Child Custody and Support—custody modification—change in circumstances—welfare of the child—insufficient nexus—remand for additional findings

In a custody dispute between a mother (plaintiff) and her former girlfriend (intervenor), with whom she had co-parented her minor son, an order modifying custody and visitation in intervenor's favor was vacated where, although the trial court entered findings that described the breakdown in communication between the parties regarding both major and minor decisions concerning the child, as well as the child's emotional dysregulation and difficulty transitioning between households, the court failed to make findings establishing a nexus between the parties' broken communication and the child's emotional difficulties. For this reason, the matter was remanded for further findings regarding the existence or lack of such a nexus.

3. Appeal and Error—appellate jurisdiction—criminal contempt —violation of child custody order

In a mother's appeal from a custody modification order, the Court of Appeals lacked jurisdiction to review the mother's argument challenging a portion of the order holding her in criminal contempt for violating a prior child custody order in the case. Since the order was entered by the district court in Randolph County, the Randolph County Superior Court had exclusive jurisdiction under N.C.G.S. § 5A-17 to hear an appeal on the finding of criminal contempt.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff mother from orders entered 11 September 2020, 27 June 2022, 28 March 2024, and 17 April 2024 by Judge Sarah N. Lanier in District Court, Randolph County. Heard in the Court of Appeals 14 August 2025.

Hayes Law Offices, PLLC, by Mark L. Hayes, for plaintiff-appellant.

Megerian & Wells, by Margaret Jeanne Megerian, for intervenor-appellee.

No brief filed for Justin A. Turner, pro se defendant-appellee.

ARROWOOD, Judge.

Jennifer Bullins ("mother") appeals from multiple orders, the final order dated 17 April 2024, permitting intervention by Haley Nicole Riddle ("intervenor") in mother's complaint for custody of juvenile K.B.[1] against Justin A. Turner ("father"), awarding joint legal and physical custody to mother and intervenor, awarding primary legal and physical custody to intervenor, further modifying custody, and holding mother in criminal contempt for violating the custody order. For the following reasons, we affirm the final order in part, vacate it in part, dismiss the appeal in part, and remand this matter to the trial court for additional findings of fact.

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1. Initials are used to protect the identity of the juvenile.

I. Factual Background

Mother initiated this case with a complaint for child custody on 26 November 2019. In this complaint, she alleged that father had no interest in visitation with K.B., demonstrated a blatant disregard for K.B.'s best interests, and had requested that his rights be relinquished. On 9 December 2019, the trial court ordered mother have full legal and physical custody of K.B. and father's rights were extinguished.

On 31 July 2020, intervenor filed a motion seeking permission to intervene in the custody action and be given joint custody of K.B. She alleged that she was the former partner of mother and had been "a primary source of physical, financial, and emotional support for the minor child since birth." Intervenor stated that mother resided with her at the time K.B. was born and intervenor, with the agreement of mother, took on many of the parenting duties, such that mother "voluntarily ceded paramount decision-making authority over the minor child without creating an expectation that the relationship would be terminated." Mother left intervenor's home around 1 July 2020 and their relationship ended. Following a hearing on the motion, the trial court concluded intervenor had standing to intervene, and on 11 September 2020 awarded joint legal and physical custody to intervenor and mother, with intervenor given the majority of visitation days.

Three days later, intervenor filed a motion to modify custody and a motion for an ex parte custody order, alleging substantial changes to circumstances affecting K.B.'s welfare, based on the violent actions of mother and mother's romantic partner. On 20 October 2020, mother filed a motion requesting the court set aside the custody order on grounds of intervenor's misrepresentation and misconduct; she also filed a motion in the alternative to modify custody.

Following an order for temporary child custody and two amendments, the trial court addressed the merits of mother's motions on 15 June 2022. The trial court made 213 findings of fact, including that mother hit intervenor during and following their relationship, but that K.B. was never abused by either party, nor witnessed any domestic violence. The trial court gave full legal and physical custody to intervenor, and allowed mother to have visitation every other weekend, and every other Wednesday and Thursday. The court also incorporated a list of 13 Parenting Guidelines which it required the parties to follow. These guidelines permitted the parent who had K.B. to make minor routine decisions, required a free flow of information concerning health care providers and teachers, and set "ground rules" concerning the way the parties would interact with K.B. as to each other's parenting.

On 8 November 2023, intervenor filed a motion to modify custody and for an ex parte custody order. She alleged that "substantial and material changes in circumstances" had occurred: (1) K.B. had been refusing to leave intervenor's car during visitation exchanges; (2) intervenor saw a man who had been arrested for felony controlled substance possession in mother's car; (3) K.B. told intervenor that this man had been staying with mother; (4) mother was harassing intervenor; (5) mother interfered with K.B.'s therapy; and (6) mother was expecting K.B. to hold Facetime conversations longer than were developmentally appropriate. Intervenor also alleged that mother had violated the custody order by: (1) enrolling K.B. in daycare without intervenor's knowledge or consent; (2) giving K.B. haircuts to which intervenor had not consented; and (3) keeping K.B. in an environment injurious to his welfare. Intervenor also alleged that K.B. had called her a "fake mamma" and made other statements that indicated he was hearing disparaging comments about intervenor while staying with mother. Intervenor requested the court grant her sole custody and hold mother in contempt.

The trial court conducted hearings on intervenor's motions on 31 January 2024 and 22 February 2024. On the issue of contempt, the trial court found that mother's enrollment of K.B. in daycare was a willful violation of the custody order, which had granted intervenor primary custody and required prompt communication concerning matters of education. Mother testified at the hearing that she had brought K.B. to the daycare where she worked eight to ten times, and that she was with him all day as he was one of the children she looked after at the daycare.

Regarding custody, the trial court found that both mother and intervenor stipulated to a change in circumstances affecting K.B., that there had been "a breakdown in communication between the parties" over major and minor decisions, and that these communications issues had affected K.B. such that he had difficulty transitioning between the parties' households. The trial court awarded intervenor tie-breaking authority in decision-making, and granted mother visitation every other weekend and every other Wednesday evening for an hour and a half, removing Thursday visitation. The trial court also sentenced mother to 30 days in jail, suspended the sentence, and placed her on 12 months of unsupervised probation. An amended order was filed 17 April 2024. Mother gave notice of appeal 8 May 2024.

II. Discussion

Mother raises four issues on appeal: (1) whether intervenor has standing to seek custody of K.B. under N.C.G.S. § 50-13.5(j); (2) whether the trial court erred in concluding that a substantial change in circumstances justified a modification of the custody order; (3) whether the trial court abused its discretion in creating the new visitation schedule; and (4) whether the trial court erred in holding mother in criminal contempt for violation of the custody order. We address each argument in turn.

A. Intervenor's Standing

[1] "Standing implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 136 (2010) (citation omitted). Standing is a question of law, which we consider *de novo*. *Violette v. Town of Cornelius*, 283 N.C. App. 565, 569 (2022). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re G.C.*, 230 N.C. App. 511, 516 (2013) (citation omitted).

"Subject matter jurisdiction is a court's power to hear a specific type of action, and is conferred upon the courts by either the North Carolina Constitution or by statute." *Chavez v. Wadlington*, 261 N.C. App. 541, 544 (2018) (quotations and citation omitted). Standing permits a court to exercise subject matter jurisdiction. *Id.* The circumstances under which a person has standing to seek the custody of a child are contained in N.C.G.S. § 50-13 (2025). Most broadly, "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . . ." N.C.G.S. § 50-13.1(a).

However, this statute "does not convey an absolute right upon every person who allegedly has an interest in the child to assert custody." *Krauss v. Wayne Cnty. Dept. of Soc. Servs.*, 347 N.C. 371, 379 (1997). Rather, it must respect the constitutional rights of parents to raise their children. *Id.* In light of these limitations, to make "a claim for custody on [the basis of the child's best interest], the party seeking custody must allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent." *Moriggia v. Castelo*, 256 N.C. App. 34, 47 (2017).

In the case *sub judice*, the trial court made the following pertinent findings of fact and conclusion of law in its order allowing intervention:

> 8. Intervenor has been a source of physical, financial, and emotional support for the minor child since birth. After the Intervenor and Plaintiff ended their relationship,

> the Intervenor has shared parenting time with the Plaintiff pursuant to an informal agreement between Plaintiff and Intervenor.
>
> 9. Intervenor has a parent-like relationship with the child [and] has standing to intervene in the present custody action pursuant to N.C. Gen. Stat. § 50-13.5(j).
>
> 11. That the Plaintiff has brought the Intervenor, a non-parent, into the family unit and voluntarily ceded paramount decision-making authority over the minor child without creating an expectation that the relationship would be terminated.

Mother's challenge to intervenor's standing is limited solely to the trial court's invocation of N.C.G.S. § 50-13.5(j). This statute entitles grandparents to custody or visitation rights, and has no applicability to intervenor, who is not related by blood to K.B. Mother is correct that this cannot form the basis for intervenor's standing, and this portion of Finding of Fact 9 is erroneous. However, as § 50-13.1(a), *Krauss*, and *Moriggia* establish, a person unrelated to a child in a custody matter may still have standing under certain circumstances. Findings of Fact 8 and 11 satisfy the requirements that there be a sufficient relationship between the party seeking intervention and the child, and that the parent has acted inconsistently with their status as parent. Mother has challenged neither finding, and unchallenged findings of fact are binding on appeal. *In re K.H.*, 281 N.C. App. 259, 270 (2022). The trial court concluded that "the Intervenor has standing to seek custody of the minor child," a conclusion supported by the binding findings of fact. Therefore, intervenor had standing to bring this current action.[2]

The dissent repeatedly suggests that intervenor is "interfering" with mother's right to the care and custody of her child, citing *Perdue v. Fuqua*, 195 N.C. App. 583 (2009) to assert that intervenor failed to "overcome the presumption that [mother] has the superior right to the care" and custody, and that the trial court did not find that mother "engaged in conduct inconsistent with her right to custody[.]" *Id.* at 584. However, as previously noted, the unchallenged Finding of Fact 11

2. The dissent cites *McIntyre v. McIntyre*, 341 N.C. 629 (1995) to assert that a party acting under N.C.G.S. § 50-13.5(j) can only intervene "when the actual parents are in a custody dispute." *Id.* at 634–35. However, we note that *McIntyre* "was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*." *Sharp v. Sharp*, 124 N.C. App. 357, 360 (1996) (emphasis in original).

reflects that mother "brought the Intervenor, a non-parent, into the family unit and voluntarily ceded paramount decision-making authority over the minor child . . . ." Similarly, the court later concluded plaintiff "intentionally took steps to identify Intervenor as a parent to the minor child[,]" and in the course of establishing a shared family unit, plaintiff "acted inconsistently with her paramount parental status." The motion to intervene and the evidence presented throughout the proceedings were sufficient for the trial court to find and conclude, as it did, that intervenor overcame the presumption that mother had the superior right to care and custody.

The dissent further characterizes our analysis as improperly creating an argument for intervenor. Although it is true that the trial court found standing under the incorrect statute, the issue of standing was clearly before the trial court. As previously stated, the record and findings of fact in this de novo review are sufficient to show that intervenor had standing under N.C.G.S. § 50-13.1(a).

B. Modification Based on Change in Circumstances

[2]

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact.

Thomas v. Thomas, 233 N.C. App. 736, 738 (2014) (citation omitted). Whether or not there has been a change in circumstances is a conclusion of law. *Brooker v. Brooker*, 133 N.C. App. 285, 289 (1999).

"As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests." *Shipman v. Shipman*, 357 N.C. 471, 474 (2003) (citation omitted). A trial court accomplishes this objective by determining whether the child's circumstances have changed, then determining whether this change has affected the welfare of the child. *Id.* If the court finds both to be the case, it must then determine whether modifying the custody order is in the best interest of the child. *Id.* Importantly, "before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Id.* at 478 (citing *Carlton v. Carlton*, 145 N.C. App. 252, 262 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 (2001) *cert. denied*, 122 S. Ct. 2630 (2002)).

We note at the outset that while both parties stipulated that there was a change of circumstances, this does not affect our inquiry. *See Thomas*, 233 N.C. App. 736 at 739–40. The existence of a change in circumstances is a conclusion of law, and stipulations to conclusions of law are generally invalid. *Id.*

Finding of Fact 25 provides a summary of the change in circumstances as determined by the trial court: "There has been a breakdown in communication between the parties regarding care, custody, and control of the child in both major decisions, such as medication and school enrollment, and minor issues such as haircuts." In Finding 26, the trial court determined that this breakdown in communication "has affected the minor child in that he has exhibited difficulty in transitioning between households, becoming emotional and clingy."

Even if we assume, without deciding, that the communication issues between mother and intervenor constitute a change in circumstances, the trial court has not articulated a sufficient nexus between these issues and K.B.'s difficulties with transitions between the homes. While the Court in *Shipman* did not require robust specificity, instead noting that the "effects of the substantial changes in circumstances on the minor child in the present case are self-evident," *Shipman*, 357 N.C. at 479, we discern no such self-evident effects here. The parties' disagreements are not a "self-evident" cause of K.B.'s emotional dysregulation, since a child might become dysregulated for a variety of reasons. It was incumbent upon the trial court to make a finding explaining why this reason specifically had caused the dysregulation, which it failed to do.

The trial court found in Conclusion of Law 4, "There has been a significant change in circumstances affecting the minor child that render it appropriate to modify the July 27, 2023 custody order." Since we have determined that this conclusion is unsupported by the findings of fact, we vacate the modified custody order and direct the trial court to make additional findings of fact and conduct a new hearing if there is insufficient evidence in the record to allow the trial court to make the required additional findings of fact. Because we vacate the custody order, we need not address mother's third assignment of error concerning the elements of that order.

C. Contempt Order

[3] Lastly, mother contends remand is necessary to correct the trial court's erroneous finding that held mother in criminal contempt. However, "appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." N.C.G.S. § 5A-17 (2025). "This statute vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt." *Summerville v. Summerville*, 259 N.C. App. 228, 242 (2018) (citation omitted). Accordingly, the Randolph County Superior Court has exclusive jurisdiction to hear an appeal on the trial court's finding of criminal contempt. As we lack jurisdiction to address the issue, mother's appeal as to criminal contempt is dismissed.

III. Conclusion

For the foregoing reasons, we affirm the order in part, vacate the order in part, dismiss the appeal in part, and remand to the trial court to make additional findings of fact.

AFFIRMED IN PART, VACATED IN PART, DISMISSED IN PART, AND REMANDED.

Judge CARPENTER concurs.

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

TYSON, Judge, concurring in part, dissenting in part.

I fully concur the trial court erred in citing a wholly inapplicable statute for jurisdiction and standing to allow third-party intervention. I also concur with the majority's decision and holding to vacate the custody order because the trial court's conclusion a substantial change in circumstances had occurred is unsupported by its findings of fact.

I disagree with the majority's conclusion and holding the non-relative, third-party Intervenor had standing, as no other basis for standing or jurisdiction was asserted or found. Intervenor has asserted no arguments on appeal, and this Court cannot formulate and make new arguments for the parties on appeal. *In re R.A.F.*, 384 N.C. 505, 512, 886

S.E.2d 159, 164 (2023) ("Further, the Court of Appeals may not address an issue not raised or argued by respondent for '[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.' " (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360 (2005))). The statute cited by the trial court as the basis for intervention does not provide Intervenor with standing, and the trial court was, and this Court is, without jurisdiction to allow it.

I also disagree with the majority's decision to uphold the conclusion Mother committed criminal contempt. Any orders entered on, or proceedings held after, the unlawful initial intervention are without jurisdiction, are invalid and void. *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) ("Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction."); *State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted . . . ." (citations omitted)); *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) ("A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." (citation and quotation marks omitted)). I respectfully dissent.

I. Standing

"Subject matter jurisdiction has been defined as a court's power to hear a specific type of action, and 'is conferred upon the courts by either the North Carolina Constitution or by statute.' " *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009) (quoting *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003)). " 'Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' " *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). "[P]laintiffs [and Intervenors carry and] have the burden of proving [ ] standing exists." *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) (citation omitted). Questions of standing are reviewed *de novo* by this Court. *Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 404, 721 S.E.2d 350, 353 (2012).

A. N.C. Gen. Stat. § 50-13.5(j)

The trial court, in Finding of Fact 9 of the 11 September 2020 Order Allowing Intervention, found, "Intervenor has a parent-like relationship with the child [and] has standing to intervene in the present custody action pursuant to N.C. Gen. Stat. § 50-13.5(j)."

N.C. Gen. Stat. § 50-13.5(j) (2023) provides:

> (j) **Custody and Visitation Rights *of Grandparents*.** – In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the *grandparents of the child* are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, *"grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.* Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

N.C. Gen. Stat. § 50-13.5(j) (2023) (emphasis supplied).

The majority's opinion correctly acknowledges N.C. Gen. Stat. § 50-13.5(j) (2023) only "entitles grandparents to custody or visitation rights, and has no applicability to [I]ntervenor, who is not related by blood to K.B." Their opinion also correctly concludes "Mother is correct [ ] this [statute] cannot form the basis for [I]ntervenor's standing, and th[at] portion of Finding of Fact 9 is erroneous."

N.C. Gen. Stat. § 50-13.5(j) (2023) was and is the *sole* basis asserted and stated in the "Order Allowing Intervention" filed 11 September 2020 to permit Intervenor to interfere with the biological parents' agreed-upon and entered final custody order entered months earlier. N.C. Gen. Stat. § 50-13.5(j) (2023).

The case of *McIntyre v. McIntyre* holds a party acting under N.C. Gen. Stat. § 50-13.5(j) cannot initiate a custody action, and a party acting under that statute can only intervene to seek *visitation* when the actual parents are in a *current custody* dispute. *McIntyre v. McIntyre*, 341 N.C. 629, 634-35, 461 S.E.2d 745, 749-50 (1995) (explaining N.C. Gen. Stat. §§ 50-13.1(a), 50-13.2(b1), 50-13.5(j), and 50-13.2A "provide *grandparents* with the right to seek *'visitation' only* in certain clearly specified situations" and "[t]hose situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing").

Over six months had elapsed since the final joint custody order between the parents of the child had been entered on 9 December 2019. No custody action was pending. Even if relevant, it is undisputed Mother had left Intervenor's home around 1 July 2020 and their relationship had ended a month prior to Intervenor's purported motion to intervene.

B. N.C. Gen. Stat. § 50-13.1(a)

The majority's conclusion errs by constructing an argument out of whole cloth for Intervenor, who made no appearance or argument on appeal, and asserting N.C. Gen. Stat. § 50-13.1(a), *Krauss v. Wayne County Dept. of Social Services*, 347 N.C. 371, 379, 493 S.E.2d 428, 433 (1997), and *Moriggia v. Castelo*, 256 N.C. App. 34, 47, 805 S.E.2d 378, 385 (2017), purportedly establish jurisdiction and standing for Intervenor to interfere with Mother's agreed-upon custody judgment.

Neither the motion to intervene nor the trial court's order assert or mention N.C. Gen. Stat. § 50-13.1(a), *Krauss*, or *Moriggia*. Yet the majority's opinion relies upon an unasserted and unnamed statute to purportedly excuse what we all agree is the trial court's lack of jurisdiction and prejudicial error.

Our Supreme Court recently explained the reasons why appellate courts cannot advance arguments a party has not preserved or asserted for themselves:

> First, it departs from the well-settled rule in juvenile cases that appellate courts "may not address an issue not raised or argued by respondent for it is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. at 512, 886 S.E.2d 159 (cleaned up); N.C. R. App. P. 28(b)(6).
>
> Second, it conflicts with our preservation rules . . . , which require litigants to timely raise arguments concerning evidentiary privileges or constitutional claims in order to preserve them for appellate review. *See In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495 (2022); N.C. R. App. P. 10.
>
> Finally, and most notably here, when an appellate court addresses a legal theory on appeal that has not been tested in the crucible of adversarial briefing, there

> is much greater risk that the court is missing something and, as a result, is about to mess up the law.

In re E.H., 388 N.C. 100, 108, 919 S.E.2d 233, 239 (2025). Worse here, Intervenor has made no appearance or arguments before this Court.

The majority's opinion also wholly fails to address the absence of mandatory findings the statute requires *before* an intervenor may invoke standing under N.C. Gen. Stat. § 50-13.1(a) (2023). This Court has previously held: "Despite the broad language of N.C. Gen. Stat. § 50-13.1, *non-parents do not have standing to seek custody against a parent unless they overcome the presumption that the parent has the superior right to the care, custody, and control of the minor child.*" *Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009) (emphasis supplied) (citing *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994)).

These holdings in *Perdue*, *Peterson*, and its progeny merely restate and apply the universal and fundamental law prohibiting unrelated third parties from interfering with a fit parent's right to the exclusive care, custody, and control of their minor child. "This Court has recognized that the protection of the family unit is guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citing *Petersen*, 337 N.C. at 401, 445 S.E.2d at 903).

Applying any "best interest of the child analysis" or other invented or purported basis, as between non-parents and parents, offends the Due Process Clause if no supported findings and conclusions prove the parent is unfit or has acted inconsistent with their constitutional right to parent their child. *Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148.

N.C. Gen. Stat. § 50-13.1(a) was never cited by Intervenor or the trial court or any party before this Court. The majority's conclusion improperly creates an argument for Intervenor that was not raised by Intervenor at trial or on appeal. *See In re E.H.*, 388 N.C. at 108, 919 S.E.2d at 239. The majority's holding also incorrectly affirms the trial court's basis for finding Intervenor, a third party who is admittedly wholly unrelated to the child, to have had standing under N.C. Gen. Stat. § 50-13.5(j). N.C. Gen. Stat. § 50-13.5(j) cannot provide standing to Intervenor for even visitation, much less custody, or for the trial court to provide the third-party Intervenor superior rights over Mother because Intervenor is not the minor child's grandparent and is not related to the child in any familial relationship or legal manner. N.C. Gen. Stat. § 50-13.5(j) (2023); *Adams v. Dillon*, 300 N.C. App. 333, 921 S.E.2d 189, 2025 WL 2524178 (Sept. 3,

2025) (denying all visitation and custody rights to a long-term, unrelated caregiver of an infant child, even as against a grandparent).

Intervenor was allowed to purportedly intervene *nearly a year after* the child's biological and fit parents had settled custody of their child on 9 December 2019 through a jointly entered order. No custody action was pending. *See McIntyre*, 341 N.C. at 634-35, 461 S.E.2d at 749-50. Lastly, without a finding Mother is unfit or has acted inconsistent with her constitutional rights to the exclusive care, control, custody, and to parent her child, Intervenor, an undisputed non-parent and non-relative, wholly lacks standing to interfere under N.C. Gen. Stat. § 50-13.1(a). *Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148.

Intervenor herself testified Plaintiff is a fit parent, who loves and cares for her child, yet she purports to decide, over Mother's objections, the child's grooming, appearance, training, schools, medical care, and other matters, contrary to and which lie exclusively within the care, custody, and control of a fit, biological parent. *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 194, 913 S.E.2d 174, 184 (2025) (providing "the state constitution protects a parent's right to control her child's upbringing, including her right to make medical decisions on her child's behalf" and explaining the "right to control the upbringing of one's own child is deeply rooted in '[t]he history and culture of Western civilization' and is 'now established beyond debate as an enduring American tradition' " (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)). The trial court's intervention order is affected with prejudicial and reversible errors, the trial court is without jurisdiction, and the order is void. *Id.*; *Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148. The majority's opinion otherwise is erroneous.

II. Contempt

Any orders entered on, or proceedings held after, the unlawful initial intervention are without jurisdiction, are invalid and void. *Eudy*, 288 N.C. at 75, 215 S.E.2d at 785; *State ex rel. Hanson*, 235 N.C. at 535, 70 S.E.2d at 568; *Hart*, 244 N.C. at 90, 92 S.E.2d at 678. The majority's opinion dismisses Mother's third argument regarding the trial court's unsupported and unlawful conclusion to find and hold Mother in criminal contempt. Mother specifically argues Finding of Fact 8 is unsupported by the evidence or any legal basis.

Finding of Fact 8 provides:

> 8. Based on the evidence and testimony presented, the Court *finds beyond a reasonable doubt* that Plaintiff

> enrolled the minor child in daycare at Christ Way Child Development Center in early September of 2022 without the knowledge or consent of the Intervenor. This was in contravention of the July 26, 2022 custody order granting primary legal custody of the child to Intervenor and paragraph (7) of the Parenting Guidelines incorporated therein.

(emphasis supplied).

The 26 July 2022 purported custody order granting primary legal custody of the minor child to Intervenor is based upon an illegal intervention and is wholly unlawful. It was entered in gross derogation of Mother's Constitutional right to the exclusive care, custody, and control of her son. *Id.* Mother asserts the trial court also erred because the evidence does not show she unlawfully or otherwise enrolled her child in daycare, and she "was only taking the child with her while she herself worked at the daycare center" for eight times while being physically present with her child.

Mother testified regarding the daycare:

> Q. Okay. But it didn't start until what time in September that you started working at the daycare?
>
> A. It was the beginning of September.
>
> Q. Okay.
>
> A. I believe September 8th.
>
> Q. Okay. So it would have been less than – no more than eight, ten times?
>
> A. Correct.
>
> Q. Okay. And if you hadn't been working there, would [K.B.] have gone to that daycare?
>
> A. No.
>
> Q. You pay for him to go there?
>
> A. No.
>
> Q. So you didn't – why didn't you have to pay?
>
> A. Because I worked there.
>
> Q. Did you stay in contact with [K.B.] during the day?

> A. Yes.
>
> . . . .
>
> Q. So was [K.B.] one of the children you were looking after?
>
> A. Yes.
>
> Q. So were you with him all day?
>
> A. Yes.
>
> Q. Did you consider under the order that you were required to notify [Intervenor] of the situation?
>
> A. No, I did not know I needed to tell her that, where I worked.

The majority's decision dismisses the trial court's conclusion of such evidence supports a finding of criminal contempt "beyond a reasonable doubt." " '[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . then the order entered thereon must be vacated and the case remanded for detailed findings of fact.' " *Hampton v. Hampton*, 29 N.C. App. 342, 344, 224 S.E.2d 197, 199 (1976) (quoting *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967)).

Presuming jurisdiction and any lawful basis existed to enter such an order as against a fit Mother, the totality and *quantum* of the evidence presented, taken as true, does not survive a motion to dismiss nor support a conclusion of criminal contempt. *See Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021).

Based upon Mother's unchallenged testimony, Finding of Fact 8 is not based on substantial evidence to support criminal contempt to survive a motion to dismiss and certainly not to convict Mother "beyond a reasonable doubt." It is uncontested Mother lawfully took her child to her place of employment eight times, did not pay for the care, and was physically present with her child, while at her place of employment, and would otherwise not have been there. *Id.* Mother was required to put the school on written notice of her child's physical presence with Mother at the school where she was employed. *Id.*

III. Conclusion

We all agree and I fully concur in holding, the trial court prejudicially erred in citing a wholly inapplicable statute to establish jurisdiction and standing to allow an unrelated third party to intervene nearly a year after a final joint custody order had been entered between the biological fit parents. We also agree and I also concur with the majority's decision to vacate the purported and unlawful custody order because the trial court's conclusion a substantial change in circumstances had occurred is wholly unsupported by its findings of fact.

N.C. Gen. Stat. § 50-13.1(a) was never cited by Intervenor at trial, or by the trial court, or argued by Intervenor on appeal. The majority's conclusion improperly creates an argument for Intervenor because this argument was not raised by Intervenor at trial or before this Court. *See In re E.H.*, 388 N.C. at 108, 919 S.E.2d at 239. Intervenor failed to file any brief or to raise any arguments before this Court.

"This Court has recognized that the protection of the family unit is guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citing *Petersen v. Rogers*, 337 N.C. 397, 401, 445 S.E.2d 901, 903 (1994)).

Applying any "best interest of the child analysis" or other purported basis to intervene and to award primary custody, as between non-parents and parents, offends the Due Process Clause, where no supported finding and conclusion declares the parent is unfit or has acted inconsistent with their constitutional right to the exclusive care, custody, and control of their minor child. *Troxel*, 530 U.S. at 66, 147 L. Ed. 2d at 57; *Happel*, 387 N.C. at 194, 913 S.E.2d at 184; *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905; *Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148.

Without any Constitutional or jurisdictional basis, the trial court's order is void, properly vacated, and the entire illegal intervention and any custody and contempt orders are properly vacated and remanded for dismissal with prejudice. *Eudy*, 288 N.C. at 75, 215 S.E.2d at 785 ("Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction."); *State ex rel. Hanson*, 235 N.C. at 535, 70 S.E.2d at 568 ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted . . . ." (citations omitted)); *Hart*, 244 N.C. at 90, 92 S.E.2d at 678 ("A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless."). I respectfully dissent.

EARNHARDT PLUMBING, LLC, Plaintiff
v.
THOMAS BUILDERS, INC. and THOMAS PROPERTIES OF NORTH CAROLINA, LLC, Defendants

No. COA25-36

Filed 19 November 2025

Arbitration and Mediation—arbitration agreement—Federal Arbitration Act—preemption of state law—forum-selection clause—mandatory

In a dispute arising from a service contract between a plumbing business (plaintiff) and a Tennessee corporation working alongside a North Carolina real estate company (defendants) to build a hotel, where defendants sought to arbitrate plaintiff's breach of contract claim in Tennessee, the trial court's order compelling arbitration in North Carolina was reversed and the matter was remanded for entry of an order allowing arbitration in accordance with the contract's arbitration agreement, which included a forum-selection clause requiring arbitration to be held "at the discretion of" defendants "either at" a defendant's principal place of business "or" at the hotel project's location. The contract involved interstate commerce—since it was between parties in different states, with payment requests and employee travel connected to the project occurring across state lines—and, therefore, the Federal Arbitration Act (FAA) applied. The FAA, which required arbitration agreements to be enforced according to their terms, preempted a state law (N.C.G.S. § 22B-3) that voided forum-selection clauses requiring arbitration outside of North Carolina. Finally, where the forum-selection clause's plain language demonstrated the parties' intent to give defendants the right to choose the forum for arbitration from the identified locations, the clause was mandatory—not permissive, as the trial court had determined—and, therefore enforceable.

Appeal by Defendants from Order entered 23 July 2024 by Judge Patrick T. Nadolski in Cumberland County Superior Court. Heard in the Court of Appeals 12 August 2025.

Troy D. Shelton and James R. Vann for Plaintiff-Appellee.

Penn Stuart & Eskridge, P.C., by M. Shaun Lundy, for Defendants-Appellants.

HAMPSON, Judge.

Factual and Procedural Background

Thomas Builders, Inc., and Thomas Properties of North Carolina, LLC, (collectively, Defendants) appeal from an Order requiring them to arbitrate a breach of contract claim brought by Earnhardt Plumbing, LLC, in Cumberland County, North Carolina. The Record before us tends to reflect the following:

Plaintiff entered into a written agreement with Defendants under which Plaintiff agreed to provide and install a plumbing and gas line system for a hotel Defendants were constructing (the Contract). The Contract included an arbitration clause:

> Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.3, shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation. Claims not resolved by mediation shall be decided by arbitration. Demand for arbitration shall be filed in writing with the other party. A demand for arbitration shall be made within the time limits specified in the conditions of the Prime Contract as applicable, and in other cases within a reasonable time after the claim has arisen, and in no event shall it be made after the date when institution of legal proceedings based on such a claim would be barred by the applicable statute of limitation. The parties shall select the arbitrator by the same procedures set forth in Paragraph 19a for selection of the mediator; provided, however, that such arbitrator must have experience in the construction industry, either as a contractor, design professional, or attorney, and must have had no prior dealings with either party. The Arbitration shall be held at the discretion of the Contractor either at the Contractor's principle [sic] place of business or where the project is located.

On 7 March 2022, Plaintiff filed a Complaint alleging Defendants had failed to pay for the services rendered under the Contract, in the amount of $159,488.50. Defendants moved to dismiss or stay the proceedings under the Contract's arbitration clause. Defendants sought to enforce the arbitration clause and, in particular, require the arbitration take place in Tennessee, where Thomas Builders, Inc., is registered. Plaintiff agreed the Contract required the matter be arbitrated but argued the portion of the provision giving Defendants discretion to choose Tennessee as the forum for arbitration was unenforceable.

The trial court denied the motion to dismiss and allowed the motion to stay proceedings pending arbitration. It held the provision placing the forum in Tennessee was unenforceable under Section 22B-3 of our General Statutes and that the Federal Arbitration Act (FAA) did not preempt the application of this provision. Accordingly, it ordered arbitration be conducted in North Carolina.

Defendants appealed that decision to this Court. *Earnhardt Plumbing, LLC v. Thomas Builders, Inc.*, 291 N.C. App. 1, 893 S.E.2d 564 (2023). We concluded we could not determine whether the FAA preempts Section 22B-3 in this case because the trial court did not make any findings of fact regarding whether the Contract involves interstate commerce. *Id.* at 6, 893 S.E.2d at 568. We therefore remanded the case to the trial court for findings of fact as to whether the Contract evidences a transaction involving interstate commerce and, based on that fact-finding, to apply the applicable law to the forum-selection clause contained in the Contract. *Id.*

On remand, the trial court found the Contract involves interstate commerce and concluded the FAA preempts Section 22B-3 as applied to the forum-selection clause. However, it additionally determined the Contract's forum-selection clause is permissive, not mandatory, and therefore unenforceable under North Carolina law. It directed the parties to arbitrate the matter in Cumberland County, North Carolina.

Defendants timely filed notice of appeal.

Appellate Jurisdiction

The trial court's Order allowing Defendant's Motion to Stay Proceedings is interlocutory and not final in nature. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Generally, a party has no right to appeal an interlocutory order." *Cox v. Dina-A-Mate, Inc.*, 129 N.C. App. 773, 775, 501 S.E.2d 353, 354 (1998). However, as we previously held in this case, the trial court's Order denying Defendants their contractual right to select the forum for arbitration affects a substantial right. 291 N.C. App. at 4, 893 S.E.2d at 567. Accordingly, we have jurisdiction to review this matter pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023). *Id.*

Issue

The sole issue on appeal is whether the trial court erred in holding the forum-selection clause to be permissive—not mandatory—and unenforceable under North Carolina law—despite the applicability of the FAA and the language of the clause itself—and ordering the parties to arbitrate in Cumberland County, North Carolina.

Analysis

Defendants argue the trial court erred in ordering arbitration be held in Cumberland County because the Contract contains a mandatory forum-selection clause that must be given effect under the Federal Arbitration Act.[1] That clause provides:

> The Arbitration shall be held at the discretion of [Defendants] either at [Defendants'] principle [sic] place of business or where the Project is located.

Defendants argue the FAA preempts North Carolina law, which would render this clause unenforceable insofar as it provides for arbitration outside of North Carolina. Plaintiff argues the FAA does not apply because the Contract does not involve interstate commerce and, even if the FAA applied, it would also require arbitration be conducted in North Carolina. Plaintiff also argues the trial court did not err in determining the clause is permissive, rather than mandatory, and therefore unenforceable.

A. Interstate commerce

As a threshold matter, we must determine if the FAA applies to the Contract. "The FAA will apply if the contract evidences a transaction involving interstate commerce." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005). "This is a question of fact, which an appellate court should not initially decide." *Id.* When this case initially appeared before us, we noted the trial court had made no findings of fact regarding whether the Contract evidenced a transaction involving interstate commerce. 291 N.C. App. at 5, 893 S.E.2d at 568. Accordingly, we did not determine

1. Plaintiff argues Defendants may not now assert arguments under the FAA because they "did not seek to compel arbitration under the FAA" and instead relied on North Carolina law before the trial court. This is not reflected by the Record. In support of their Motion to Dismiss or Stay Proceedings, Defendants made arguments expressly based in the FAA. There is no indication Defendants waived arguments under the FAA.

if the FAA applied and remanded to the trial court to make the initial factual determinations as to whether the Contract involved interstate commerce. *Id.* at 6, 893 S.E.2d at 568. Plaintiff—apparently as an alternative basis for affirming the trial court[2]—argues the trial court erred in concluding on remand the Contract involved interstate commerce.

The trial court held:

> The Contract involved or affected interstate commerce in that it was a contract between a party domiciled in North Carolina, on the one hand, and Tennessee, on the other.

In support of that conclusion, it found:

> 8. Requests for payment were submitted by the North Carolina Party, [Plaintiff], to the Tennessee Party, [Defendant].
>
> 9. Employees of [Defendant] traveled to North Carolina in connection with the Contract.

Plaintiff first argues the trial court erred because it did not find there was "substantial" interstate commerce. No such finding is required. Plaintiff's argument appears to stem from preempted precedent. In the past, some courts, including our Supreme Court, determined if a contract was subject to the FAA by examining whether the parties, at the time they entered into the agreement, "contemplated substantial interstate activity." *Burke Co. Pub. Schs. Bd. of Ed. v. Shaver P'ship*, 303 N.C. 408, 418, 279 S.E.2d 816, 822 (1981) (citations omitted). The United States Supreme Court has rejected this construction, holding the FAA applies if the transaction "in fact involve[s] interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281, 130 L. Ed. 2d 753 (1995). This construction reaches "to the limits of Congress' Commerce Clause power." *Id.* at 270. Thus, the trial court was only required to find facts supporting a conclusion the transaction involved interstate commerce, and it did not err by failing to specifically find the commerce involved was "substantial."

Plaintiff also argues the trial court erred in ruling that the Contract involved interstate commerce because it was "a contract between a

2. *See generally*, N.C. R. App. P. 10(c) (2025) (permitting an appellee to raise issues that deprived it of an alternative basis in law for supporting the order appealed from without having to notice a separate or cross-appeal).

party domiciled in North Carolina, on the one hand, and Tennessee, on the other." We agree that mere diversity of parties does not on its own require the conclusion that an agreement involved interstate commerce. *See Burke*, 303 N.C. at 418-19, 279 S.E.2d at 822. However, the trial court also found that requests for payment were made across state lines, and that employees of Defendants traveled across state lines in connection with the Contract.

The FAA does not "require proof by affidavit or other specific evidence of the nexus to interstate commerce." *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 978 n.4 (4th Cir. 1985). Where "the party seeking arbitration alleges that the transaction is within the scope of the Act, and the party opposing application of the Act does not come forward with evidence to rebut jurisdiction under the federal statute," the FAA does not require additional proof of interstate commerce. *Id.* Defendants have alleged the Contract involved interstate commerce, and Plaintiff does not identify any evidence tending to show it did not, except that Plaintiff used only materials from North Carolina and the labor of North Carolina employees. This evidence does not rebut Defendants' allegation because the origins of material and labor involved are not the only factors by which interstate commerce may be evidenced.

Additionally, the connections between the parties are similar to those our courts and federal courts have held sufficient to support a conclusion an agreement involved interstate commerce. *See, e.g.*, *United States ex rel. Red Hawk Contracting v. MSK Constr., Inc.*, No. 1:16-cv-1183, 2018 WL 2121625, at *3 (M.D.N.C. 8 May 2018) (transaction requiring monthly billing from North Carolina corporation to South Carolina corporation and transfer of payment through mail between states involved interstate commerce). *See also Gaylor, Inc. of North Carolina v. Vizor, LLC*, 2015 WL 6659662 (N.C. Bus. Ct. 30 Oct 2015) (payment from Indiana party to North Carolina party and personnel traveling from Indiana to North Carolina project site "clearly evidences a transaction involving interstate commerce"). While these opinions are not controlling upon our decision, they are in accord with the directive of the United States Supreme Court that the FAA be applied "to the limits of Congress' Commerce Clause power." *Allied-Bruce*, 513 U.S. at 270. Thus, we agree the Contract in this case, which involved payment requests and employees of Defendants traveling across state lines, evidences a transaction involving interstate commerce. The FAA therefore applies to the Contract.

B. Enforceability of forum-selection clause

Plaintiff further argues, even if the FAA applies to the Contract, it does not preempt North Carolina law rendering the forum-selection clause unenforceable. The FAA does not completely preempt state contract law because it does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477, 103 L. Ed. 2d 488 (1989). However, when there is a conflict between federal and state law, the Supremacy Clause requires we give effect to federal law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 123 L. Ed. 2d 387 (1993). *See also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 64 n.1, 193 L. Ed. 2d 365 (2015) (Ginsburg, J., dissenting) ("State laws are preempted by the FAA only to the extent that they conflict with the contracting parties' intent."). The enforceability of a contractual arbitration clause is a judicially determined conclusion of law that we review *de novo*. *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536, 640 S.E.2d 740, 742 (2007).

Plaintiff's argument is based in a provision of our General Statutes that renders void forum-selection clauses which require contracting parties to arbitrate disputes outside of the State:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

N.C. Gen. Stat. § 22B-3 (2023).

This provision is in conflict with the Federal Arbitration Act. "[The Supreme Court has] held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Volt*, 489 U.S. at 478 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10, 79 L. Ed. 2d 1 (1984)). "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10.

This preemption is in accord with the purpose of the FAA. Congress enacted the FAA in 1925 "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742 (2011). The Supreme Court of the United

States has described the Act as reflecting a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765 (1983), and "the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63, 67, 177 L. Ed. 2d 403 (2010). The principal purpose of the FAA is to "ensure that private arbitration agreements are enforced according to their terms[.]" *Volt*, 489 U.S. at 478. The terms of the agreement in this case state that arbitration "shall be held at the discretion of [Defendants] either at [Defendants'] principle [sic] place of business or where the Project is located."

We have previously resolved the conflict between N.C. Gen. Stat. § 22B-3 and this policy, holding when the FAA applies to a contract the forum-selection clause contained in that contract is enforceable even if the forum designation is against the law and public policy of North Carolina. *Goldstein*, 181 N.C. App. at 538, 640 S.E.2d at 743 (designation of Fargo, North Dakota as forum for arbitration enforceable as FAA "preempts North Carolina's statute and public policy regarding forum selection").

Federal courts have likewise held North Carolina law preempted by the FAA when addressing this issue. "[Section 22B-3] falls squarely within the preempted category of state laws as recognized by *Volt*[.]" *U.S. ex rel. TGK Enters., Inc. v. Clayco, Inc.*, 978 F.Supp.2d 540, 549 (E.D.N.C. 2013) (holding as enforceable under FAA agreement requiring parties to arbitrate in Missouri). *See also Aspen Spa Props., LLC v. Int'l Design Concepts, LLC*, 527 F.Supp.2d 469, 473 (2007) (holding plaintiff had correctly conceded FAA preempts Section 22B-3 and accordingly there were "no state-law grounds for revoking the forum-selection clause" placing arbitration in King County, Washington).

Despite this, Plaintiff asserts two arguments disputing preemption, the first based in Section 4 of the FAA and the second based on the "equal footing" principle. We note that both arguments are generally applicable to the conflict between Section 22B-3 and the FAA and would undermine our holding in *Goldstein*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We briefly address each argument in turn.

Plaintiff first argues there is no conflict between the FAA and State law as each mandates an identical result: that arbitration be conducted in North Carolina. In support of this argument, it cites Section 4 of the

FAA, which allows parties to a written arbitration agreement to "petition any United States district court which, save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Under that statute: "The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." *Id.* Plaintiff argues this provision forecloses an interpretation of the forum-selection clause requiring arbitration be conducted in Tennessee, as Tennessee was not the forum of the trial court action in this case.

Plaintiff wholly misinterprets Section 4 of the FAA. Section 4 creates a specific procedure allowing a party to petition a federal district court to compel arbitration when "aggrieved by the alleged failure, neglect, or refusal" of another party to arbitrate as required by a written agreement. *Id.* Even a cursory reading reveals this statute is unrelated to the state court Order at issue in this case, which resolved Defendants' Motion to Stay Proceedings Pending Arbitration. As an example of the application of this statute, if a party to the Contract in this case refused to arbitrate following the entry of the Order staying proceedings, the opposing party could then under Section 4 file a Petition to Compel Arbitration in a federal district court. The language identified by Plaintiff requires such a Petition be filed in the federal district court located in the forum mandated by the arbitration agreement's forum-selection clause. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995). It does not, as Plaintiff argues, relate in any way to the validity or enforceability of the forum-selection clause itself.

Second, Plaintiff argues the "equal footing" principle prevents the FAA from preempting Section 22B-3. The FAA "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center*, 561 U.S. at 67. As such, arbitration agreements are valid and can only be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Agreements to arbitrate may be invalidated by " 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC*, 563 U.S. at 339 (quoting *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 134 L. Ed. 2d 902 (1996)). For example, a Montana statute invalidated arbitration clauses in contracts unless notice of the clause was given on the contract's first page. *Casarotto*, 517 U.S. at 681. The Supreme Court held that statute was preempted by the FAA because, rather than being a generally applicable contract defense, the statute "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687.

Plaintiff argues Section 22B-3 is a "generally applicable contract defense" because it applies to "any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state[.]" N.C. Gen. Stat. § 22B-3. The statute applies not only to clauses selecting the forum for arbitration, but for those selecting the forum for litigation as well.

Such an interpretation is directly at odds with the holding of the United States Supreme Court that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. Plaintiff has identified no authority holding the equal-footing principle prevents the preemption of state law limiting the forum the parties may select for arbitration. This interpretation also conflicts with our own holding in *Goldstein* that the FAA preempts Section 22B-3. 181 N.C. App. at 538, 640 S.E.2d at 743; *Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Although Section 22B-3 "explicitly applies to all contracts, it applies to one type of provision only, forum-selection provisions." *Newman ex rel. Wallace v. First Atl. Res. Corp.*, 170 F.Supp.2d 585, 592 (M.D.N.C. 2001). It is not a general contract defense like "fraud, coercion, lack of consideration" or lack of meeting of the minds. *Id.* (citing *Casarotto*, 517 U.S. at 686-87). Thus, as we have previously held, Section 22B-3 cannot be used to invalidate a forum-selection provision in an arbitration agreement governed by the FAA. Therefore, the arbitration forum-selection clause in the Contract here is enforceable under the FAA notwithstanding Section 22B-3.

C. Mandatory and permissive forum-selection clauses

In addition to directing it determine if the FAA applied to the Contract, our previous decision in this case instructed the trial court to consider whether the forum-selection clause is mandatory or permissive. 291 N.C. App. at 6, n.1, 893 S.E.2d at 568, n.1. The trial court concluded the forum-selection clause was permissive and therefore unenforceable. Defendants argue the forum-selection clause is mandatory and that the trial court erred by ordering arbitration be conducted in North Carolina.[3]

"When a jurisdiction is specified in a provision of a contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 568, 566 S.E.2d 160, 161 (2002). A clause without such language generally only consents to the jurisdiction of a court, "allow[ing] the parties to air any dispute in that court, without requiring them to do so." *Id.* at 567, 566 S.E.2d at 162 (quoting Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum–Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. Rev. 422, 423 n. 10 (1991)). For example, a forum-selection clause stating a contract "shall be subject to the . . . jurisdiction of the State of Colorado," without indicating that jurisdiction is "sole" or "exclusive" is permissive, and does not require disputes be resolved in Colorado. *Cable Tel. Servs., Inc. v. Overland Cont., Inc.*, 154 N.C. App. 639, 645, 574 S.E.2d 31, 35 (2002). Likewise, a clause providing "[v]enue for any arbitration, settlement meetings, or any subsequent litigation whatsoever shall be in the city of Contractor's office as shown on page 1 of the Subcontract" is not a mandatory selection clause. *Se. Caissons, LLC v. Choate Const. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 657 (2016). Mandatory selection clauses "have contained words such as 'exclusive' or 'sole' or 'only' which indicate that the contracting parties intended to make jurisdiction exclusive." *Internet East, Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 86 (2001) (holding as mandatory clause providing "The parties herewith stipulate that the State courts of North Carolina shall have sole jurisdiction . . . and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina"). *See also Appliance Sales & Serv.*, 115 N.C. App. at 23, 443 S.E.2d at 790 (holding as enforceable clause stating "the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue").

3. Plaintiff argues the trial court's interpretation of the forum-selection clause should be reviewed for abuse of discretion. Determining the enforceability of a forum-selection clause and whether it is unfair or unreasonable because of circumstances such as fraud or unequal bargaining power is "highly fact-specific" and indeed subject to review for abuse of discretion. *Appliance Sales & Serv., Inc. v. Command Elec. Corp.*, 115 N.C. App. 14, 21-22, 443 S.E.2d 784, 789 (1994). However, in this case Plaintiff does not argue the agreement was unfair or unreasonable or that any factual circumstances otherwise render it unenforceable. The parties only dispute the meaning of the contract clause. "Issues relating to the interpretation of terms in an arbitration clause are matters of law, which this Court reviews *de novo*." *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 61-62, 785 S.E.2d 137, 142-43 (2016).

Here, the forum-selection clause at issue provides "The Arbitration shall be held at the discretion of [Defendants] either at [Defendants'] principle [sic] place of business or where the Project is located." Defendants argue two components of this clause render it mandatory: (1) the "either-or" construction; and (2) the indication that Defendants have discretion to choose the forum for arbitration between the two options provided.

Our courts have not addressed whether an either-or forum-selection clause is permissive or mandatory. Defendants cite to federal caselaw, primarily stemming from a decision of the Southern District of New York. *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F.Supp. 71 (1978). In that case, the district court held as enforceable a clause providing all disputes "shall be brought in either San Diego or Los Angeles County." *Id.* at 73. This disjunctive language "mandates more than that a particular court has jurisdiction. The language mandates that the designated courts are the only ones which have jurisdiction." *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77-78 (9th Cir. 1987). While not relied upon in subsequent cases, the Ninth Circuit has used the "either-or" construction as an example of a mandatory forum-selection clause. *Id.* (contrasting with permissive forum-selection clause at issue which stated "the courts of California, County of Orange, shall have jurisdiction over the parties").

The clause in this case also provides the forum for arbitration will be chosen "at the discretion of [Defendants]." The plain meaning of this language gives Defendants the right to select the venue. Federal courts have held as mandatory provisions granting one party to an agreement the right to choose the forum for resolving disputes. *See City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991) (holding clause by which insurer agreed to submit to the jurisdiction "of any court of competent jurisdiction" granted policyholder the right to choose venue and insurer could not remove the case from state court). *See also J&R Multifamily Group, Ltd. v. UBS Real Estate Securities, Inc*, 2019 WL 13218440 (S.D. Texas 20 Feb 2019) ("The language 'at Lender's option' in the forum-selection clause gives Defendants the exclusive right to choose venue."); *Mosing v. Zloop, Inc.*, 2015 WL 1841212 (S.D. Texas 22 April 2015) (clause providing "Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Harris County, State of Texas" was mandatory and enforceable).

While none of these decisions are controlling, we find their reasoning compelling and Plaintiff has identified no caselaw holding otherwise with regard to "either-or" constructions or clauses granting one party the right to choose the forum. Instead, Plaintiff surveys North Carolina decisions to argue a mandatory forum-selection clause must contain a modifier to "shall" such as "only," "solely," or "exclusively." The rule is not so prescriptive: the clause need only contain words "which indicate that the contracting parties intended to make jurisdiction exclusive." *Cable Tel Servs.*, 154 N.C. App. at 644, 574 S.E.2d at 34-35. Here, the combination of the "either-or" construction and assignment of discretion to select a forum to Defendants makes clear the parties' intent. The plain language of the forum-selection clause demonstrates the parties agreed to give Defendants the right to choose the appropriate forum for arbitration from the identified fora. Defendants may choose between the location of its principal place of business or the site of the project.

Thus, the arbitration forum-selection clause in this case is mandatory and not merely permissive. Therefore, the trial court erred in concluding the forum-selection clause was not enforceable. Consequently, the trial court erred in entering its Order requiring arbitration occur in Cumberland County, North Carolina.

Conclusion

Accordingly, the Order of the trial court is reversed and this matter remanded for entry of an order allowing the parties to pursue arbitration in accordance with the terms of the Contract, including the forum-selection clause.

REVERSED AND REMANDED.

Judges FLOOD and MURRY concur.

IN THE MATTER OF L.M., S.C., J.M., T.R-M., T.M., T.M.

No. COA25-473

Filed 19 November 2025

Child Abuse, Dependency, and Neglect—permanency planning hearing—motion to continue—repeated failure to appear—no extraordinary circumstances or prejudice shown

In a permanency planning review hearing during which reunification plans were eliminated for six of respondent-mother's seven children, the court did not abuse its discretion by denying respondent-mother's motion to continue the hearing, for which she was not present. The court cited respondent-mother's repeated failure to appear in court throughout the juvenile proceedings involving her children—a finding based not on mental impression but on judicial knowledge, since the same judge who held the permanency planning hearing (1) had also presided over several prior hearings for which respondent-mother did not appear, and (2) had received regular court reports detailing the case history for each child. Moreover, respondent-mother failed to demonstrate extraordinary circumstances justifying a continuance where her counsel cited respondent-mother's absence as the sole basis for her motion to continue. For this same reason, respondent-mother failed to show that she was prejudiced by the denial of her motion and waived her arguments on appeal that her constitutional due process rights were violated and that she received ineffective assistance of counsel.

Appeal by Respondent-Mother from judgment entered 15 October 2024 by Judge Annette Turik in Greene County District Court. Heard in the Court of Appeals 29 October 2025.

Gay Parker Stanley for Petitioner-Appellee Greene County Department of Social Services.

Peter Wood for Respondent-Appellant Mother.

William L. Gardo, II, for guardian ad litem.

GRIFFIN, Judge.

Respondent-Mother[1] appeals the trial court's permanency planning order, arguing the trial court abused its discretion when it denied her motion to continue at the 3 September 2024 hearing and this denial caused her prejudice. We disagree and affirm the trial court.

I. Factual and Procedural Background

Respondent-Mother has seven children. The children are Susan, Lana, Julie, Trent, Trisha, Teresa, and Rose.[2] On 8 March 2019, Greene County Department of Social Services filed a petition alleging Susan to be neglected, and, on 1 July 2019, the trial court adjudicated and found Susan to be neglected. On 1 June 2020, DSS filed a petition alleging Lana to be abused and neglected, and, on 20 January 2021, the trial court adjudicated and found Lana to be abused and neglected. On 1 June 2020, DSS filed petitions alleging Julie and Trent to be neglected, and, on 20 January 2021, the trial court adjudicated and found Julie and Trent to be neglected. On 1 June 2022, Pitt County DSS filed petitions alleging Teresa and Trisha to be neglected and dependent. The trial court adjudicated and found Teresa and Trisha neglected and dependent on 2 February 2023. Their case was transferred to Greene County on 9 February 2023. Respondent-Mother attended each of these adjudication hearings.

On 5 February 2024, the trial court issued an order for nonsecure custody for Rose, the youngest child, giving nonsecure custody to DSS because of the substantial risk Respondent-Mother and her living environment posed to Rose. On 11 March 2024 and 15 April 2024, the trial court held nonsecure custody hearings regarding Rose, and, on 20 May 2024, the trial court held adjudication and disposition hearings regarding Rose, finding Rose neglected. Respondent-Mother did not attend any of these hearings, which Judge Turik presided over. Respondent-Mother's whereabouts were unknown to the trial court and the parties at the time. Thus, the trial court continued the hearings. Later, the trial court was informed that Respondent-Mother was incarcerated in Pitt County at the time of the adjudication and disposition hearings. Until Rose's

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1. We use the pseudonyms stipulated to by the parties to protect the identity of the children pursuant to the Rules of Appellate Procedure. N.C. R. App. P. 42(b). We also use the name Respondent-Mother to protect the identity of the children. None of the children's fathers join in this appeal. Because each child, except Trisha and Teresa, have different fathers, we distinguish Father with the child's name for clarity when needed.

2. Rose's case is not included in this appeal. However, the previous proceedings regarding Rose leading up to and through the 3 September 2024 hearing at issue are included in the transcript and supplemental record. Thus, we review the whole record for purposes of evaluating the issue presented in this appeal.

nonsecure custody hearing, Respondent-Mother had attended each hearing for the six older children except the 15 August 2022 permanency planning hearing for Lana.

On 22 July 2024, Judge Turik held an initial permanency planning hearing for Rose as well as permanency planning review hearings for Susan, Lana, Julie, Trent, Trisha, and Teresa. Respondent-Mother did not attend the hearing, because she was in the emergency room at ECU Vidant Hospital due to illness. Based on Respondent-Mother's absence, the trial court continued the permanency planning hearing until 3 September 2024 and set aside Rose's prior adjudication. However, during the 22 July 2024 hearing, the trial court dealt with an issue regarding Respondent-Mother, Susan, and a cell phone in Susan's possession. The phone issue pertained to Susan's refusal to surrender the phone, Respondent-Mother's purported "intentional and willful violations" of the trial court's previous orders governing contact between Susan and Respondent-Mother, and Susan's purported use of the phone to record court proceedings for Respondent-Mother and subsequent lying to the trial court about her possession of the phone. On 2 August 2024, DSS filed a motion for contempt regarding Respondent-Mother and Susan based on these issues related to the phone. The trial court scheduled and held a contempt hearing for Susan and Respondent-Mother on 12 August 2024. Respondent-Mother failed to appear. Over the course of the various proceedings, GAL and DSS provided court reports to the trial court, providing status updates on the children, issues for the trial court to address, recommendations, and case history.

On 3 September 2024, the trial court held Rose's adjudication and disposition hearings as well as permanency planning hearings for the six older children. The trial court was scheduled to hold Respondent-Mother's contempt hearing the same day. Respondent-Mother received notice fifteen days prior to the hearing as well as the purpose of the hearing, but she failed to attend. Her counsel motioned to continue:

> MR. BROADWAY [Respondent-Mother's Counsel]: I do represent [Respondent-Mother]. And we'll me [sic] making a motion to continue. My client messaged me this morning since court started to say that she's home and does not have a ride and so has asked me to ask for a continuation (inaudible) that.
>
> MS. KIRBY [Trisha and Teresa's Father's Counsel]: Your Honor, I would also join in on that continuance request. My client also contacted me when I was on the way over

> back from Wayne County to Greene. He has a ride that can get him at 11:30 (inaudible) be here until this afternoon sometime. So he is requesting a continuous [sic] for that.
>
> . . .
>
> THE COURT: Okay. You wish to be heard on the motion to continue?
>
> MS. STANLEY [DSS's Counsel]: Your Honor, we're ready to proceed. And with regards to [Respondent-Mother], she doesn't seem to be appearing in court lately. She has missed most of the court dates and she's (inaudible) last day and no transportation. I know she let us know this morning she was not coming.
>
> MS. KIRBY: I tried texting [Respondent-Mother] all week and this is the first time I heard from her, so –
>
> MR. BROADWAY: And I'm communicating via e-mail.
>
> THE COURT: Yes, sir. Mr. Brown, are you ready to proceed?
>
> MR. BROWN [GAL Attorney Advocate]: Yes, Your Honor. We're ready to proceed.
>
> THE COURT: All right. I understand the position of counsel. [Respondent-Mother] regularly does not appear in this court. She's not compliant with the orders of the [c]ourt. [Trisha and Teresa's Father] is who you represent?
>
> MS. KIRBY: Yes, Your Honor.
>
> THE COURT: I believe, according to the report, they're living together. So he has also not complied with the orders of the [c]ourt and I don't know if he's been here since he got out of prison. He wasn't here on the last court date.
>
> MS. KIRBY: He was here on the last –
>
> THE COURT: He was here on the last court date?
>
> MS. KIRBY: Yes, Your Honor.
>
> THE COURT: Okay. The motion to continue by [Respondent-Mother's] counsel is respectfully denied.

The hearing proceeded. Respondent-Mother's counsel was presented with opportunities to cross-examine witnesses and participate in the hearing on behalf of Respondent-Mother. On 15 October 2024, the trial court filed permanency planning orders for the oldest six children, which included the elimination of reunification plans. Respondent-Mother timely appealed.

II. Analysis

The issue is whether the trial court abused its discretion when it denied Respondent-Mother's motion to continue the permanency planning review hearing when Respondent-Mother was not present. Respondent-Mother argues "the trial court abused its discretion when it denied [her] motion . . . because the court erroneously believed [Respondent-Mother] had routinely failed to come to court when [Respondent-Mother] had actually missed only one court date in five years." We disagree and affirm the trial court.

Since Respondent-Mother "did not assert in the trial court that a continuance was necessary to protect a constitutional right" the "motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516–17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *In re S.M.*, 375 N.C. 673, 680, 850 S.E.2d 292, 299–300 (2020) (citation modified).

In juvenile abuse, neglect, and dependency hearings, motions to continue are governed by N.C. Gen. Stat. § 7B-803, which states,

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. Resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.

N.C. Gen. Stat. § 7B-803 (2023). Here, the trial court would grant the continuance only in an extraordinary circumstance. Thus, Respondent-Mother must show that she had an extraordinary circumstance for the continuance and the trial court's denial of her motion to continue was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re C.J.C.*, 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020) (quoting *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019)). "[Respondent-Mother] must also show she 'suffered prejudice as a result of the error.' " *In re L.G.*, 274 N.C. App. 292, 295, 851 S.E.2d 681, 685 (2020) (quoting *In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91).

Extraordinary circumstances are "[a] highly unusual set of facts that are not commonly associated with a particular thing or event." *Circumstance*, Black's Law Dictionary (12th ed. 2024) (defining "extraordinary circumstance"). This Court has addressed which circumstances constitute the extraordinary circumstances required for a motion to continue. For example, in *In re D.W.*, this Court ruled extraordinary circumstances supported a "motion to continue a hearing to terminate the parental rights of a [r]espondent[-]mother who was suffering from mental disability, to whom there is no evidence that notice was given, and from whom the trial court could hear testimony directly addressing the ultimate issue at trial." 202 N.C. App. 624, 629, 693 S.E.2d 357, 360 (2010).

Closer to the facts of this case, in *In re L.G.*, a trial court denied a motion to continue after counsel for the respondent-mother made an oral motion in court to continue. 274 N.C. App. at 296, 851 S.E.2d at 685. There, counsel "not[ed] [the respondent-mother] had consistently attended all court proceedings;" the respondent-mother intended to check into medical facilities; and she had "received copies of the report[s] . . . and has not been able to communicate back to [counsel] . . . her comments." *Id.* "In denying [the respondent-mother's] motion, the trial court observed the case had been before the [c]ourt [ ] for twenty-three months, and pointed to the amount of information contained in the court file and in the reports submitted by DHHS and the GAL." *Id.* (citation modified). On appeal, this Court affirmed the trial court, noting "[t]he purpose of a permanency planning hearing is to identify the 'best permanent plans to achieve a safe, permanent home for the juvenile' consistent with the juvenile's best interest," yet the respondent-mother's "counsel made no proffer, other than [her] absence, tending to suggest a continuance would further the cause of identifying the appropriate permanent plan for [her child]." *Id.* at 297, 851 S.E.2d at 685–86 (quoting N.C. Gen. Stat. § 7B-906.1(g), (i) (2019)).

Respondent-Mother argues the trial court's denial of her motion was "primarily because of the unsupported assumption that [Respondent-Mother] had not appeared for court the past few court dates" and "the trial court and [P]etitioner both remembered the history of the case wrong." In support of this argument, Respondent-Mother contends "[u]ntil the [3 September] 2024 hearing, she had missed only one of thirteen court hearings," the 15 August 2022 permanency planning review hearing. However, Respondent-Mother also did not appear at Rose's 11 March 2024 and 15 April 2024 nonsecure custody hearings, Rose's 20 May 2024 adjudication and disposition hearings, the 22 July 2024 hearings for all seven children, the 12 August 2024 contempt hearing, and the 3 September 2024 hearing. Respondent-Mother cites our Supreme Court's opinion in *Shankle v. Shankle*, which said, "[i]n reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record[.]" 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976) (quoting 17 C.J.S. Continuances § 97 (1963)). But, as Respondent-Mother acknowledges, the Court continued saying "although . . . it may take into consideration facts within its judicial knowledge." *Id.* (omission in original).

Here, Judge Turik presided over these 2024 hearings at which Respondent-Mother did not appear, and she granted continuances when needed, such as when Respondent-Mother was in prison or in the hospital. Further, DSS and GAL submitted court reports at regular intervals keeping the trial court up to date not only on the status of the children but also on the case history. Thus, the trial court's denial of the motion to continue based on Respondent-Mother regularly not appearing in court was not premised on mental impression but on judicial knowledge. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) ("A trial court may take judicial notice of earlier proceedings in the same cause." (citing *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985))).

Moreover, like in *In re L.G.*, here, Respondent-Mother's counsel motioned to continue and only offered the reason "that she's home and does not have a ride and so has asked me to ask for a continuation." No additional support for Respondent-Mother's motion was provided; thus, it was not a highly unusual set of facts warranting a motion to continue for extraordinary circumstances. Additionally, the trial court's denial of the motion to continue for juvenile cases that have been active anywhere from three to six years for the oldest six children advanced substantial justice for the children. Thus, the trial court did not abuse its discretion in denying the motion to continue.

Furthermore, even assuming error, Respondent-Mother was not prejudiced by the trial court's denial of her motion to continue. Respondent-Mother argues "[t]here is inherent prejudice when a court conducts a hearing in the absence of a parent" and contends her constitutional right to due process was violated. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Our Supreme Court has been clear about when constitutional rights are not the basis of the motion to continue in the trial court:

> However, there is no indication in the record that [the] respondent's counsel moved to continue the termination hearing in order to protect [the] respondent's constitutional rights. There is no mention of the need to continue due to a lack of notice or in order to ensure due process. Although the transcript of the proceedings is incomplete, the transcript shows that upon inquiry from the trial court [the] respondent's counsel confirmed that his only objection to proceeding with the termination hearing was [the] respondent's absence. A parent's absence from termination proceedings does not itself amount to a violation of due process. Accordingly, [the] respondent has waived any argument that the denial of the motion to continue violated his constitutional rights[.]

In re J.E., 377 N.C. 285, 290, 856 S.E.2d 818, 822 (2021) (internal citations omitted); *see In re L.G.*, 274 N.C. App. at 297, 851 S.E.2d at 686 ("Moreover, the mere fact [Respondent-Mother] was not present for the [permanency planning and review] hearing is not *per se* prejudicial."). Likewise, here, nothing in the 3 September 2024 transcript mentioned "the need to continue due to a lack of notice or in order to ensure due process;" the only support offered for the motion to continue was Respondent-Mother's absence. Respondent-Mother cites *In re D.W.* in support of her due process argument, but this Court in *In re D.W.* held there to be an abuse of discretion where the respondent-mother "was suffering from mental disability, [ ] there [was] no evidence that notice was given, and from whom the trial court could hear testimony directly addressing the ultimate issue at trial." 202 N.C. App. at 629, 693 S.E.2d at 360. Those facts are not present here. Thus, the due process argument is waived.

Similarly, Respondent-Mother raises the possibility that her absence could be ineffective assistance of counsel; however, because her counsel only raised her absence as the reason for the motion to continue, her ineffective assistance of counsel is also waived on this appeal. *In re C.M.P.*, 254 N.C. App. 647, 652, 803 S.E.2d 853, 857 (2017) (holding the "respondent failed to preserve the issue of whether the denial of the motion violated her constitutional right to effective assistance of counsel" because the "respondent's counsel raised only one ground to support the motion to continue at the hearing: that [the] respondent was absent from the hearing"); *see In re S.M.*, 375 N.C. at 679, 850 S.E.2d at 299 ("Because [the] respondent-father did not assert before the trial court that a continuance was necessary to protect a constitutional right, that position is waived. . . ." (citing *In re A.L.S.*, 374 N.C. at 516–17, 843 S.E.2d at 91)). While a "timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" may not necessarily be required "if the specific grounds were [ ] apparent from the context," N.C. R. App. P. 10(a)(1), Respondent-Mother's motion to continue solely premised on her absence because she did "not have a ride" as well as her argument on appeal that generally "[r]epresenting a client who is not present in court can be ineffective assistance of counsel" does not provide the necessary context to save her argument from waiver. *See In re C.M.P.*, 254 N.C. App. at 652, 803 S.E.2d at 857.

Therefore, because Respondent-Mother did not present an extraordinary circumstance and the denial of the motion to continue was not "manifestly unsupported by reason or [ ] so arbitrary that it could not have been the result of a reasoned decision," *In re C.J.C.*, 374 N.C. at 47, 839 S.E.2d at 746, the trial court did not abuse its discretion.

III. Conclusion

Accordingly, we affirm the trial court's denial of Respondent-Mother's motion to continue.

AFFIRMED.

Judges ARROWOOD and GORE concur.

CORNELIUS McCALL and SINCERA McCALL, Plaintiffs
v.
YUYING ZHANG, Defendant

No. COA25-222

Filed 19 November 2025

Contracts—specific performance—option to purchase—no evidence of being ready, willing, and able to close—summary judgment proper

In buyers' action for specific performance of an option to purchase real estate, the trial court properly entered summary judgment in favor of the seller. Even construing ambiguities in the option contract against the seller, there was no genuine issue of material fact that, although the buyers gave their intent to purchase, they were not ready, willing, and able to close on the property even six and a half months after the stated closing date when they commenced this action—a period of time that was not reasonable as a matter of law. Further, despite the buyers' argument, the seller was under no obligation to prepare a new purchase agreement to satisfy a condition of the buyers' chosen lender, and buyers' failure to be ready to close in a reasonable amount of time was not through any breach by the seller.

Appeal by plaintiff-appellants from order entered 19 July 2024 by Judge Matthew T. Houston in Wake County Superior Court. Heard in the Court of Appeals 10 September 2025.

Satterfield Law, PLLC, by Daron D. Satterfield, for plaintiff-appellants.

Gaskins Hancock Tuttle Hash LLP, by James M. Hash, and Andrew M. Simpson, for defendant-appellee.

DILLON, Chief Judge.

Plaintiffs ("Buyers") commenced this action for specific performance of an option contract among other damages in superior court. Buyers appeal from the trial court order granting summary judgment in favor of Defendant-Seller ("Seller"). We conclude the trial court did not err in ordering summary judgment in favor of Seller.

I. Background

In May 2020, Buyers, Cornelius McCall and Sincera McCall, and Seller, Yuying Zhang, entered into an arrangement whereby Buyers leased a certain single-family residence (the "Property") owned by Seller for a period of approximately 24 months, with an option to purchase said Property. The arrangement was evidenced by three written agreements, as follows:

The parties signed a lease agreement whereby Buyers would lease the Property from Seller for 24 months, with the term expiring on 30 June 2022 (the "Lease"). The Lease stated it was being signed along with an option to purchase contract.

The parties signed an option to purchase agreement whereby Buyers would have the option to purchase the Property from Seller for $535,000.00 any time prior to 30 June 2022, when the Lease terminated (the "Option Contract"). Under the Option Contract, Buyers paid $25,000.00 for the option, which would be applied to the purchase contract should a sale thereunder be consummated.

The parties signed an Option to Purchase Disclosure (the "Disclosure"), whereby Buyers acknowledged, among other things, that their rights to purchase under the Option would terminate if they defaulted under the Lease.[1]

Two years later, on 16 May 2022, about a month and a half before the Lease and Option were to expire, Buyers notified Seller via text message of their intent to exercise the option to purchase. Within a few weeks, Buyers were in the process of obtaining a mortgage. However, the lender that Buyers were working with required Buyers to submit a standard purchase agreement. Buyers reached out to Seller and asked Seller to prepare a purchase agreement which would be acceptable to Buyers' lender. Seller refused, indicating he had no obligation to prepare a purchase agreement. Buyers did not obtain loan approval or otherwise indicate they were prepared to close by 30 June 2022, the expiration date of the Lease and Option.

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1. This arrangement between Buyers and Seller – whereby Buyers leased residential property with an option to purchase that property – potentially implicates provisions of Chapter 47G of our General Statutes, which generally provides a residential tenant with the right to cure certain defaults to prevent forfeiture of his option to purchase under the lease. In any event, we note Buyers do not make any argument that Chapter 47G applies; and, therefore, we do not consider Chapter 47G in our evaluation of Buyers' arguments on appeal.

Six months later, in January 2023, Buyers commenced this present action seeking specific performance under the Option and other damages. Nothing in the record demonstrates that Buyers otherwise were ready, willing and able to close at any time up to the commencement of this action.

After a hearing on the matter, the trial court entered summary judgment for the Seller. Buyers appeal.

II. Analysis

On appeal, Buyers argue the trial court erred by granting Seller summary judgment. We review a trial court's order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524 (2007). "[F]acts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to [the nonmoving] party." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334 (2015).

To survive summary judgment, Buyers were required to produce evidence showing they properly exercised their option to purchase under the Option (thereby showing they had a contract to purchase the Property) and that they were ready, willing and able to close by the closing date as required under the Option.

We note Seller's argument that Buyers failed to properly exercise the Option. Our Supreme Court has held an option to purchase must be exercised, if at all, by the date specified in the option contract. *See Trust Co. v. Medford*, 258 N.C. 146, 150 (1962) (reiterating the general rule time is of the essence in an option to purchase). Further, the option to purchase must be exercised, if at all, in *the manner* specified in the option contract. *Id.*; *Kidd v. Early*, 289 N.C. 343, 361 (1976). That is, an option contract may provide for an option to be exercised by tendering all or part of the purchase price by the option deadline. Or the option contract may provide an optionee merely needs to give the optionor notice of his intent to exercise by the deadline, in which case (absent a stated closing date), the optionee must tender the purchase price within a reasonable amount of time after said notice is given. *Id.* at 371.

In the present case, the Option Contract provided Buyers could exercise the option to purchase the Property, if at all, as follows:

> NOTICE REQUIRED TO EXERCISE OPTION. To exercise the Option to Purchase, the Buyer/Lessee must deliver to the Seller/Landlord written notice of Buyer/Lessee's intent to purchase. In addition, the written notice must specify a valid closing date. The closing date must occur before the

> original expiration of the Lease Agreement, or the date of the expiration of the Option to Purchase Agreement designated in paragraph 1, whichever occurs later.

Based on the above provision, the closing date was 30 June 2022, as the expiration date for both the Lease and the Option Contract was 30 June 2022.

The above provision is ambiguous in many respects. However, for purposes of our analysis, we construe any ambiguity against the Seller. As such, to exercise the option to purchase the Property, Buyers were merely required *to provide notice* to Seller of their intent to purchase, with said notice to include a closing date. There was no set date by which Buyers were required to provide the notice, so long as Buyers closed the sale by the date as specified in the Option Contract. However, Seller argues Buyers did not properly *exercise the option* because Buyers did not provide a closing date as part of their notice, as required by the Option Contract. Seller points to the phrase in the Option Contract requiring Buyers to include a proposed closing date as part of the notice, something Buyers did not do.

Assuming, though, Buyers were not deficient in *providing notice* of their intent to exercise the option, for the reasoning below, we conclude Seller was still entitled to summary judgment, as Buyers failed to produce evidence that they were ready, willing and able *to close* within a reasonable amount of time after 30 June 2022, through no fault of the Seller. *See Munchak Corp. v. Caldwell*, 301 N.C. 689, 694 (1981) (holding that a party claiming a right to specific performance has the responsibility to show "the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform").

An option contract generally transforms into the purchase contract upon the optionee's proper exercise of the option. *Kidd*, 289 N.C. at 352 (citing *Lawing v. Jaynes*, 285 N.C. 418, 423 (1974)). The closing date thereunder was 30 June 2022.

Regarding a closing date provision in a real estate purchase contract, our Supreme Court has held that "[g]enerally, in the absence of a 'time is of the essence' provision, the parties must perform *within a reasonable amount of time* of the date set for closing." *Fletcher v. Jones*, 314 N.C. 389, 393–94 (1985) (emphasis added). That is, time is of the essence, generally, regarding the time by which an option *must be exercised*. But time is *not* of the essence regarding a stated closing date unless specified as such in the contract. Where the stated closing date is *not* specified as of the essence, a buyer may close on a date after the stated closing date as long as it is within a reasonable amount of time after the stated closing date.

Here, assuming Buyers properly exercised their option, the Option Contract became the purchase contract. There is a provision in the Option Contract that time was of the essence, but it could be argued this provision does not govern the closing date but rather only the date by which Buyers were to exercise their option. If the provision did not apply to the closing date, Buyers had a reasonable time after 30 June 2022 to be ready to close.

There was, however, no evidence that Buyers were ready, willing and able to close by the stated closing date or even six months after, when they commenced this action in 2023. We hold this period of over six months was beyond any reasonable time Buyers had to close. In so holding, we note what constitutes a reasonable time is "generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law." *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 174 (1925). And our Court has held a short delay of days or a few weeks constituted a reasonable time. *See Harris v. Stewart*, 193 N.C. App. 142, 148 (2008) (five-day delay in performance for pre-closing condition is reasonable); *see also Wolfe v. Villines*, 169 N.C. App. 483, 489 (2005) (a few weeks is not unreasonable as a matter of law). We hold, though, in the context of the parties' contracts, Buyers' failure to be ready to close within six and a half months (when they commenced this action) is not reasonable as a matter of law.

Buyers, though, argue they were unable to close in a timely manner because Seller was uncooperative in failing to provide a separate/new purchase contract which was being required by Buyers' lender. Concerning this argument, there was evidence which showed as follows: In late May or early June 2022, Buyers had applied for a loan with one lender. The lender informed Buyers that, as a condition of approval, Buyers were required to provide lender a separate purchase agreement between Buyers and Seller for the Property, suggesting that the lender would not provide a loan commitment based on the Option Contract which had ripened into the purchase contract. Buyers reached out to Seller, requesting Seller prepare, provide, or otherwise pay for the drafting of a new purchase agreement consistent with the terms of the Option Contract to satisfy Buyers' lender. There is no evidence Buyers themselves ever undertook the preparation of a new purchase agreement or provided the same to Seller for Seller's signature.

We recognize there is a duty of good faith and fair dealing implied in every contract between the contracting parties. *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted). This duty means the contracting parties will "not do anything which injures the right of the other to receive the benefits of the agreement." *Id*. However, we conclude this duty did not impose upon *Seller* any obligation to prepare a new purchase agreement where such agreement was required by Buyers' chosen lender. At best, Seller may have had a duty to cooperate with Buyers in executing a new agreement prepared by Buyers to satisfy Buyers' lender. And there is no evidence Seller otherwise unduly hindered or acted in bad faith in thwarting Buyers' ability to meet the closing deadline. Accordingly, since Buyers failed to obtain a loan or otherwise show they had the ability to close the purchase of the Property within a reasonable time after 30 June 2022, through no breach by Seller, Seller was entitled to summary judgment on Buyers' claims.

III. Conclusion

We conclude, on *de novo* review, there is no genuine issue of material fact. The Buyers failed to produce evidence that they were ready, willing, and able to close on the Property within a reasonable time after the closing date provided in the Option Contract, through no breach by the Seller. Therefore, we affirm the trial court's order granting summary judgment for Seller.

AFFIRMED.

Judges ZACHARY and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
JAMES MATTHEW DEAN, DEFENDANT

No. COA24-654

Filed 19 November 2025

1. Drugs—possession with intent to sell or deliver—special jury instructions—methamphetamine isomers—differentiation not required

In a prosecution for possession with intent to manufacture, sell, or deliver methamphetamine, the trial court did not err by denying defendant's request for three special jury instructions, which defendant sought largely based on his contention that, because the State's testing did not delineate between two different isomers of methamphetamine (D- and L-methamphetamine), the State could not prove that the substance found in defendant's vehicle was a controlled substance pursuant to N.C.G.S. § 90-95(a)(1). Contrary to defendant's assertion, the State was not required to differentiate between the isomers because the plain language of the North Carolina Controlled Substances Act explicitly includes both forms of the drug as illegal controlled substances. Further, even if defendant was entitled to an instruction that the State must prove the existence of a controlled substance by a "[s]cientifically valid chemical analysis," defendant failed to demonstrate prejudice where the instructions in their entirety adequately explained the State's burden.

2. Drugs—possession with intent to sell or deliver—methamphetamine isomers—differentiation not required

The trial court properly denied defendant's motion to dismiss a charge of possession with intent to manufacture, sell, or deliver methamphetamine where the State's evidence gave rise to a reasonable inference that a crystalline substance discovered in defendant's vehicle, which testing confirmed was methamphetamine, was a controlled substance pursuant to N.C.G.S. § 90-95(a)(1). Contrary to defendant's assertion, the State was not required to differentiate between the D-methamphetamine and L-methamphetamine isomers of the drug—one of which defendant contended was legal—because the plain language of the North Carolina Controlled Substances Act explicitly includes both forms of the drug as illegal controlled substances.

Appeal by Defendant from judgment entered 20 October 2023 by Judge Rebecca W. Holt in Johnston County Superior Court. Heard in the Court of Appeals 30 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Grace R. Linthicum, for the State-Appellee.

Blass Law, PLLC, by Attorney Danielle Blass, for the Defendant-Appellant.

STADING, Judge.

James Matthew Dean ("Defendant") appeals from final judgment entered upon a jury verdict convicting him of possession with intent to manufacture, sell, or deliver methamphetamine, and possession of drug paraphernalia. After careful review, we discern no error.

I. Background

On 13 January 2022, Sergeant Joseph Wheeler of the Smithfield Police Department saw a red Ford Explorer leaving the Village Motor Lodge at a rapid pace. Sergeant Wheeler relayed his observations to Officer Jennifer LeCrone of the Smithfield Police Department. Officer LeCrone noticed the Explorer "traveling at a high rate of speed." Upon checking the vehicle's registration, she discovered it had expired. Officer LeCrone also discovered the registrant, later determined to be the driver—who was Defendant, had an outstanding order for his arrest.

Officer LeCrone activated her patrol car's emergency equipment and the Explorer pulled over. She approached the vehicle and informed Defendant of the reason for the stop and observed that he acted "slightly nervous." Sergeant Wheeler arrived on the scene and spoke with Defendant. Sergeant Wheeler instructed Defendant to exit the vehicle; Defendant complied and remained cooperative.

Officer LeCrone handcuffed Defendant for the outstanding order for arrest. Sergeant Wheeler conducted a search of Defendant's person, locating a digital scale, approximately $1,253 in U.S. currency, and plastic bags containing a "crystalline material." Officer LeCrone searched Defendant's vehicle, discovering several "little corner baggies" and "a small bag of green leafy substance."

On 7 February 2022, the Johnston County Grand Jury returned a true bill of indictment against Defendant for possession with intent to manufacture, sell, or deliver methamphetamine; possession of marijuana up to one-half ounce; possession of drug paraphernalia; and having attained habitual felon status. On 3 May 2023, the State learned Defendant sought to introduce expert testimony about the drug testing and thereafter moved to exclude the testimony, alleging a violation of North Carolina's criminal discovery statutes. The trial court denied the State's motion to exclude the expert's testimony on 12 June 2023, and Defendant's trial began.

During the State's case-in-chief, the trial court accepted the State's tender of Ms. Korinthia Mills, a forensic scientist with the North Carolina State Crime Laboratory, as an expert in drug chemistry. Ms. Mills testified the crystal-like substance found on Defendant's person was methamphetamine. She also explained that methamphetamine exists as two isomers commonly designated as D and L, which have "the same chemical formula, but . . . how the pieces are put together are a little different." Ms. Mills recalled she performed a preliminary color test and a Fourier Transfer Infrared Spectrophotometer ("FTIR") test, both of which indicated the presence of methamphetamine but did not differentiate between isomers. She elaborated, both isomers yield the same color-test result (turning orange) and produce identical FTIR graphs.

The defense offered the testimony of an expert witness, Edward Brown, a Doctor of Philosophy in chemistry. Dr. Brown testified that methamphetamine exists in two isomer forms—D-isomer (or "D-methamphetamine") and L-isomer (or "L-methamphetamine"). He stated, while both isomers have the same melting and boiling points and appear identical, they have different effects on the body. Dr. Brown noted, neither the color test nor the FTIR test "differentiate between the D isomer and L isomer."

Defendant moved to dismiss all charges at the close of the State's evidence. With respect to the possession with intent to manufacture, sell, or deliver methamphetamine charge, Defendant argued the State had not proven which isomer was present, and that one of the isomers was not illegal. The trial court granted Defendant's motion with respect to the possession of marijuana charge for insufficient evidence, otherwise it denied Defendant's motion. Again, Defendant moved to dismiss the remaining charges at the close of all evidence. The trial court denied Defendant's motion. Defendant then requested special jury instructions, stating:

1. Methamphetamine-D is a controlled dangerous substance under Chapter 90 of North Carolina General Statutes.

2. Methamphetamine-L is not a controlled dangerous substance under Chapter 90 of North Carolina General Statutes.

3. State v. Ward requires the State to prove the existence of a Controlled Dangerous Substance by using some form of Scientifically valid chemical analysis.

The trial court denied Defendant's request and used the relevant pattern instructions:

> Now, the defendant has been charged with possessing methamphetamine with the intent to sell or deliver it. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed methamphetamine.
>
> Methamphetamine is a controlled substance. A person possesses methamphetamine when the person is aware of its presence, and has both the power and intent to control the disposition or use of that substance.
>
> And second, that the defendant intended to sell or deliver the methamphetamine.

The jury found Defendant guilty of possession with intent to sell or deliver methamphetamine, and possession of drug paraphernalia. Additionally, the jury found Defendant had attained habitual felon status. Defendant entered a defective written notice of appeal and thus petitioned our Court for a writ of certiorari ("PWC").

II. Jurisdiction

Defendant's written notice of appeal was defective since it failed to designate "the court to which the appeal was taken," and "it omitted the habitual felon file number." It therefore failed to comply with our Rules of Appellate Procedure. *See* N.C. R. App. P. 4. Notwithstanding, for the reasons below, we grant Defendant's PWC. N.C. R. App. P. 21(a)(1); N.C. Gen. Stat. § 7A-32 (2023).

A PWC is a "prerogative writ." N.C. Gen. Stat. § 7A-32. "It is intended as an extraordinary remedial writ to correct errors of law." *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (citation omitted); *see also State v. Diaz-Tomas*, 382 N.C. 640, 651–52, 888 S.E.2d 368, 377 (2022) (noting a writ of certiorari is "an *extraordinary* remedial writ," and the necessity to provide "sufficient cause" to support the petition). "Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan*, 384 N.C. at 572, 887 S.E.2d at 851 (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). And "[s]econd, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Cryan*, 384 N.C. at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811 (1982)). It is necessary that Defendant's PWC show extraordinary circumstances because, "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Cryan*, 384 N.C. at 572–73, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, . . . this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (citation omitted). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Id.* (citing *Ricks*, 378 N.C. at 740, 862 S.E.2d at 838).

Here, Defendant concedes his written notice of appeal failed to comply with N.C. R. App. P. 4. Even so, Defendant's PWC complies with the standards set out in *Cryan*. 384 N.C. at 572–73, 887 S.E.2d at 851; *see also Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839; *see also Diaz-Tomas*, 382 N.C. at 651, 888 S.E.2d at 377. Accordingly, we grant Defendant's PWC and proceed with our review on the merits.

III. Analysis

Defendant presents two issues on appeal. First, Defendant argues the trial court committed reversible error by declining to instruct the jury with his requested special instructions that were "correct and supported by evidence." Second, Defendant contends the trial court erred in denying his motion to dismiss the charge of possession with intent to sell and deliver methamphetamine, as the State failed "to produce evidence that the seized substance contained an illegal isomer . . . as opposed to a legal isomer." For the reasons below, we hold no error.

A. Special Jury Instructions

[1] Defendant argues the trial court committed error by failing to give three special jury instructions. He was charged with possession with intent to sell and deliver methamphetamine, whereby it is unlawful for any person to "possess with intent to manufacture, sell or deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a)(1) (2023). To maintain a conviction under subsection 90-95(a)(1), "the State must present evidence of the defendant's (1) possession; (2) of a controlled substance; (3) with intent to sell or deliver the controlled substance." *Id.* (citation omitted). "Methamphetamine is a controlled substance." *State v. Blagg*, 377 N.C. 482, 489, 858 S.E.2d 268, 274 (2021). Defendant challenges whether the substance located on his person was a controlled substance under subsection 90-95(a)(1) since the State's testing does not delineate between the two isomers of methamphetamine.

"We review a trial court's denial of a request for jury instructions *de novo*." *State v. Ramseur*, 226 N.C. App. 363, 373, 739 S.E.2d 599, 606 (2013) (citation omitted). "[T]o determine whether the trial court should have given the instruction requested by defendant, we first determine whether the requested instruction was both a correct statement of the law and supported by the evidence." *State v. Bowman*, 188 N.C. App. 635, 647, 656 S.E.2d 638, 648 (2008). "Requests for special jury instructions are allowable . . . if the requests are in writing." *Id.* "The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case." *State v. Rogers*, 121 N.C. App. 273, 281, 465 S.E.2d 77, 82 (1996). "If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993).

1. Methamphetamine Isomers

Defendant's first two proposed instructions relied on the proposition that under N.C. Gen. Stat. § 90-90(3)(c), only one isomer of methamphetamine—D-isomer—is a controlled substance under subsection 90-95(a)(1). Whether the State must discern between isomers of methamphetamine when charging the jury is an issue of first impression in our State. We thus consider whether the trial court's jury instructions complied with the North Carolina Controlled Substances Act since the State's test did not distinguish between isomers of methamphetamine. *See Bowman*, 188 N.C. App. at 647, 656 S.E.2d at 648.

"Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 700–01 (2019) (citation and quotation marks omitted); *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (internal quotation marks and citation omitted)

("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent."). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Rieger*, 267 N.C. App. at 649, 833 S.E.2d at 701.

Proof that the substance at issue is a controlled substance is a requisite element for possession with intent to sell or deliver a Schedule II substance, and for sale of methamphetamine. *See State v. Bridges*, 257 N.C. App. 732, 733, 810 S.E.2d 365, 367, *review denied*, 371 N.C. 339, 813 S.E.2d 856 (2018); N.C. Gen. Stat. § 90-95(a)(1). "[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010); *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007) (citation omitted) ("To obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance."). Methamphetamine is a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(3)(c) (2023). This definition includes, "its salts, isomers, and salts of isomers." *Id.*

The North Carolina Controlled Substances Act defines "isomer" to mean "the optical isomer, unless otherwise specified." N.C. Gen. Stat. § 90-87(14a) (2023); *see also* N.C. Gen. Stat. § 90-95 (noting "methamphetamine . . . and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof" as "controlled substances."); *see also* N.C. Gen. Stat. § 90-90(3)(c) (noting "[a]ny material, compound, mixture, or preparation which contains any quantity of . . . Methamphetamine, including its salts, isomers, and salts of isomers."). "[O]ptical isomers are compounds with the same molecular formula but which act in opposite ways on polarized light." *State v. Ward*, 199 N.C. App. 1, 25, 681 S.E.2d 354, 371 (2009) (citation omitted).

Since our Controlled Substances Act designates the optical isomers of methamphetamine as illegal controlled substances, the plain language explicitly contemplates that both isomers of methamphetamine are controlled substances.[1] Further, we note the legislature's formulation encompassing the drug in its various possible forms,

1. Both isomers, D- and L-methamphetamine, are optical isomers. *See* Toshihiko Nagai et al., *Identification of Optical Isomers of Methamphetamine and Its Application to Forensic Medicine*, 46 Nihon Hoigaku Zasshi 244 (1992).

"methamphetamine, including its salts, isomers, and salts of isomers," is consistent with federal law. N.C. Gen. Stat. § 90-90(3)(c); 21 U.S.C. § 841 *et seq.*; *see also United States v. Sizemore*, No.19-4508, 2022 U.S. App. LEXIS 1586, 2022 WL 168439 (4th Cir. Jan. 19, 2022) ("Federal law similarly prohibits distribution of methamphetamine and its isomers. . . ."); *see also*, *e.g.*, *United States v. Walls*, 1996 U.S. App. LEXIS 6588, No. 95-5466, 1996 U.S. App. LEXIS 6588, at *3 (4th Cir. Apr. 5, 1996) (applying a "mandatory minimum sentence . . . whether D-methamphetamine or L-methamphetamine is involved" since the federal statutes "make[ ] no distinction between types of methamphetamine.").

At trial, Ms. Mills testified she identified the substance through color and FTIR tests used across forensic labs. Although Defendant sought an explanation distinguishing between the isomers, the trial court correctly explained that the North Carolina General Statutes "do not specifically differentiate between L- and D- isomers," and that the pattern instructions appropriately addressed whether the substance was methamphetamine. In other words, Defendant's first requested special instruction was given *at least in substance*, and his second requested special instruction is incorrect in law. *See Harvell*, 334 N.C. at 364, 432 S.E.2d at 129 ("If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction at least in substance."). We discern no error from the trial court's declination of Defendant's differentiating instructions to treat the isomers D-methamphetamine as illegal and L-methamphetamine as entirely outside the statutory scope.

2. Chemical Analysis

Citing the North Carolina Supreme Court's decision in *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), Defendant also requested a jury instruction that the State must prove the presence of a controlled substance by a "[s]cientifically valid chemical analysis." Defendant maintains the State failed to prove that he possessed a controlled substance because the State's expert, Ms. Mills, used methods that did not distinguish between the isomers of methamphetamine. *See id.* ("Nevertheless, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.").

"When instructing the jury, the trial court has the duty to, 'declare and explain the law arising on the evidence.' Although a trial judge is not required to give requested instructions verbatim, he is required to give the requested instruction at least in substance" if proper and supported by the evidence. *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982) (citations omitted). "Moreover, the court may totally refuse instructions based on an erroneous statement of the law, or which concern issues irrelevant to the case." *State v. Agnew*, 294 N.C. 382, 395–96, 241 S.E.2d 684, 692 (1978) (citations omitted).

Defendant does not argue against the validity of the FTIR method used to test the substance. Rather, he again focuses on the test's failure to distinguish between D- and L-methamphetamine. As resolved above, the isomers of methamphetamine are encompassed by N.C. Gen. Stat. § 90-90(3)(c). The pattern jury instructions in this case directed the jury that they must be satisfied beyond a reasonable doubt as to every element of the charged offense, including the identification of a controlled substance. The trial court further instructed that the jury was the sole judge of the weight and credibility of the evidence, including testimony from both the State's and Defendant's experts. The trial court's instructions captured the essential substance of the law, and therefore it did not err in declining Defendant's specific request. *See Corn*, 307 N.C. at 86, 296 S.E.2d at 266; *see also Agnew*, 294 N.C. at 395–96, 241 S.E.2d at 692.

Even assuming error, Defendant has failed to show prejudice. We have previously held, "failure to instruct on an essential element of a crime is not structural error, reversible *per se*, but rather an error to which we may apply harmless error review." *State v. Bunch*, 196 N.C. App. 438, 444, 675 S.E.2d 103, 107 (2009). Under harmless error review, a defendant is prejudiced if there is a reasonable possibility that a different result would have been reached at trial absent the error. *See State v. Ramos*, 363 N.C. 352, 355–56, 678 S.E.2d 224, 227 (2009) (applying "reasonable possibility" of a "different result" standard to determine whether an erroneous instruction was prejudicial); *see also State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation omitted) ("[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' "). "A defendant has the burden to establish prejudice." *Castaneda*, 196 N.C. App. at 116, 674 S.E.2d at 712 (citation omitted). Further, "[w]hen reviewing the instruction for error, the Court must construe it contextually. 'In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments.' " *State v. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996) (citations omitted).

As with Defendant's previous contentions, his arguments of prejudice also revolve around a distinction between isomers of methamphetamine. Having resolved this concern, viewing the instructions in their entirety, we are unable to discern how a reasonable possibility of a different result would be feasible. *See Ramos*, 363 N.C. at 355–56, 678 S.E.2d at 227; *see also Hartman*, 344 N.C. at 467, 476 S.E.2d at 340. Consequently, we hold the trial court did not err in its instructions to the jury. Those instructions adequately explained the State's burden of proving the substance was a controlled substance, and the presence of methamphetamine was proven using a scientifically valid method. *See* N.C. Gen. Stat. § 15A-1443(a) (2023) (noting that prejudice occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). Defendant's jury instruction arguments are overruled.

B. Motion to Dismiss

[2] Defendant next argues the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine on the ground that the State failed to present sufficient evidence of a controlled substance. Specifically, Defendant asserts the trial court committed error because the State failed to present substantial evidence of a controlled substance as determined by a scientifically valid chemical analysis. Defendant again raises the concern that the State did not differentiate between the isomers of methamphetamine.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citing *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982)); N.C. Gen. Stat. § 15A-1227 (2023).

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing N.C. Gen. Stat. § 90-95(a)(1)). Considering the offense, substantial evidence supports the trial court's denial. "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). "As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence." *Id.* (citation omitted). "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citing *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)). "The trial court must also resolve any contradictions in the evidence in the State's favor." *Id.* (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *Id.* "Moreover, 'circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' " *Mann*, 355 N.C. at 301, 560 S.E.2d at 781 (citation omitted).

Here, Defendant challenges whether the State produced sufficient evidence of the second element of possession with intent to sell or deliver methamphetamine—that the substance possessed by Defendant was a controlled substance. At trial, Ms. Mills testified she performed a preliminary color test and an FTIR test to determine the substance on Defendant's person was methamphetamine. Additionally, Ms. Mills reviewed the report prepared by Defendant's expert witness: "Q . . . has your scientific opinion as the identity of that substance . . . changed at all? A. It has not. It is still identified as methamphetamine." *See* N.C. Gen. Stat. § 90-90(3)(c). When viewed in the light most favorable to the State, the evidence supports a reasonable inference that Defendant possessed a controlled substance—methamphetamine. *State v. Tucker*, 380 N.C. 234, 240, 867 S.E.2d 924, 929 (2022) (citations omitted) ("The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. The evidence need only be sufficient to support a reasonable inference."); *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) ("So long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence."); *State v. Dover*, 381 N.C. 535, 548, 873 S.E.2d 267, 275 (2022) ("Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty."). The State presented substantial evidence to support a reasonable inference of Defendant's guilt, and the trial court correctly denied Defendant's motion to dismiss for insufficient evidence. *See Tucker*, 380 N.C. at 240, 867 S.E.2d at 929.

IV. Conclusion

For the above reasons, the trial court properly refused Defendant's three requested special jury instructions and correctly denied his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine.

NO ERROR.

Judges HAMPSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
MARK OWEN MATTHEWS

No. COA24-961

Filed 19 November 2025

1. **Threats—communicating threats—actual belief that threat would be carried out—insufficiency of evidence**

   In a prosecution for crimes including two counts of communicating threats, where, as two officers—one male, one female—attempted to arrest defendant and were met with resistance, defendant threatened to kill both officers and their families, the trial court erred in denying defendant's motion to dismiss the charge of communicating threats as to the female officer. Although the male officer testified at trial that he believed defendant's threat, and the evidence showed that it would have been reasonable for the female officer to have believed the threat as well (especially where, after elbowing the male officer and communicating the threat, defendant said "I know where you live," and then accurately described the male officer's former residence and the female officer's current residence), the State presented no evidence that the female officer actually believed defendant would carry out the threat.

2. **Criminal Law—pattern jury instruction—false, contradictory, or conflicting statements by the accused—no prejudicial error**

   In a prosecution for crimes including possession of methamphetamine and carrying a concealed gun, where defendant gave conflicting testimony concerning how the illegal items at issue came into his possession, the trial court did not prejudicially err by including in its jury charge Pattern Jury Instruction 105.21, which explained that false, contradictory, or conflicting statements by defendant regarding the commission of a crime may be considered as a circumstance tending to reflect the mental processes of someone with a guilty conscience seeking to divert suspicion or exculpate himself. Specifically, defendant could show no prejudice where: the instruction acknowledged that defendant denied making any false statements and that it was up to the jury to determine whether defendant did make such statements; the trial court clarified that these statements would not create a presumption of guilt and, absent other evidence, would be insufficient to prove defendant's guilt; and, under the law, the jurors were presumed to have followed the court's instructions.

Appeal by defendant from judgments entered 11 January 2024 by Judge Michael A. Stone in Moore County Superior Court. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kendell Williams, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ZACHARY, Judge.

Defendant Mark Owen Matthews appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of one count each of possession of methamphetamine and carrying a concealed gun and two counts each of resisting a public officer and communicating threats. On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss one charge of communicating threats, and (2) instructing the jury regarding false, contradictory, or conflicting statements allegedly made by Defendant. After careful review, we conclude that the trial court erred by denying Defendant's motion to dismiss one charge of communicating threats but did not prejudicially err in its jury instructions. Accordingly, we reverse in part and remand for resentencing.

I. Background

Defendant's case came on for jury trial on 8 January 2024 in Moore County Superior Court. The evidence presented at trial tended to show the following:

On 16 June 2020, Officer Benjamin Haddock and Detective Evelyn Ballard of the Vass Police Department were on patrol and saw Defendant operating his vehicle in Vass although he was a non-licensed driver. While Defendant was parked at a gas station, Officer Haddock observed a known drug user lean into Defendant's driver-side window. Defendant briefly interacted with the individual and then drove away, as the officers followed. After verifying that Defendant had a suspended license, Officer Haddock initiated a traffic stop.

Officer Haddock and Detective Ballard exited their patrol vehicle and approached Defendant, who was belligerent. Officer Haddock twice ordered Defendant to exit his vehicle and step toward the patrol car, to which Defendant responded by screaming: "F*** you." Upon the officer's third order, Defendant still refused to comply. Following the fourth order, Defendant exited the vehicle but walked away from the officers, toward a convenience store. When the officers attempted to place Defendant under arrest, he resisted: he flailed about, elbowed Officer Haddock, screamed and cursed at the officers, and threatened to kill them and their families. The officers eventually handcuffed Defendant and took him into custody.

At trial, Defendant faced charges for possession with intent to sell or deliver methamphetamine, possession of methamphetamine, injury to personal property, carrying a concealed gun, possession of an open container of alcohol in a passenger area, two counts of communicating threats, and two counts of resisting a public officer. At the close of the State's evidence, defense counsel made a motion to dismiss all charges, which the trial court granted in part as to the charges of possession of methamphetamine, injury to personal property, and possession of an open container of alcohol in a passenger area and denied as to the remainder of the charges. Defense counsel made a motion to dismiss the remaining charges at the close of all evidence; the trial court denied the motion.

On 11 January 2024, the jury returned verdicts finding Defendant guilty of one count each of possession of methamphetamine (instructed as a lesser-included offense of possession with intent to sell or deliver methamphetamine) and carrying a concealed gun, and two counts each of resisting a public officer and communicating threats. That same day, the trial court entered judgments against Defendant, consolidating his convictions for one count of communicating threats and both counts of resisting a public officer and sentencing him to a term of 120 days' imprisonment in the custody of the North Carolina Department of Adult Correction. The court also consolidated Defendant's remaining conviction for communicating threats and his conviction for carrying a concealed gun and sentenced him to a consecutive term of 120 days' imprisonment. Finally, for Defendant's conviction for possession of methamphetamine, the trial court entered a judgment sentencing Defendant to a suspended term of 6 to 17 months' imprisonment and placing him on 18 months of supervised probation, to begin upon Defendant's release from prison.

Defendant entered oral notice of appeal.

II. Discussion

Defendant argues that the trial court erred by 1) denying his motion to dismiss the charge of communicating threats as to Detective Ballard, and 2) delivering Pattern Jury Instruction 105.21, titled "False, Contradictory, or Conflicting Statements of Defendant."

A. Standard of Review

"A trial court's denial of a motion to dismiss is reviewed de novo." *State v. Norris*, 294 N.C. App. 475, 477, 903 S.E.2d 225, 228 (2024) (italics omitted). Likewise, "[t]his Court reviews challenges to a trial court's decisions regarding jury instructions de novo." *State v. Carter*, 269 N.C. App. 329, 338, 837 S.E.2d 629, 636 (2020). "Under a de novo review, this Court considers the matter anew and freely substitutes its judgment for that of the lower court." *Id.* (cleaned up).

B. Motion to Dismiss

[1] Defendant asserts that the trial court erred when it denied his motion to dismiss the charge of communicating threats as to Detective Ballard because there was no evidence that she "believed Defendant's alleged threats." We agree.

"A trial court's ruling on a motion to dismiss is determined by whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator." *State v. Guice*, 286 N.C. App. 106, 112, 879 S.E.2d 350, 354 (2022) (cleaned up). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (citation omitted).

Therefore, "if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. White*, 289 N.C. App. 93, 96–97, 887 S.E.2d 902, 905–06 (citation omitted), *disc. review denied*, 385 N.C. 319, 891 S.E.2d 272 (2023).

> A person is guilty of the offense of communicating a threat if:
>
> (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2023).

Defendant does not challenge the first three elements of the charge of communicating threats as to Detective Ballard. Rather, Defendant's argument is limited to the fourth element—that the "person threatened believes that the threat will be carried out," *id.* § 14-277.1(a)(4)—evidence of which he asserts "d[id] not even rise to the level of speculation and conjecture" because "[t]he State tendered no evidence, from [Detective] Ballard or [Officer] Haddock or any other source, that in any way supports a conclusion that [Detective] Ballard believed the alleged threats from Defendant." Meanwhile, the State contends that under "the totality of the circumstances," it was reasonable for the jury to find that Detective Ballard believed the threat. In his reply brief, Defendant asserts that the State's argument is relevant only to the *third* element of the offense rather than the challenged *fourth* element.

As this Court has previously determined, "the conduct proscribed by [N.C. Gen. Stat.] § 14-277.1 is the making and communicating of the threat in the manner described in the statute, with no requirement that the threat be carried out." *State v. Hill*, 227 N.C. App. 371, 379, 741 S.E.2d 911, 917 (cleaned up), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 577 (2013). However, the victim must in fact believe that the threat would be carried out. N.C. Gen. Stat. § 14-277.1(a)(4).

In *Hill*, the defendant threatened to assault a law enforcement officer after she and another officer searched the defendant's cell. 227 N.C.

App. at 372, 741 S.E.2d at 913. The officer testified at trial that "she both believed [the] defendant was capable of doing it, and believed that [the] defendant would carry out his threat if he had the opportunity to do so." *Id.* (cleaned up). The defendant argued on appeal that the State did not present sufficient evidence that the officer believed the threat "because she believed an attempted assault on her person could be contained with the help of her fellow officers." *Id.* at 379–80, 741 S.E.2d at 917. This Court rejected the defendant's argument, noting that the officer "also testified that she believed [the] defendant was capable of carrying out his threat and would do so on the condition that he had the opportunity." *Id.* at 380, 741 S.E.2d at 918.

In this case, however, the State did not present evidence tending to show that Detective Ballard "in fact believed the threat would be carried out." *Id.* at 379, 741 S.E.2d at 917 (citation omitted). As Officer Haddock and Detective Ballard were placing Defendant under arrest, he resisted by pulling away, cursing and screaming at the officers, and elbowing Officer Haddock. Officer Haddock testified that during the arrest, Defendant threatened both officers, declaring: "I'm going to kill you and your family." When asked at trial if he believed the threat, Officer Haddock answered: "Absolutely." Additionally, while under arrest and in Officer Haddock's patrol vehicle, Defendant stated: "I know where you live," and proceeded to accurately describe the house where Officer Haddock had previously resided and where Detective Ballard was currently residing. Defendant also called Detective Ballard "a fat whore" and "a slut" and told her "that he was going to kill her whole family."

Significantly, however, although Officer Haddock testified that he "[a]bsolutely" believed the threat, he did not testify as to whether *Detective Ballard* believed Defendant's threat or exhibited any reaction or response manifesting her belief that Defendant would carry out the threat. Detective Ballard did not testify at trial.

On appeal, Defendant does not dispute that the threat was "made in a manner and under circumstances which would cause a reasonable person to believe that the threat [wa]s likely to be carried out." N.C. Gen. Stat. § 14-277.1(a)(3). But that is not the issue before us. The question is whether, viewed in the light most favorable to the State, there was substantial evidence presented at trial to support the fourth essential element of the offense: that Detective Ballard believed that Defendant would carry out his threat. *See id.* § 14-277.1(a)(4).

Defendant's threats to the two law enforcement officers were reprehensible. Nevertheless, there was no evidence—direct or circumstantial—presented at trial evincing Detective Ballard's belief that Defendant would carry out his threat. Accordingly, the trial court erred by denying Defendant's motion to dismiss as to this charge.

C. Pattern Jury Instruction 105.21

[2] Defendant also argues that "[t]he trial court prejudicially erred when it overruled [his] objection to the State's request to instruct the jury with Pattern Jury Instruction 105.21 regarding alleged False, Contradictory[,] or Conflicting Statements [of] Defendant."

"Our Supreme Court has held that false, contradictory, or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself." *Carter*, 269 N.C. App. at 338, 837 S.E.2d at 636 (citation omitted). "The probative force of such evidence is that it tends to show consciousness of guilt." *Id.* (citation omitted).

"A trial court may only use a jury instruction to this effect if the defendant's statement is relevant to proving that [he or] she committed the crime and indeed provides substantial probative force, tending to show consciousness of guilt." *Id.* at 338–39, 837 S.E.2d at 637 (cleaned up). "The instruction is proper not only where [the] defendant's own statements contradict each other but also where [the] defendant's statements flatly contradict relevant evidence. The instruction is inappropriate if it fails to make clear to the jury that the falsehood does not create a presumption of guilt." *Id.* at 339, 837 S.E.2d at 637 (cleaned up).

"Generally, an error in jury instructions is prejudicial and requires a new trial *only if* there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Voltz*, 255 N.C. App. 149, 156, 804 S.E.2d 760, 765 (2017) (cleaned up).

At trial, Defendant testified regarding the circumstances of the traffic stop:

> [Defense counsel:] All right. And so tell me what happened when you got stopped?
>
> [Defendant:] I was stopped at the store, let the girl go in, get her something to eat, and she knocked the stuff out of the seat . . . on the ground, and I picked it up and got charged with it.
>
> [Defense counsel:] What stuff is that?
>
> [Defendant:] The two candy containers and the pistol.

On cross-examination, the State questioned Defendant further about this incident:

> [The State:] All right. Now, and your testimony further goes on that when you pulled into the parking spaces at the [gas station], she gets out and she knocks some candy onto the ground; is that correct?
>
> [Defendant:] The containers on the ground.
>
> [The State:] Okay. And you pick it up; is that correct?
>
> [Defendant:] That's right.
>
> . . . .
>
> [The State:] Okay. And so this container that's in your vehicle gets knocked out; correct?
>
> [Defendant:] The what now?
>
> [The State:] The container that's in your vehicle --
>
> [Defendant:] Two containers --
>
> [The State:] -- gets knocked out --
>
> [Defendant:] – fell out.

Cross-examination continued, and the State eventually also asked Defendant about the pistol:

> [The State:] Okay. So now your story is, is that when she gets . . . out, she knocks the pistol out, too?
>
> [Defendant:] Correct. The two containers and the pistol.
>
> [The State:] You didn't mention that just a moment ago.
>
> [Defendant:] What did I mention?
>
> [The State:] You said she just knocked out the candy containers.
>
> [Defendant:] Well, that's what the damn -- that's what the -- two candy containers and the pistol. Weren't the drugs in them?

During the charge conference, the State requested that the trial court deliver Pattern Jury Instruction 105.21, "False, Contradictory, or Conflicting Statements of Defendant." In support of its request, the State argued that Defendant's testimony was inconsistent as to whether the gun was knocked out of his vehicle. Over Defendant's objection, the trial court granted the State's request and delivered the following instruction to the jury:

> Ladies and gentlemen, the State contends, and . . . [D]efendant denies, that . . . [D]efendant made false[,] contradictory[,] or conflicting statements.
>
> If you find that . . . [D]efendant made such statements they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to defer suspicion or to exculpate the person, and you should consider that evidence along with all the other believable evidence in this case. However, if you find . . . [D]efendant made such statements, they do not create a presumption of guilt and such evidence standing alone is not sufficient to establish guilt.

Assuming, *arguendo*, that the challenged instruction should not have been delivered, on appeal "Defendant acknowledges that Pattern Jury Instruction 105.21 notes that Defendant denies making false statements and states it is up to the jury to decide if Defendant made such statements." "The law presumes that jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005); *see also State v. Hauser*, 271 N.C. App. 496, 498, 844 S.E.2d 319, 322 (2020) ("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." (citation omitted)).

Indeed, as factfinder, it was for the jury to determine whether Defendant made such statements. Moreover, the trial court made it clear that these statements "d[o] not create a presumption of guilt, and such evidence standing alone is insufficient to establish guilt." *Carter*, 269 N.C. App. at 340, 837 S.E.2d at 637–38. We presume that "jurors follow the court's instructions," *Tirado*, 358 N.C. at 581, 599 S.E.2d at 535, and therefore, Defendant cannot show prejudice by the trial court's inclusion of Pattern Jury Instruction 105.21 in its jury charge.

III. Conclusion

For the foregoing reasons, we conclude that there was no prejudicial error in the jury charge. We reverse Defendant's conviction for communicating threats as to Detective Ballard and—because the two convictions for communicating threats were separated between two judgments with no indication as to which conviction and judgment corresponded to which officer—remand for resentencing.

NO PREJUDICIAL ERROR IN PART; REVERSED IN PART AND REMANDED FOR RESENTENCING.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
MICHAEL VAUGHN

No. COA24-1089

Filed 19 November 2025

1. Firearms and Other Weapons—providing false information to firearms dealer—attempted possession of a firearm by a felon—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss charges of providing false information to a firearms dealer and attempted possession of a firearm by a felon, where the State presented substantial evidence of each offense sufficient to send the charges to the jury, including that defendant: had accepted a plea arrangement in 2002, which resulted in him becoming a convicted felon; sought to purchase a firearm from a pawn shop and placed a firearm on layaway; and completed a federal firearms transaction form (ATF form 4473) when he returned to the pawn shop stating that he had never been convicted of a felony. Although defendant stated that he believed his conviction had been expunged, the weighing of a witness's credibility was within the province of the jury.

2. Criminal Law—possession of a firearm—no instruction on attempt—clear error—new trial

In a prosecution for possession of a firearm by a felon and providing false information to a firearms dealer, in which the jury acquitted defendant of the possession charge but found him guilty of attempted possession of a firearm by a felon and of providing materially false information, defendant was entitled a new trial on the possession charge. The trial court committed prejudicial error by failing to properly instruct the jury on the elements of "attempt," including by stating that the jury would have to find that defendant had the intent to commit the substantive offense and that he had committed an overt act that went beyond mere preparation but fell short of completing the substantive offense. Further, the State made blatant misstatements of law regarding intent, which likely misled the jury concerning which intent it needed to apply for attempt.

3. Appeal and Error—preservation of issues—constitutionality of firearm law—not raised at trial—Rule 2 not invoked

The appellate court declined to invoke Rule 2 of the Rules of Appellate Procedure to review defendant's argument on appeal that the statute barring felons from possessing firearms is unconstitutional, where defendant did not raise the constitutional issue in his trial for multiple firearm offenses and failed to demonstrate that his case represented a sufficiently distinct circumstance to merit suspension of the appellate rules.

Appeal by Defendant from judgments entered 19 April 2024 by Judge Bob R. Cherry following jury verdicts in New Hanover County Superior Court. Heard in the Court of Appeals 13 August 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Allison C. Hawkins, for the State.

Center for Death Penalty Litigation, by Ryan Christopher Kuchinski, for the Defendant.

WOOD, Judge.

Michael Vaughn ("Defendant") appeals from judgments following jury verdicts finding him guilty of providing false information to a firearms dealer and attempted possession of a firearm by a convicted felon. On appeal, Defendant raises three issues: (1) the trial court erred when it denied Defendant's Motion to Dismiss both the providing false information charge and attempted possession charge at the close of the State's evidence and again at the close of all evidence; (2) the trial court prejudicially erred when it failed to instruct the jury it was required to find Defendant intended to possess a firearm as a felon and committed an overt act toward such possession as the elements of attempt; and (3) North Carolina's statute banning felons from possessing firearms is unconstitutional. After careful review of the record, we conclude the trial court erred by failing to instruct the jury on the elements of attempt and, when paired with the State's erroneous statements of the law during closing arguments, it constituted prejudicial error.

I. Factual and Procedural Background

In 2002, Defendant pleaded guilty to possession of cocaine, resulting in a felony conviction. On 28 November 2022, Defendant decided to pawn a watch because he was low on money for bills and gas. While at the pawn shop Defendant began talking to the clerk about obtaining a weapon for self-defense. Defendant decided to put a shotgun on layaway. He made an initial payment toward the purchase price of the shotgun but could not complete the necessary forms because his identification did not match his current address.

In January 2023, Defendant returned to the pawn shop to pay off the balance remaining on the shotgun, at which time he was asked to complete a federal firearms transaction record ("ATF form 4473"). One of the questions on the ATF form 4473 is, "Have you ever been convicted in any court, including a military court, of a felony or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence, including probation?" Defendant indicated "no" despite his 2002 felony conviction. As a result, Defendant's application to purchase the firearm was denied. The clerk informed Defendant of the denial but could not explain why when asked.

Two days after Defendant attempted to purchase the shotgun, Detective Troy Herman ("Detective Herman") from the Wilmington Police Department received notification of the failed attempted purchase, including the information Defendant provided on the ATF form 4473. The detective verified the information on the application, which was accurate apart from the response concerning the previous felony conviction. He also obtained copies of the security videos from the shop and on 31 January 2023 took out arrest warrants on Defendant for possession of a firearm by a felon and providing false information to a firearms dealer.

On 5 March 2023, the Burgaw police surrounded Defendant's home with guns drawn. Defendant came to the door very confused. The police read him the charges regarding the possession of a firearm and he responded, "I've never had a gun." The Burgaw officer informed him the charges were from New Hanover County. Defendant was confused and thought the situation was "so crazy" but complied with the officers.

On 17 April 2024, Defendant's case came on for trial. Defendant testified in his own defense. He testified that in 2013 he attended an expunction clinic held at a library and met with an attorney to have his conviction expunged in order to improve his job prospects. Defendant testified that he gave the attorney the details about his 2002 conviction, and the attorney stated he had all he needed to complete the expunction paperwork and Defendant did not need to come back. Afterwards, Defendant believed his conviction had been expunged, as he went on to hold jobs that required background checks including one at the United States military base at Camp Lejeune. He had "no problem" passing the background check and being allowed on and off base.

At the close of State's evidence Defendant moved to dismiss his charges for insufficient evidence. The trial court denied the motion. At the charge conference the parties engaged in extended discussion with the trial court about specific instructions, including the necessity for an instruction on attempt. The trial court noted "[t]hey're getting the intent in there" and asked if there was a certain intent instruction the parties desired. Defendant requested that the instruction that possession is a general intent crime while attempt is a specific intent crime be given. Defendant renewed his motion to dismiss at the close of all evidence. Following the trial court's instructions to the jury, the defense stated "I realize that you probably should have given them an attempt instruction. So [I] know it wasn't done at that time, but I'm just realizing it now." The trial court heard from the State who responded, "intent's defined and basically saying he intended to - - for the intent" and left it to the trial court's discretion. The trial court denied Defendant's request for additional instructions on attempt but noted Defendant's objection saying it would only be addressed if "the jurors come back and ask for some more specific instruction on attempt itself."

The jury acquitted Defendant on the possession of a firearm by a felon charge and convicted him on attempted possession of a firearm by a felon and providing materially false information charges. The trial court sentenced Defendant to a prison term of 8 to 19 months on the attempted possession charge and suspended his sentence for providing false information. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal: (1) the trial court erred when it denied Defendant's Motion to Dismiss both the providing false information charge and attempted possession charge at the close of the State's evidence and again at the close of all evidence; (2) the trial court prejudicially erred when it failed to instruct the jury it was required to find Defendant intended to possess a firearm as a felon and committed an overt act toward such possession as the elements of attempt; and (3) North Carolina's statute banning felons from possessing firearms is unconstitutional.

A. Motions to Dismiss

[1] Defendant contends the State did not provide sufficient evidence to establish the necessary elements to enable the jury to find the defendant guilty of either providing false information to a firearms dealer or attempted possession of a firearm. We disagree.

When analyzing a motion to dismiss, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). "When we consider a defendant's motion to dismiss, the question is whether there is substantial evidence . . . of each essential element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Hoyle*, 373 N.C. 454, 458, 838 S.E.2d 435, 439 (2020) (cleaned up). In reviewing a motion to dismiss, our Supreme Court has instructed courts to apply

> long-established legal principles that the evidence must be considered in the light most favorable to the State upon a defendant's motion to dismiss a criminal charge, that the State is entitled to every reasonable inference from the evidence in the face of a defendant's motion to dismiss, and that evidence which supports a contrary inference is not determinative on a motion to dismiss[.]

State v. Blagg, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990). "The trial court, in considering a motion to dismiss, may not weigh the credibility of the witnesses." *State v. Lewis*, 172 N.C. App. 97, 107, 616 S.E.2d 1, 7 (2005). If "the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied[.]" *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

In the case *sub judice*, the State presented testimony from Detective Herman, New Hanover County clerk of Superior Court Jennifer Wittenberg, pawn shop manager Brycen Shenker, and pawn shop clerk Stephanie Silva. The State also provided other evidence, including the

ATF form 4473 Defendant filled out, video of the transactions at the pawn shop, and a record of Defendant's plea arrangement from 2002. The State presented uncontroverted evidence that (1) Defendant accepted a plea arrangement in 2002 which resulted in him becoming a convicted felon; (2) Defendant engaged in a transaction at a local pawn shop in which he held an unloaded firearm before placing the firearm on layaway in November 2022; and (3) Defendant returned to the pawn shop and completed an ATF form 4473 stating that he had never been convicted of a felony in January 2023.[1] Taken in the light most favorable to the State, and giving every reasonable inference, there is ample evidence to support the allegation that Defendant provided false information to a firearms dealer and attempted to possess the firearm. Therefore, the trial court did not err in denying Defendant's Motion to Dismiss at the close of the State's evidence.

Defendant presented no evidence beyond his testimony in his own defense. Defendant testified he had attended an expunction clinic at the local library and after his meeting with the attorney believed his previous felony to have been expunged and as such, he believed he was legally allowed to answer the ATF form 4473 question about previous felonies by responding no. The State did not rebut Defendant's testimony or present any direct evidence that Defendant actually knew his felony had not been expunged. However, when reviewing a motion to dismiss, this Court must give the State the benefit of every inference and cannot weigh the credibility of the witness' testimony as such is the providence of the jury. Therefore, we hold the trial court did not err by denying Defendant's Motion to Dismiss at the close of all the evidence and allowing the issues of credibility to reach the jury for determination. We find no error in the trial court's denial of both motions to dismiss.

B. Jury Instructions

[2] Defendant contends the trial court prejudicially erred when it failed to instruct the jury accurately on attempt, including that the jury was required to find (1) Defendant *intended* to possess a firearm with the awareness that he was a felon and (2) that he committed an *overt act* towards the possession. We agree.

"Where a defendant has properly preserved [his] challenge to jury instructions, an appellate court reviews the trial court's decisions

1. On page five of ATF form 4473 "exceptions" to prohibited persons states, "[a] person subject to any of these exceptions [which includes persons who have received an expungement under the law in the jurisdiction where they were convicted] . . . should answer 'no' to the applicable question."

regarding jury instructions *de novo*. . . . Failure to give the requested instruction where required is a reversible error." *State v. McVay*, 287 N.C. App. 293, 300, 882 S.E.2d 598, 604 (2022) (cleaned up).

"In order to prove an attempt of any crime, the State must show: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Fabian*, 286 N.C. App. 712, 717, 882 S.E.2d 99, 104 (2022) (quoting *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (2003)). "A trial judge is required . . . to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime. Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Whiteley*, 172 N.C. App. 772, 780, 616 S.E.2d 576, 581 (2005) (cleaned up).

However, as the State contends,

> [t]he charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (cleaned up).

In the case *sub judice*, both the State and the defense clearly requested jury instructions on attempt during the charge conference which took place prior to the defense's presentation of evidence.

> Prosecution: I guess the only other thing along the same lines - - the same paragraph - - attempted possession of firearm by felon - - after we say "you would then consider whether the defendant's guilty of attempted possession of firearm by felon," do we then want to tell them what attempted is just so it's clear? That - - I mean - - same element except intended to possess or have care, custody and control versus, you know, having it. . . .
>
> Court: Do you have a standard jury instruction on intent that you would like to reference?

> Prosecution: No. But they're getting the intent instructions.
>
> Court: Right. They're getting the intent in there, but I didn't know if you had one specifically on attempt that you'd like to use?
>
> Defense: All I would say, Your Honor, is that if we are going to do that, then I would ask for the designation on the possession crime and the attempt that possession is a general intent crime and attempt is a specific intent crime, if we're going to make those amendments and add that. So I would make that request on a piggyback along with what the State is saying.

When summarizing its planned jury instructions, the trial court laid out many of the intended instructions and highlighted several pattern jury instructions including general intent. When discussing the attempted possession instructions the trial court stated, "we discussed the rest of the possession of firearm by felon. We've inserted 104.41 [actual-constructive possession]. And I am modifying the last paragraph under that section to flow better between the actual possession for firearm by felon and finding an attempted possession of firearm by felon." However, when instructing the jury the trial court merely stated,

> Court: If you do not so find or have a reasonable doubt as to one or both of these things, you must then consider whether the defendant is guilty of attempted possession of a firearm by a felon. If you find from the evidence beyond a reasonable doubt that on February 6, 2002, the defendant pled guilty to the felony of possession of cocaine that was committed on August 27, 2001 in violation of the laws of the State of North Carolina and the defendant after February 6, 2002, to wit, November 28, 2022, attempted to possess or attempted to have within defendant's custody, care or control a firearm, it would be your duty to return a verdict of guilty of attempted possession of a firearm by a felon.

The trial court did not instruct on the elements of attempt but merely inserted the word "attempt" in front of the words "possession of a firearm by a felon." After the trial court sent the jury to deliberate, the parties again addressed the issue of instructions on attempt:

> Court: Any corrections or clarifications besides the three scrivener's errors in the jury instructions that I'm going to send back to the jurors in the jury room?

> Defense: Your Honor, I realize that you probably should have given them an attempt instruction. So [I] know it wasn't done at that time, but I'm just realizing it now.
>
> Court: Okay. State, do you want to be heard on whether or not to give a specific instruction to finding attempt?
>
> Prosecution: You know, I think we've talked about this that, you know, we felt intent's defined and basically saying he intended to - - for the intent. So I think it's - - I left it in your discretion earlier, Judge. I leave it in your discretion again. I think it's - - satisfactory through with the - - with the current instructions as they are.
>
> Court: Okay. So I appreciate your objection. We're going to note it. For right now, I'm not going to overrule it. What I'm going to say is, I'm going to deny your request with allowing to open - - to reopen it. If the jurors come back and ask for more specific instructions on attempt itself. It might be a moot point depending on whether they either, A, find him guilty and don't - - possession of firearm by a felon and don't get to the attempt or, B, they just might find him not guilty of it and not have a question. Does that sound like a fair way to handle it?
>
> Defense: Yes, as long as Your Honor will note my objection.

The trial court clearly failed to instruct on the elements of attempt, and Defendant made clear objections preserving this issue for review. Therefore, the trial court's failure to instruct is reversible error if "such error was likely, in light of the entire charge, to mislead the jury." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002). *See also McVay*, 287 N.C. App. at 300, 882 S.E.2d at 604.

To be convicted of an attempt offense the jury must find Defendant had the intent to commit the substantive offense and he completed an overt act that goes beyond mere preparation but falls short of the completed offense. *Fabian*, 286 N.C. App. at 717, 882 S.E.2d at 104. In this case not only did the trial court not inform the jury that an overt act beyond preparation was required, but it also failed to clarify what type of intent was required.

The trial court gave no instruction to the jury that an overt act was required or what constitutes an overt act beyond preparation. This Court has previously summarized the requirement of an overt act as follows:

> In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

State v. Miller, 344 N.C. 658, 668, 477 S.E.2d 915, 921 (1996) (quoting *State v. Prince*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971)). Without instructions that an overt act and not "preparation" is necessary for Defendant's behavior to constitute attempt, it is impossible for the jury to weigh the facts against the law effectively.

The State contends Defendant possessed or attempted to possess the firearm on 28 November 2022 when he initially handled the unloaded and secured firearm and placed it on layaway. The jury clearly did not determine the facts sufficient to find Defendant guilty of possession. Without instruction on the distinction between preparation and "overt acts" it is unclear whether the jury would have considered layaway anything more than preparation for a possession that never occurred. Therefore, if properly instructed on the requirement of overt actions a jury may have found this element unmet.

Additionally, the trial court gave the pattern jury instruction on the definition of general intent prior to the substantive instructions on both charges:

> [i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

N.C.P.I.-Crim. 120.10. However, our Supreme Court has held, "[t]he crime of attempt requires an act done with the specific intent to commit the underlying offense." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000). As such, "[a]n attempted crime is an intentional 'overt act' done for the *purpose* of committing a crime but falling short of the completed crime." *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 453 (1999) (emphasis added).

While there is a dearth of caselaw on attempted possession of a firearm by a felon, this Court considered a case on aiding and abetting the possession of a firearm by a felon in *State v. Gunter*. Aiding and abetting is another inchoate crime which is related to and reliant upon the underlying crime, in this case possession of a firearm by a felon. A person is guilty of aiding and abetting if, among other elements, they "*knowingly* advised, instigated, encouraged, procured, or aided the other person to commit that crime." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (emphasis added). Both attempt and aiding and abetting add a specific intent component to the underlying crime, *purpose* in the case of attempt and *knowing* in the case of aiding and abetting. This Court ruled in *Gunter* that evidence was sufficient to prove aiding and abetting possession of a firearm by a felon when the evidence supported that Defendant (1) provided the firearm to the individual *and* (2) Defendant knew of the prior felony. *State v. Gunter*, 289 N.C. App. 45, 51, 887 S.E.2d 745, 749 (2023). In the case *sub judice*, the specific intent required, whether the Defendant knew of his prior felony, was not accurately instructed and was a factual question of credibility necessary for the jury to determine.

The State contends that because the jury reached a verdict of guilty on the charge of providing materially false information, the jury must have determined that Defendant knew he was a felon when he attempted to purchase the firearm and, therefore, the jury already determined the necessary intent for attempt. This may have been a valid argument if not for the State's blatant misstatements of law during closing arguments which the trial court failed to stop or correct either during the State's closing argument or in the trial court's own instructions to the jury. During the State's closing arguments to the jury, the prosecutor stated,

> You – I'll go step further. Even if you think the defendant's statement was credible, even if you believe every single word he said on the stand, it is still - - violated this element [referencing element 3 of N.C. Gen. Stat. §14-408.1(c), that Defendant knew the information to be false]. It is still a materially false statement he knew because this question that he carefully analyzed on the computer screen - - carefully clicked a button - - is have you ever been convicted in any Court of a felony regardless of the length of the

> sentence including probation. Ever been convicted of a felony. He had been convicted of a felony. He knew that. Asked the question - - you've got it expunged or not. The - - the question is have you ever - - convicted of a felony. He was. He knew it. That's a materially false statement. If he thought it'd been expunged fine. It's gone. But the question is have you ever been convicted of a felony, and that was a false statement he made. He said he had not been convicted of a felony. He certainly was.

This is a clear and egregious misstatement of the law that was extremely likely to cause confusion in the jury deliberations and would be highly prejudicial to Defendant. If the jury believed "every single word he said on the stand" then they believed Defendant did not know the information he provided on the form to be materially false because he believed the felony was expunged. The ATF form 4473 entered into evidence by the State, clearly stated that an exception to questions regarding prohibited persons, such as the question at issue here, includes persons who have received an expungement and "[a] person subject to any of these exceptions . . . should answer 'no' to the applicable question." If Defendant honestly believed his felony conviction was expunged, then under the exceptions as laid out on the ATF form itself, he filled out the form correctly based on his knowledge at the time. Element three of providing materially false information under N.C. Gen. Stat. §14-408.1(c), requires that Defendant know the information to be false. Therefore, the jury could not believe everything Defendant said on the stand and still find him guilty of providing materially false information. This directly contradicts the prosecutor's statement to the jury: "[e]ven if you think the defendant's statement was credible, even if you believe every single word he said on the stand, it is still - - violated this element . . . ." The trial court should have corrected this erroneous and clearly prejudicial statement of law *sua sponte* notwithstanding the defense attorney's failure to object. Failing to make this correction would clearly have been prejudicial error by the trial court had Defendant raised such issue on appeal. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

We cannot conclude the jury actually determined the necessary intent for attempted possession in light of the State's egregious statement, because the jury may have reached a verdict of guilty on the materially false information charge based on a misstatement of the law. Additionally, the trial court's failure to address the misstatements concerning intent on the materially false information charge significantly increases the likelihood, "in light of the entire charge," that the trial court's failure to instruct the jury on the necessary specific intent for the attempted possession charge misled the jury. *Bass*, 149 N.C. App. at 160, 560 S.E.2d at 847. Therefore, we hold the trial court prejudicially erred in failing to clearly instruct the jury on the elements of attempt, including the necessary elements of intent and overt acts, and we remand for a new trial on the charge of attempted possession of a firearm by a felon.

C. Rule 2 Request

[3] Finally, Defendant requests that this Court invoke Rule 2 to address the constitutionality of N.C. Gen. Stat. §14-415.1 which bars the possession of a firearm by a felon.

Constitutional issues not raised in the trial court will not be considered for the first time on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Defendant acknowledges his failure to raise any constitutional issues at trial and now requests this Court in its discretion invoke Rule 2 to address this issue. Under Rule 2, this Court may suspend the Appellate Rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2. However, our Supreme Court has directed, "the exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *State v. Hart*, 361 N.C. 309, 316, 664 S.E.2d 201, 205 (2007) (cleaned up). Further, "precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Griffin*, 298 N.C. App. 85, 93, 914 S.E.2d 8, 14 (2025) (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017)).

Defendant contends this Court should invoke Rule 2 because allowing the conviction "would cause a manifest injustice" based on the factual circumstances of a "single, non-violent, two-decade-old felony." However, Defendant fails to differentiate the facts of this case from every other individual convicted of a single non-violent felony who failed to preserve their constitutional argument at trial. "Because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it, but others are not" we decline to address an issue that impacts so many through this extraordinary procedure. *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (quoting *State v. Hart*, 361 N.C. 309, 317, 664 S.E.2d 201, 206 (2007)).

III. Conclusion

For the foregoing reasons, we find no error in the trial court's denial of Defendant's motions to dismiss and decline to invoke Rule 2 to address constitutional issues not raised at trial. Because the trial court failed to instruct the jury on the elements of attempt and the State made erroneous statements of law concerning intent which likely misled the jury in applying the necessary intent for attempt, we find prejudicial error and remand to the trial court for a new trial on the attempted possession of a firearm charge.

NO ERROR IN PART, PREJUDICIAL ERROR IN PART, AND REMANDED FOR NEW TRIAL.

Chief Judge DILLON and Judge COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 19 November 2025)

BENDEL v. BENDEL No. 25-209	Guilford (20CVD002841-400)	Affirmed in Part, Vacated in Part, and Remanded
IN RE A.D. No. 25-311	Chatham (21JT000004-180) (21JT000005-180) (21JT000006-180)	Affirmed.
IN RE A.S.A. No. 25-302	Rockingham (21JT000050-780) (23JT000162-780)	` Affirmed
IN RE C.S.W. No. 25-350	New Hanover (17JT000003-640)	Affirmed
IN RE G.Y. No. 25-221	Haywood (23JA000051-430) (23JA000052-430) (23JA000053-430)	Vacate and Remand
IN RE M.A.C. No. 25-242	Cabarrus (23JA000169-120) (23JA000170-120) (23JA000171-120)	Affirmed
IN RE P.H. No. 25-295	Gaston (23JA000066-350) (23JA000067-350)	Affirmed
IN RE S.H. No. 25-393	Chowan (21JT000007-200) (21JT000008-200) (21JT000009-200) (21JT000010-200) (21JT000011-200) (21JT-000012-200) (21JT000013-200)	Affirmed
IN RE W.D.T-W. No. 25-119	Forsyth (23JT000131-330)	Affirmed
JAMES v. CARSON No. 25-149	Mecklenburg (20CVS005840-590)	Reversed and Remanded
MARINE FED. CREDIT UNION v. BRASWELL No. 25-56	Nash (23CVD000857-630)	Affirmed

McMURRAY v. KOTSIAS No. 25-191	Henderson (24CVD000692-440)	Affirmed in part and dismissed in part.
STATE v. CALDWELL No. 25-369	Cabarrus (23CR477854-120) (24CR000165-120)	No Error
STATE v. EPLEY No. 25-342	Burke (23CR224488-110)	Dismissed
STATE v. GREEN No. 24-346	Forsyth (22CR054835-330)	No Error
STATE v. JAMISON No. 24-1031	Henderson (21CR000208-440) (22CR000419-440) (22CR000420-440) (22CR000421-440) (22CR000425-440) (22CR000426-440) (22CR000427-440) (22CR000428-440)	No Error.
STATE v. LEQUIRE No. 25-301	Haywood (21CR050407-430) (21CR050408-430) (21CR050409-430) (21CR050411-430)	No Error
STATE v. MARTINEZ No. 24-1082	Johnston (21CR051550-500)	No Error
STATE v. McLEAN No. 24-938	Gaston (20CR058803-350)	No Prejudicial Error
STATE v. OQUIN No. 24-1097	Johnston (22CR360484-500) (23CR000127-500)	Affirmed.
STATE v. SHERIDAN No. 24-835	Buncombe (21CR086086-100) (21CR086087-100) (21CR086088-100) (21CR086089-100) (21CR086090-100) (21CR086091-100) (21CR086093-100) (21CR086095-100) (21CR086096-100)	No Error.

STATE v. TYSON No. 25-112	Pitt (22CR053520-730) (22CR053521-730)	No Error
STRICKLAND v. McLACHLAN No. 24-695	Mecklenburg (19CVD015899-590)	Vacated and Remanded.
WETHERINGTON v. SEAMAN No. 25-293	Wake (20CVD006936-910)	Affirmed

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