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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 12, 2026

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COURT OF APPEALS

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Denial of motion to suppress—waiver—failure to object to evidence at trial—In a prosecution for failure to report a new address as a sex offender, defendant waived his right to have the trial court's denial of his motion to suppress reviewed on appeal because defendant failed to object to the evidence (testimony from a sheriff's deputy regarding statements that defendant made about his residence before being read his *Miranda* rights) when it was introduced at trial. **State v. Redfear, 97.**

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Interlocutory order—denial of motion to intervene—substantial right—In an equitable distribution action, where the primary dispute concerned the assets of an insurance brokerage company that the parties formed during their marriage, the Court of Appeals had jurisdiction to review the company's appeal from an order denying its motion to intervene in the action where, although the order was interlocutory, it was immediately appealable as affecting a substantial right. **Roesel v. Roesel, 37.**

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Preservation of right to appeal—denial of motion to suppress—guilty plea—notice of intent to appeal—On appeal from a judgment entered upon an *Alford* plea to driving while impaired, the appellate court had jurisdiction to review the trial court's denial of defendant's pretrial motion to suppress. Although defendant's right to appeal was circumscribed by statute because she entered a guilty plea, defendant properly gave notice before plea negotiations were finalized of her intent to appeal both the judgment entered upon her conviction and the denial of her motion to suppress. **State v. Alston, 47.**

Rule 2—due process—failure to request recordation of closing arguments—manifest injustice not shown—In a second-degree murder prosecution arising

from defendant speeding after his ex-girlfriend's vehicle and causing her fatal crash, where defendant asserted his counsel may have conceded defendant's guilt during closing arguments without defendant's consent, the appellate court declined to invoke Appellate Rule 2 to reach defendant's unpreserved argument that his trial attorney's failure to request recordation of closing arguments violated defendant's constitutional right to due process. These circumstances showed no manifest injustice because a defendant's due process rights are not violated when defense counsel fails to request recordation of matters not required to be recorded under N.C.G.S. § 15A-1241, such as closing arguments. **State v. Locklear, 83.**

Waiver—pro se defendant—denial of motion for competency evaluation—involuntary intoxication raised—failure to pursue issue—In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, defendant's argument that the trial court erred by denying his motion for a competency evaluation was waived on appeal. Upon inquiry by the trial court, defendant—who was representing himself—clarified that he was not arguing incompetency for standing trial but, rather, that he was entitled to an evaluation to help him prove that he was involuntarily intoxicated at the time of the crimes and thus could not form the requisite criminal intent. However, defendant failed to request access to an expert or otherwise articulate what type of evaluation would have been effective or relevant, eighteen months after the crimes were committed, at determining his prior mental capacity. **State v. Samson, 106.**

ATTORNEYS

Disciplinary hearing—choice of sanction—suspension of license—abuse of discretion analysis—On remand from a prior appellate decision, the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar did not abuse its discretion by suspending an attorney from practicing law for five years—with reinstatement possible after three years upon meeting certain conditions—rather than disbarring him despite the attorney's pattern of misconduct, commission of multiple felonies, and obstructive behavior during the disciplinary process. Based on the whole record test, the DHC's choice of punishment was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision where the DHC clearly set forth its evaluation of numerous factors from 27 N.C. Admin. Code 1B.0116(f) and its reason for imposing suspension rather than disbarment, including by noting defendant's record of representing indigent clients and the personal losses that he experienced during the relevant time period. **N.C. State Bar v. Key, 27.**

Motion to disqualify—plaintiff's attorney—likely necessary witness at trial—Rule 3.7—exceptions inapplicable—In an action filed against a fire and casualty insurance company (defendant) following a dispute over plaintiff's claim for water damage to her home, the trial court did not abuse its discretion by disqualifying plaintiff's counsel from representing her at trial. The court found that the attorney would likely be a necessary witness at trial, since it was the attorney—not plaintiff—who was primarily involved in handling and communicating with defendant about plaintiff's insurance claim. Further, none of the exceptions to Rule 3.7 of the Rules of Professional Conduct—precluding lawyers from acting as an advocate at trials in which they are likely to be necessary witnesses—applied here, where: much of the attorney's testimony would concern contested issues raised in plaintiff's complaint; this testimony would likely not relate to the nature and value of legal services rendered in the case; and, given

ATTORNEYS—Continued

that defendant repeatedly notified the attorney that he may be called to testify as a necessary witness, and that the attorney had ample time to hand over plaintiff's case to another lawyer at his firm (some of whom were already familiar with and had assisted on the case), disqualifying the attorney would not work substantial hardship on plaintiff. **Sloan-Oudeh v. State Farm Fire & Cas. Co., 43.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—restriction on contact with child—prohibition on social media discussion—In a permanency planning order entered in a juvenile neglect and dependency proceeding, the trial court's restriction that respondent-mother have no contact with her child and not discuss the case (or people involved with the case) on social media were fully supported by the court's findings of fact and not an abuse of the court's discretion. The no-contact decree was supported by uncontested findings detailing respondent-mother's history of verbal abuse, profanity, and threats of violence directed at social workers—in some instances, in the presence of, and with negative effects upon, the child. The decree that respondent-mother not discuss the case or individuals associated with it on any social media platform was supported by findings that respondent-mother had threatened suicide, claimed child abuse, and named specific people involved in the case in her social media posts, some of which were menacing. Respondent-mother's constitutional argument regarding the decrees was not raised in the trial court and thus was waived for consideration on appeal. **In re M.B., 17.**

CONSTITUTIONAL LAW

Competency to stand trial—prior adjudication of incompetency—no order restoring competency—new trial granted—In a prosecution for felony larceny, felony possession of stolen goods, and felony conspiracy to commit felony larceny, where a prior judicial incompetency order had been entered and remained in effect, the trial court violated defendant's constitutional due process right not to be tried while incompetent by proceeding to trial without holding a new competency hearing or entering findings restoring competency. Where the record did not permit a retrospective determination of defendant's competency at the time of trial—although defendant had been deemed competent after a second evaluation, that report was not adopted by the trial court and, moreover, a substantial amount of time had passed between that evaluation and trial—defendant's convictions were vacated and the matter was remanded for a new trial upon a judicial determination of defendant's competency. **State v. Cooke, 58.**

Effective assistance of counsel—failure to call defendant to testify—tactical decision—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, defense counsel was not ineffective for failing to call defendant to testify where defendant expressly decided not to testify after the trial court conducted an extensive colloquy of defendant's rights and where defense counsel's pretrial preparation was apparent from the provision of a witness list to the State. **State v. Strickland, 130.**

Effective assistance of counsel—failure to challenge joinder of multiple offenses—transactional connection—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates (approximately three months apart), defense counsel was not ineffective for failing to challenge the State's motion for joinder because the facts associated with the separate incidents

had a transactional connection and, therefore, the offenses were properly consolidated pursuant to N.C.G.S. § 15A-926. The assaults on the two different dates occurred as a direct result of the victims attempting to intervene in violent domestic incidents between defendant and his wife and both assaults involved the same witnesses. **State v. Strickland, 130.**

Effective assistance of counsel—failure to file notice of defense—failure to seek instruction on self-defense or castle doctrine—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, defense counsel was not ineffective for failing to file any notice of defense under N.C.G.S. § 15A-905(c) or for failing to request jury instructions on self-defense or the castle doctrine. Counsel's performance was not deficient because defendant was not entitled to either defense: self-defense did not apply because defendant was assaulting and choking his wife in her home when another victim arrived to intervene, and the castle doctrine did not apply because defendant was not a lawful occupant of his mother-in-law's home where another of the assaults took place. **State v. Strickland, 130.**

Effective assistance of counsel—recordation of closing arguments—not requested by defense counsel—In a second-degree murder prosecution arising from defendant speeding after his ex-girlfriend's vehicle and causing her fatal crash, defendant did not receive ineffective assistance when his counsel failed to request recordation of closing arguments, during which defendant asserted his counsel may have conceded defendant's guilt without defendant's consent. Although the North Carolina Indigent Defense Services Manual recommends recordation of closing arguments, N.C.G.S. § 15A-1241 explicitly exempts closing arguments from the general mandate that the trial court ensure that a court reporter makes a record of all statements from the bench and all other proceedings, and controlling precedent holds that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of items specifically excepted from the recording statute. **State v. Locklear, 83.**

Effective assistance of counsel—tactical decision or deficient performance—cold record insufficient—In an appeal from a final judgment convicting defendant of firearm- and drug-related crimes, defendant's claim for ineffective assistance of counsel—based on his trial attorney's failure to use a peremptory strike on a juror who had expressed concerns about her impartiality—was dismissed without prejudice (so defendant could raise the claim in a motion for appropriate relief before the trial court) where, based solely on the cold record, there was insufficient evidence to determine on direct appeal whether the attorney's decision was a matter of sound trial strategy or deficient performance. **State v. Crowder, 64.**

Right to counsel—forfeiture—obstruction undermining the purpose of the right—In a prosecution resulting in guilty verdicts on multiple charges—robbery with a dangerous weapon, possession of a firearm by a felon, felony speeding to elude arrest, resisting a public officer, conspiracy to commit robbery with a dangerous weapon, and possession of a stolen firearm—defendant's misconduct permitted the trial court to compel defendant to proceed to trial without counsel. Defendant's obstructionist actions completely undermined the purpose of the right to counsel in that: over more than three years between the first time his case was called for trial and the date his trial began, defendant fired, or conflicted out, four appointed attorneys—three on days the case was called for trial and all for uncredible reasons; and after his first private attorney was removed (for being unable to proceed), despite

not having the financial ability to retain another private attorney, defendant formally waived his right to the appointment of counsel a second time and steadfastly refused to be appointed counsel by the court. **State v. Webber, 146.**

Right to counsel—voluntary waiver—defendant's acts and intentions—In a prosecution resulting in guilty verdicts on multiple charges—robbery with a dangerous weapon, possession of a firearm by a felon, felony speeding to elude arrest, resisting a public officer, conspiracy to commit robbery with a dangerous weapon, and possession of a stolen firearm—where defendant went through four appointed attorneys, one retained private attorney, and a second private attorney whom defendant attempted to hire (but could not pay) before being compelled to proceed pro se (and without standby counsel at trial because every available attorney was conflicted out due to prior appointments to defendant's case), defendant did not voluntarily waive his right to counsel. Defendant never signed a waiver of all counsel, continuously sought both appointed and retained counsel, and indicated he did not want to proceed pro se at trial. **State v. Webber, 146.**

Waiver of counsel—knowingly and voluntarily made—sufficiency of colloquy—In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, the trial court did not err by allowing defendant to represent himself, where the court's colloquies satisfied the requirements set forth in N.C.G.S. § 15A-1242—including by ensuring that defendant understood and appreciated the consequences of his decision and that he was adequately informed of the range of permissible punishments—and, therefore, defendant's waiver of counsel was knowing and voluntary. **State v. Samson, 106.**

CRIMINAL LAW

Contributing to the abuse of a juvenile—definition of caretaker—sufficiency of evidence—In a prosecution for contributing to the abuse of a juvenile (N.C.G.S. § 14-316.1)—brought against defendant, an Avery County Sheriff's Department deputy and school resource officer who helped run the Police Explorers program for high school students, during which he pressured the victim, a 17-year-old female participant, to tase herself—the trial court erred in denying defendant's motion to dismiss the charge against him for insufficient evidence that defendant encouraged the victim to be in a place or condition, or to commit an act, whereby she could be adjudicated abused pursuant to Chapter 7B. Section 7B-101, which defines "abuse," applies where a "parent, guardian, custodian, or caretaker" has created or allowed a substantial risk of physical injury by other than accidental means; defendant was not a "caretaker" as defined by subsection 7B-101(3)—"[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting"—because the Police Explorers program was not conducted in a residential setting. **State v. Sanchez, 120.**

Willfully failing to discharge duties of office—failure to act versus active commission—sufficiency of evidence—In a prosecution for willfully failing to discharge the duties of office (N.C.G.S. § 14-230)—brought against defendant, an Avery County Sheriff's Department deputy and school resource officer who helped run the Police Explorers program for high school students, during which he pressured the victim, a 17-year-old female participant, to tase herself—the trial court erred in denying defendant's motion to dismiss the charge against him for insufficient evidence where the State contended that defendant willfully failed to carry out his duty to enforce the law against contributing to the abuse of a juvenile. The plain language of

section 14-230—that defendant must be proved to have willfully omitted, neglected, or refused to discharge the duties of his office—did not encompass defendant actively committing an unlawful act, as the evidence at trial tended to show. **State v. Sanchez, 120.**

DISCOVERY

Attorney-client privilege—testamentary exception—application to trusts—determination of succession—In a declaratory judgment action to clarify the rights and obligations under a trust—specifically, whether the designation of "my nieces and nephews" as beneficiaries extended to the grantor's marital relatives in addition to his biological relatives—the trial court's order compelling discovery from the grantor's law firm was affirmed. Although petitioner (acting in her capacity as trustee of her deceased husband's trust) asserted attorney-client privilege on the grantor's behalf, the appellate court determined as a matter of first impression that the application of the testamentary exception to the attorney-client privilege to wills applied equally to trusts in a dispute regarding distribution. Under the exception, where the grantor's intent in his use of the phrase "my nieces and nephews" was at issue, the law assumed the grantor's implied authorization of the release of communications to aid in the proper administration of the trust assets, thereby waiving the privilege. **Steele v. Kenna, 166.**

Attorney-client privilege—trust documents—personal privilege of trustee protected—In a declaratory judgment action to clarify the rights and obligations under a trust—specifically, whether the designation of "my nieces and nephews" as beneficiaries extended to the grantor's marital relatives in addition to his biological relatives—the trial court's order compelling discovery from the grantor's law firm was affirmed. Although petitioner, who initiated the action in her capacity as trustee of her deceased husband's trust, asserted that her personal attorney-client privilege would be violated by the release of documents by the law firm because she and her husband had consulted with the law firm together on their estate planning, the trial court's order expressly limited the release of only those documents related to the grantor's estate. **Steele v. Kenna, 166.**

Criminal trial—motion to subpoena jail, prison, and medical records—abuse of discretion analysis—In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, in which defendant elected to proceed pro se, the trial court did not abuse its discretion by denying defendant's motion to subpoena jail, prison, and medical records. Although defendant sought the records to show that he had suffered addiction for a long period of time, the trial court properly determined that the records would not be relevant or material to any issue in the case and that the broad request amounted to a "fishing expedition." **State v. Samson, 106.**

EVIDENCE

Prior bad acts—attempted murder trial—prior marijuana use—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, there was no error in the introduction of defendant's prior marijuana use with one of the victims—as testified to by the victim when describing his previous interactions with defendant—where, although defendant lodged an objection to one statement, the evidence had previously been admitted without objection and, further, it was unclear on what basis the objection was made. Similarly, there was no

EVIDENCE—Continued

merit to defendant's alternative argument that his counsel was ineffective for failing to previously object to references to his marijuana use. **State v. Strickland, 130.**

HOMICIDE

Second-degree murder—aggressor doctrine—jury instruction—sufficiency of evidence—In a second-degree murder prosecution, the trial court properly instructed the jury on the aggressor doctrine where there was sufficient evidence from which the jury could infer that defendant was the aggressor in the fatal encounter, including that: defendant gave the victim his address and asked the victim to come to his house (to receive a payment owed by another guest at defendant's home); after a dispute broke out, while the victim produced a retractable, metal baton, he never raised or swung it at anyone; and, thereafter, defendant shot the victim in the back—a fact that could support an inference that the victim was trying to leave the confrontation when he was killed. **State v. Villarreal, 142.**

IMMUNITY

Sovereign—Tort Claims Act—vicarious liability—county deputy transporting involuntarily committed individual—In a case brought against the North Carolina Department of Health and Human Services (NCDHHS) after plaintiff's husband, who was under involuntary commitment, died in a car accident while being transported by a deputy from the Macon County Sheriff's Office, the Industrial Commission properly granted summary judgment for NCDHHS with respect to plaintiff's wrongful death claim under the Tort Claims Act, where NCDHHS could not be held vicariously liable for the deputy's alleged negligence, and therefore plaintiff's claim was barred by sovereign immunity. First, plaintiff's argument that the deputy was acting as an agent for NCDHHS was meritless where, under the Mental Health Act and relevant case law, the county—not the State—held the authority and responsibility over transporting involuntarily committed individuals; further, NCDHHS did not exercise the level of control necessary to establish an agency relationship with the county. Second, the duty to transport involuntarily committed individuals was a delegable duty assigned to the county rather than a non-delegable duty owed by the State to such individuals, including plaintiff's husband. **Bryant v. N.C. Dep't of Health & Hum. Servs., 1.**

JUDGMENTS

Criminal—lack of jurisdiction to enter judgments—resentencing after notice of appeal given—judgments vacated—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where the trial court was divested of jurisdiction after defendant timely entered oral notice of appeal from judgments entered in November 2024 (in conjunction with the passage of the statutory period for giving notice of appeal), the trial court's judgments entered in June 2025 after rehearing (in response to a letter from the Department of Adult Corrections identifying concerns with defendant's sentences) were vacated for lack of jurisdiction. **State v. Strickland, 130.**

JURY

Juror fitness—impartiality—inquiry before impanelment—statutory procedures followed—untimely challenge for cause—In a trial for firearm- and

JURY—Continued

drug-related crimes where, before the jury was impaneled, the trial court reopened voir dire of a juror who had expressed concerns about her ability to remain impartial, the court did not abuse its discretion in choosing not to excuse the juror sua sponte. The court properly followed the statutory procedures (laid out in N.C.G.S. § 15A-1214(g)) for inquiring into the juror's fitness, allowing both parties to question the juror and determining that there was no basis for a challenge for cause. Further, because defendant did not challenge the juror for cause during the reopened voir dire, at which point he had not yet exhausted his peremptory challenges, defendant could not seek reversal on the ground that the court declined to sustain his challenge for cause lodged after the jury had been impaneled. **State v. Crowder, 64**.

PARTIES

Intervention—as matter of right—equitable distribution action—insurance brokerage owned as marital property—In an equitable distribution action, in which the primary dispute concerned the assets of an insurance brokerage company that the parties formed during their marriage, the trial court properly denied the company's motion to intervene where the company failed to demonstrate an entitlement to intervene as a matter of right under Civil Procedure Rule 24(a)(2). The company alleged that plaintiff had used its property and records to form a competing business and, therefore, it had a direct interest in protecting its assets from further wrongful action by plaintiff in the equitable distribution action. However, the company failed to show how it would be better suited than the parties—the owners of the company, with defendant as its sole shareholder—to protect its assets, or how the valuation and distribution of those assets would impair its ability to protect its interests. Since the company shares were defendant's personal property, the court could classify, value, and distribute them without requiring the company to act as a party. Further, absent a showing that defendant's interests were adverse to the company's, or that defendant had engaged in any collusion or nonfeasance, the company failed to overcome the presumption that its interests were adequately represented by defendant. **Roesel v. Roesel, 37.**

PRODUCTS LIABILITY

Sealed container defense—battery for vaping device—latent, internal manufacturing defect—defense requirements met—In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, the sealed container defense applied to plaintiff's claims (for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose) against defendants (the sellers, but not the manufacturer, of the defective battery). Plaintiff's arguments that defendants failed to meet the requirements for the defense failed because: defendants did not purchase the battery from a disreputable entity, but rather from an unknown manufacturer; defendants' employees did not "install" the battery, but only placed it in the vaping device; the employees' persuasion to purchase did not expose defendants to liability for a product defect; and the fact that the battery was counterfeit was not relevant where the defect was latent and not discoverable by defendants in the exercise of reasonable care. **Weaver v. AMV Holdings, LLC, 175.**

Sealed container defense—battery for vaping device—latent, internal manufacturing defect—exercise of reasonable care—In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, plaintiff's claims (for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose) were defeated by the sealed container defense, which bars a products liability claim where "the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of" (N.C.G.S. § 99B-2(a)). The trial court's unchallenged finding of fact was that plaintiff's injuries resulted from a latent, internal manufacturing defect in the battery, and it was unreasonable to expect a distributor or seller to disassemble, closely inspect, and submit each battery to the expert testing necessary to reveal such a defect. **Weaver v. AMV Holdings, LLC, 175.**

Sealed container defense—personal jurisdiction exception—burden of proof—plaintiff's failure to forecast evidence—In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, where the sealed container defense applied to plaintiff's claims (for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose), the statutory provision that the defense "shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State" (N.C.G.S. § 99B-2(a)) constituted an exception to the defense (rather than an affirmative defense) because the provision operates when the manufacturer, who would normally be the liable party, is beyond the reach of the state's courts. Accordingly, the burden of proving the exception rested with plaintiff, who failed to forecast evidence that the courts of North Carolina did not have personal jurisdiction over the manufacturer of the exploding battery. **Weaver v. AMV Holdings, LLC, 175.**

SEARCH AND SEIZURE

Motion to suppress—toxicology report—probable cause—evidentiary support—In a prosecution for driving while impaired, the trial court properly denied defendant's pretrial motion to suppress the results of a toxicology test measuring defendant's blood alcohol level, where sufficient competent evidence in the form of a law enforcement officer's testimony and bodycam footage supported the trial court's findings of fact, including that defendant: exhibited bad driving when she almost hit the officer with her car; used the car door for balance when exiting the vehicle; had slurred speech; had a strong odor of alcohol and red, glassy eyes; admitted to driving on the date in question; and refused to perform field sobriety testing. Given the totality of the circumstances, the officer had probable cause to arrest defendant for driving while under the influence of an intoxicating substance. **State v. Alston, 47.**

SENTENCING

Aggravating factor—offense committed in presence of a minor—element of one consolidated offense—application to most serious offense not error—

SENTENCING—Continued

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where the jury found the aggravating factor that some of the offenses were committed in the presence of a minor—which was also an element in the offense of assault with a deadly weapon in the presence of a minor—there was no error in the application of the aggravating factor to the consolidated judgment that included the offense of assault with a deadly weapon in the presence of a minor, since the judgment only applied to the most serious offense in the consolidated judgment; in this case, assault by strangulation, which was properly sentenced in the aggravated range. **State v. Strickland, 130.**

Prior record level—different levels used for different judgments—erroneous judgments vacated—In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where defendant was erroneously sentenced as a prior record level IV rather than a prior record level III and was sentenced outside the permissible range of punishments for two of his offenses, as conceded by the State, the erroneous judgments were vacated and the matter was remanded for a new sentencing hearing. **State v. Strickland, 130.**

SEXUAL OFFENDERS

Failure to report new address—change of address—sufficiency of evidence— In a prosecution for failure to report a new address as a sex offender pursuant to N.C.G.S. § 14-208.11(a)(2), the State presented substantial evidence from which a jury could conclude that defendant willfully changed his address and failed to report the new address to the registering sheriff within three business days of the change. Deputies were unable to locate defendant at the only registered address, which was defendant's father's home; mail sent to the registered address by the State Bureau of Investigations was returned undelivered; when defendant was apprehended at his sister's home, he told law enforcement that he had been living there for one week and that he had been going back and forth between his father's home and his sister's home; and defendant's sister informed law enforcement that defendant had been living with her for six to eight weeks. **State v. Redfear, 97.**

Willful failure to report changed address—specific intent—voluntary intoxication instruction—plain error analysis—In the prosecution of a registered sex offender charged with willfully failing to report a change of address under N.C.G.S. § 14-208.11(a)(2), where defendant partially attributed his six-week absence from his registered address to "getting high" on drugs and losing track of time, the trial court erred by instructing the jury that the charged offense did not require any specific intent and that defendant's intoxication was therefore irrelevant. Because the legislature amended section 14-208.11(a)(2) to criminalize only "willful" registration violations, the offense did constitute a specific intent crime and, since voluntary intoxication is a recognized defense to specific intent crimes, defendant's intoxication would have been relevant to the question of his guilt. However, the court's error did not amount to plain error where defense counsel repeatedly declined to raise voluntary intoxication as a defense and where the State offered sufficient evidence that defendant's failure to update his address was willful. **State v. Davidson, 73.**

N.C. COURT OF APPEALS
2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

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

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CAMILLE BRYANT, ADMINISTRATOR OF THE ESTATE OF JAMES R. BAGGOTT, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

No. COA25-377

Filed 18 February 2026

Immunity—sovereign—Tort Claims Act—vicarious liability—county deputy transporting involuntarily committed individual

In a case brought against the North Carolina Department of Health and Human Services (NCDHHS) after plaintiff's husband, who was under involuntary commitment, died in a car accident while being transported by a deputy from the Macon County Sheriff's Office, the Industrial Commission properly granted summary judgment for NCDHHS with respect to plaintiff's wrongful death claim under the Tort Claims Act, where NCDHHS could not be held vicariously liable for the deputy's alleged negligence, and therefore plaintiff's claim was barred by sovereign immunity. First, plaintiff's argument that the deputy was acting as an agent for NCDHHS was meritless where, under the Mental Health Act and relevant case law, the county—not the State—held the authority and responsibility over transporting involuntarily committed individuals; further, NCDHHS did not exercise the level of control necessary to establish an agency relationship with the county. Second, the duty to transport involuntarily committed individuals was a delegable duty assigned to the county rather than a non-delegable duty owed by the State to such individuals, including plaintiff's husband.

Appeal by plaintiff from order entered 18 November 2024 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2025.

Ferikes Bleynat & Cannon, PLLC, by Edward L. Bleynat, Jr., and Elizabeth L. Oxley, for plaintiff-appellant.

Attorney General Jeff Jackson, by Deputy Solicitor General James W. Doggett and Solicitor General Fellow Katharine Devan Daly, for defendant-appellee.

Executive Vice President and General Counsel Edmond W. Caldwell, Jr., and Associate General Counsel Jesse M. Gutstein, for North Carolina Sheriffs' Association; and Fred P. Baggett, for the North Carolina Association of Chiefs of Police, amici curiae.

FLOOD, Judge.

Plaintiff Camille Bryant, as Administrator of the Estate of James R. Baggott, appeals from the North Carolina Industrial Commission's (the "Full Commission") order dismissing Plaintiff's wrongful death claim made under the Tort Claims Act. On appeal, Plaintiff argues the Full Commission erred, first, by finding her claim was barred by sovereign immunity, and second, by failing to award summary judgment in Plaintiff's favor. After careful review, we conclude the Full Commission properly granted summary judgment for Defendant North Carolina Department of Health and Human Services ("NCDHHS") with respect to Plaintiff's claim under the Tort Claims Act, where Plaintiff's claim was barred by sovereign immunity. We, therefore, affirm the Full Commission's order.

I. Factual and Procedural Background

On 1 September 2020, Plaintiff filed an affidavit of claim under the Tort Claims Act against NCDHHS, Macon County Sheriff's Office ("MCSO"), and Macon County Sheriff's Office Deputy Cody Mitchell ("Deputy Mitchell") in the North Carolina Industrial Commission, seeking damages for the wrongful death of her husband, James R. Baggott, as a result of an automobile accident that occurred on 12 February 2019. In her affidavit, Plaintiff described the 12 February 2019 accident in detail:

> [Mr.] Baggott . . . was under the care, custody[,] and control of the State of North Carolina and NCDHHS by and through an involuntary commitment proceeding and order issued by the Magistrate, Macon County, North Carolina in

> February 2019. . . . On 12 February 2019, Mr. Baggott was discharged from the behavioral treatment facility located in Winston-Salem, North Carolina, and was being transported back to Macon County in a van operated by Deputy . . . Mitchell. While traveling down US Hwy 64 in Macon County, Deputy Mitchell drove the transport van, then having inadequate treaded tires, at an excessive speed at or over 80 m.p.h. during inclement weather and lost control of the vehicle while entering a curve with an upslope. As a result, . . . Deputy Mitchell lost control of the van, hydroplaned off of the roadway, and flipped the van multiple times. Mr. Baggott, who was locked in the rear of the van, was violently tossed about the rear of the van striking his head and body upon the metal interior and was severely injured. Mr. Baggott was transported from the scene to Mission Hospital in Ashville [sic] but died from his injuries.

Plaintiff alleged that "[t]he negligent conduct in failing to ensure the transportation van was adequately equipped with sufficiently treaded tires and the negligent conduct of the transportation agent, Deputy Mitchell, acting on behalf of the State and NCDHHS, proximately caused the wrongful death of Mr. Baggott."

In response to Plaintiff's affidavit, on 30 October 2020, MCSO moved to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted, arguing that MCSO "is not a State department, institution, or agency as required by the Tort Claims Act." Deputy Commissioner David Mark Hullender granted MCSO's motion and dismissed Plaintiff's claims against MCSO and Deputy Mitchell with prejudice. Deputy Commissioner Hullender later amended this order to clarify that nothing in the order prevents "Plaintiff from pursuing any claims against the dismissed parties in a proper jurisdiction under North Carolina law."[1]

NCDHHS also moved to dismiss Plaintiff's claim; however, the motion was denied. NCDHHS appealed to the Full Commission, which

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1. Plaintiff did not appeal Deputy Commissioner Hullender's order dismissing MCSO and Deputy Mitchell as parties to the action to the Full Commission. Rather, the Record on appeal indicates Plaintiff filed a Complaint in Macon County Superior Court against the County of Macon; MCSO; John B. Holbrooks, in his capacity as Macon County Sheriff; Deputy Mitchell, individually and in his capacity as Macon County Deputy Sheriff; and Western Surety Company, as Surety.

determined the allegations in Plaintiff's affidavit regarding an agency relationship between NCDHHS and Deputy Mitchell were sufficient for Plaintiff's claim to proceed to discovery and thus affirmed the deputy commissioner's order.

After discovery, NCDHHS moved for summary judgment, arguing "the [S]tate's sovereign immunity remains intact against [Plaintiff's] claim[]" as "no agent of [NCDHHS] was involved in [Mr.] Baggott's transportation home on" 12 February 2019, and Plaintiff cannot show that NCDHHS owed Mr. Baggott a duty as a matter of law. On 18 March 2024, Deputy Commissioner Hullender entered an order granting NCDHHS's motion for summary judgment for two reasons: first, "the State's sovereign immunity is not waived by the Tort Claims Act in this claim, because the county official[s] were not agents of NCDHHS[,]" and second, NCDHHS "owed [P]laintiff no duty as a matter of law[.]" Deputy Commissioner Hullender subsequently dismissed Plaintiff's claim. Plaintiff appealed this order to the Full Commission.

Following a hearing, the Full Commission entered an order granting NCDHHS's motion for summary judgment, dismissing Plaintiff's claim with prejudice, and taxing costs to Plaintiff. In granting NCDHHS's motion for summary judgment, the Full Commission found and concluded that, "[i]n the light most favorable to Plaintiff, as the non-moving party," NCDHHS showed there was no genuine issue of material fact. In determining Plaintiff failed to produce evidence that can establish a *prima facie* case of a negligence claim under the Tort Claims Act, the Full Commission found the following:

> [NCDHHS] has shown that Plaintiff failed to identify an agent or employee of [] NCDHHS whose alleged negligent conduct would subject [] NCDHHS to liability under the Tort Claims Act. Moreover, [] NCDHHS has shown that the only named negligent actors, Deputy Mitchell and MCS[O], were not agents or employees of [] NCDHHS on 12 February 2019. Moreover, assuming arguendo that Plaintiff had properly named an agent or employee of [] NCDHHS as a negligent actor, Plaintiff has also failed to identify any duty owed by [] NCDHHS to Mr. Baggot[t] during his transportation on 12 February 2019 or how any such duty was breached by an employee or agent of [] NCDHHS.

Plaintiff timely filed her notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to hear an appeal from any final order of the Full Commission pursuant to N.C.G.S. §§ 7A-29 and 143-293 (2023).

III. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524 (2007)).

IV. Analysis

On appeal, Plaintiff argues that sovereign immunity does not apply in this case, and the Full Commission erred by granting NCDHHS's motion for summary judgment and dismissing her claim based on this defense. Specifically, Plaintiff claims NCDHHS waived its sovereign immunity and is vicariously liable as principal for Deputy Mitchell's negligent acts under the Tort Claims Act because he was acting as an agent of NCDHHS at the time of the fatal accident. To support her claim, Plaintiff advances two theories of agency: (A) under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 (the "Mental Health Act"), NCDHHS has "far reaching control" over the local officials who act as agents to "implement the statutory and regulatory regime[;]" and (B) NCDHHS had a nondelegable duty to transport involuntarily committed individuals.

A. The Mental Health Act

Plaintiff first contends NCDHHS waived its sovereign immunity and is vicariously liable for Deputy Mitchell's negligence under the Tort Claims Act because "[c]ounties and law enforcement officers act" as agents of NCDHHS "when transporting involuntarily committed individuals for services under" the Mental Health Act. We disagree.

The Tort Claims Act vests jurisdiction in the Industrial Commission to hear and decide "tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C.G.S. § 143-291 (2023). "In a Tort Claims Act case, the [Industrial] Commission's duty in addressing a summary judgment motion is limited to determining the existence of genuine issues of material fact and stops short of resolving such issues without an evidentiary hearing." *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 216 (2003). "Although issues of negligence are generally not appropriately

decided by way of summary judgment, if there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established, summary judgment is proper." *Norris v. Zambito*, 135 N.C. App. 288, 293 (1999). Summary judgment is also proper where the movant shows "the opposing party . . . cannot surmount an affirmative defense which would bar the claim." *Smith v. Phillips*, 117 N.C. App. 378, 381 (1994).

In its motion for summary judgment, NCDHHS asserted the doctrine of sovereign immunity as a bar to Plaintiff's claim. Generally, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104 (1997). "[B]y enacting the State Tort Claims Act, [however,] the State 'partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment.' " *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 45 (2022) (quoting *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329 (1982)). In the same vein, the State partially waived its sovereign immunity from suits brought against it for the negligent acts committed by the State's agents acting within the scope of their agency:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291 (emphasis added). As such, to determine whether NCDHHS waived its sovereign immunity pursuant to the Tort Claims Act, we must first determine whether Deputy Mitchell was acting as an agent of the State and within the scope of his agency at the time of the fatal accident. *See id.* "[S]ince the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed and the terms must be strictly adhered to." *Etheridge v. Graham*, 14 N.C. App. 551, 553–54 (1972); *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983) ("Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.").

We begin our analysis noting that "[t]he legislature has not defined the term 'agent' in the Tort Claims Act." *Medley v. N.C. Dep't*

of Correction, 330 N.C. 837, 840 (1992). Acknowledging this, Plaintiff asserts that counties act as agents of NCDHHS assisting in the administration of a statewide program like the Mental Health Act. To support her proposition, Plaintiff relies on *Stephenson v. Bartlett*, 355 N.C. 354 (2002), where our Supreme Court stated that "[c]ounties serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens." *Id.* at 365. In *Stephenson*, which is a redistricting case, our Supreme Court generally discussed the counties' historical role in legislative redistricting and their importance as "political subdivisions of the State of North Carolina." *Id.* at 364. When reviewing the legislature's control over counties, the *Stephenson* Court noted how counties "are creatures of the General Assembly and serve as agents and instrumentalities of State government[,]" that play a vital role in "carrying out the general policy of the [S]tate in the administration of government." *Id.* at 364, 366 (citations omitted). The *Stephenson* Court, however, did not consider whether counties were considered agents of the State, within the meaning of the Tort Claims Act, in their administration of all statewide programs. *Id.* at 358.

Whether the State is liable for the negligent acts of a county with respect to administration of statewide policies so "as to confer jurisdiction on the Industrial Commission to hear and decide the merits of this claim pursuant to the provisions of the Tort Claims Act[,]" *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 54 (1996), "depends upon application of the principles of agency and respondeat superior to the facts in the case under consideration[,]" *Vaughn v. N.C. Dep't of Hum. Res.*, 296 N.C. 683, 692 (1979); *see also Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284 (1972) ("Under the Tort Claims Act negligence, contributory negligence and proximate cause, as well as the applicability of the doctrine of respondeat superior, are to be determined under the same rules as those applicable to litigation between private individuals."). The general principles of agency and respondeat superior have been summarized as follows:

> Whenever the principal retains the right to control and direct the manner in which the details of the work are to be executed by his agent, the doctrine of respondeat superior operates to make the principal vicariously liable for the tortious acts committed by the agent within the scope of his employment. Conversely, a principal is not vicariously liable for the tortious acts of an agent who is not subject to the control and direction of the principal with

> respect to the details of the work and is subordinate only in [e]ffecting a result in accordance with the principal's wishes. In sum, a principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal over the details of the work as it is being performed. The controlling principle is that vicarious liability arises from the right of supervision and control.

Vaughn, 296 N.C. at 686 (internal quotation marks and citations omitted).

Our Supreme Court has applied these general principles in *Vaughn* and in *Gammons* to determine whether the State Department of Human Resources ("DHR")—the predecessor of NCDHHS—was vicariously liable as the principal for the acts of a county department of social services ("DSS") as an agent.

In *Vaughn*, the claimant filed a claim under the Tort Claims Act against DHR, alleging that the Durham County Director of DSS and his staff had acted negligently in their delivery of foster care services. 296 N.C. at 685. DHR moved to dismiss the claim for want of jurisdiction, arguing the County Director was not a State employee. *Id.* at 684. The Court analyzed the statutory scheme and the administrative regulations for the delivery of foster care services, and concluded the following factors indicated DHR exercised a substantial amount of control over the County Director: (1) the Social Service Commission, which has the statutory authority to promulgate rules regarding placement of children in foster homes, enacted comprehensive standards that the County Director was mandated to follow; (2) the Social Service Commission's "mandatory standards on foster care instruct[ed] the County Director of Social Services on virtually all aspects of foster care"; (3) the State provided a substantial amount of funding; (4) the County Director was required to submit semi-annual reports to DHR; and, importantly, (5) the statutory language provided that "the County Director of Social Services is '[t]o act as Agent of the Social Services Commission in relation to Work required by the Social Services Commission in the county.' " *Id.* at 687–90. After considering these factors, the Court concluded that, "in defining the duties of the County Director of Social Services[,] the General Assembly envisaged that he would be the agent responsible for executing whatever work was required by the Social Services Commission in his county." *Id.* at 690. As such, the Court held,

> [t]his statutory scheme gives the [DHR], through the Social Services Commission, control over the delivery of foster care services and designates the County Director as

> the person responsible for carrying out the policies formulated by the [DHR]. Thus, in practice, as well as in name, the role of the County Director in the delivery of foster care services is that of an agent. Like the agent, the County Director acts on behalf of the [DHR] and is subject to its control with respect to the actions he takes on its behalf.

Id. The Court, however, limited its holding, stating that "[i]n every instance the liability of the [DHR] depends upon application of the principles of agency and respondeat superior to the facts in the case under consideration." *Id.* at 692.

Similarly, in *Gammons*, our Supreme Court held DHR could be vicariously liable for the negligent acts of a county DSS with respect to the delivery of child protective services. 344 N.C. at 56. In reaching its holding, the Court utilized the same legal analysis as the *Vaughn* Court and determined the statutory scheme, mandatory administrative regulations, and written comprehensive guidelines clearly demonstrated that "the General Assembly envisaged that [the County Director of Social Services] would be the agent responsible for executing whatever work was required by the Social Services Commission in his county." *Id.* at 62. The Court concluded there was a sufficient agency relationship between DHR and the County Director of Social Services and thus held DHR could be vicariously liable under the Tort Claims Act for the County Director's negligent actions regarding the delivery of child protective services. *Id.* at 63.

Thus, as *Vaughn* and *Gammons* instruct, we must analyze "in detail the statutory scheme and administrative regulations" and apply the general "principles of agency and respondeat superior to the facts in th[is] case" to determine whether the State, through NCDHHS, is liable for the negligent acts of MCSO and its deputies with respect to the transportation of involuntarily committed respondents. *See Vaughn*, 296 N.C. at 692; *see also Gammons*, 344 N.C. at 54. As such, we now turn to "analyze[] in detail the statutory scheme and administrative regulations" for the transportation of involuntarily committed respondents. *See Gammons*, 344 N.C. at 56.

We begin with the statutory scheme of the Mental Health Act. The Mental Health Act, as codified in Chapter 122C of the North Carolina General Statutes, was established to "assist individuals with needs for mental health, developmental disabilities, and substance abuse services in ways consistent with the dignity, rights, and responsibilities of all North Carolina citizens." N.C.G.S. § 122C-2 (2023). To achieve the policy

of the State, "State and local governments shall develop and maintain a unified system of services centered in area authorities or county programs" and "shall ensure that the following core services are available: (1) [s]creening, assessment, and referral[;] (2) [e]mergency services[;] (3) [s]ervice coordination[; and] (4) [c]onsultation, prevention, and education." *Id.*

Under the Mental Health Act, the Secretary of NCDHHS is required to enforce the rules promulgated by the Mental Health Commission. N.C.G.S. § 122C-111 (2023). The Mental Health Commission has the vested authority "to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, developmental disabilities, substance abuse programs including education, prevention, intervention, screening, assessment, referral, detoxification, treatment, rehabilitation, continuing care, emergency services, case management, and other related services." N.C.G.S. § 143B-147 (2023). Further, N.C.G.S. § 143B-147 authorizes the Mental Health Commission

> (1) [t]o adopt rules regarding the
>
> > a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of [N.C.] G.S. [§] 122C-181(a), that is now or may be established;
> >
> > b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
> >
> > c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
> >
> > . . . .
> >
> > f. Standards of public services for mental health, developmental disabilities, and substance abuse services.
>
> . . . .
>
> (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health

> and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes.

N.C.G.S. § 143B-147. The statute, however, is silent as to whether the Mental Health Commission is authorized to adopt rules relating to the transportation of respondents who have been involuntarily committed under the Mental Health Act.

This is likely because, under N.C.G.S. § 122C-251, the counties are given authority to determine the details of transportation. Despite a few exceptions, the counties are responsible for the transportation between counties of a respondent who has been involuntarily committed under the Act. *See* N.C.G.S. § 122C-251(b) (2023). Which county is responsible for transportation between counties depends on the reason the respondent is being transported: if the respondent is being transported "for a first examination as described in [N.C.]G.S. [§] 122C-263(a) and [N.C.] G.S. [§] 122C-283(a) [or] for admission to a 24-hour facility[,]" the county where the respondent is taken into custody shall provide transportation; if the respondent is being transported because he requested a change of venue for the district court hearing, the "county where the petition for involuntary commitment was initiated" must provide transportation; but, importantly here, if the respondent is being transported after discharge from a facility, "the county of residence of the respondent" must provide transportation, or the "respondent being discharged from a facility may use his own transportation at his own expense." N.C.G.S. § 122C-251(b).

Generally, the cities and counties must "retain and be required to perform the responsibilities set forth in this Article[;]" however, an exception to this general rule is where the plan that was "developed, agreed upon, and adopted in compliance with" N.C.G.S. § 122C-215(g) provides otherwise. N.C.G.S. § 122C-251(g)(4) (2023). Under N.C.G.S. § 122C-215(g), "[t]he governing body of a city or county" is required to "adopt a plan known as an 'involuntary commitment transportation agreement' or 'transportation agreement' for the custody and transportation of respondents in involuntary commitment proceedings[.]" N.C.G.S. § 122C-251(g). While "[l]aw enforcement and other affected agencies" must "participate in developing the transportation agreement[,]" N.C.G.S. § 122C-251(g)(1), the governing body maintains the discretionary authority to "designate law enforcement officers, volunteers, or other public or private personnel who have agreed pursuant to subsection (g) of [N.C.G.S. § 122C-251] to provide all or parts of the custody and transportation required by involuntary commitment

proceedings[,]" N.C.G.S. § 122C-251(g)(2) (2023). Regardless of whom the county designates, the designated person or agency must comply with Article 5 of the Mental Health Act, which provides:

> Any person or agency designated or required to provide all or parts of the custody and transportation required by involuntary commitment proceedings shall follow the procedures in this Article. References in this Article to a law enforcement officer apply to any person or entity designated to provide custody or transportation. The transportation agreement may provide that private personnel or agencies may contract for transportation services to transport respondents under involuntary commitment from one entity to another.

Id. In other words, the statute does not require a "law enforcement officer[,]" which is defined as a "[s]heriff, deputy sheriff, police officer, State highway patrolman, or an officer employed by a city or county under [N.C.]G.S. [§] 122C-302[,]" N.C.G.S. § 122C-3(19) (2023), to transport an involuntarily committed respondent who has been discharged back to their county. Rather, the statute authorizes the local governing body to designate a person or agency to transport involuntarily committed respondents. But even if the governing body has designated a law enforcement officer to transport "a respondent being discharged from a facility[,]" that respondent "may [nonetheless] use his own transportation at his own expense." *See* N.C.G.S. § 122C-251(b).

While the governing body may designate law enforcement officers to provide transportation, such designated law enforcement officers are directed by statute, "[t]o the extent feasible . . . dress in plain clothes and shall travel in unmarked vehicles[,]" and "to the extent possible, shall advise respondents when taking them into custody that they are not under arrest and have not committed a crime, but are being taken into custody and transported to receive treatment and for their own safety and that of others." N.C.G.S. § 122C-251(c) (2023). Yet, the local governing body also has the power to determine the type of vehicle in which to transport the respondent. *See* N.C.G.S. § 122C-251(c) ("Transportation of a respondent may be (i) by city- or county-owned vehicles, (ii) by private vehicle by contract with the city or county, or (iii) as provided in an agreement developed and adopted under [N.C.G.S. § 122C-251(g)] and [N.C.]G.S. [§] 122C-202.2."). Lastly, the plain language places the responsibility of the cost and expenses of custody and transportation of a respondent, not on NCDHHS, but on the "the county of residence of the respondent." *See* N.C.G.S. § 122C-251(h) (2023). If the State were

to provide transportation as permitted under N.C.G.S. § 122C-408(b) (providing special provisions for the Town of Butner), the State is entitled "to recover the reasonable cost of transportation from the county of residence of the respondent." *Id.* (emphasis added).

Our review of the statutory scheme of the Mental Health Act indicates that, unlike *Vaughn* and *Gammons*, the county—not the Mental Health Commission, nor NCDHHS—has the authority to control and direct the manner in which involuntarily committed respondents are transported by designating any person or agency to transport involuntarily committed individuals, adopting an "involuntary commitment transportation agreement[,]" and funding of the transportation of involuntarily committed individuals. As such, we are not convinced that the legislature bestowed upon NCDHHS the level of control over "the manner in which the details of the work" necessary to make it vicariously liable for the tortious acts committed by law enforcement officers transporting involuntarily committed respondents. *Cf. Vaughn*, 296 N.C. at 686.

Next, we must analyze any enacted administrative guidelines for the transportation of involuntarily committed respondents to determine whether NCDHHS "retains a right of control over the manner in which [transportation of involuntarily committed respondents] are provided by a local agency." *See Gammons*, 344 N.C. at 61. Plaintiff, however, does not point to—and our research does not reveal—any regulations or manuals promulgated by NCDHHS that supplement the statutes in this area.[2] Rather, Plaintiff directs our attention to a document called "Commitment Issues for Law Enforcement" prepared by the North Carolina Department of Justice. But this document was "designed as a reference guide only[,]" and, while it does state the applicable law, it also recommends "that agencies develop a written departmental policy for how to handle the various issues that arise during the course of involuntary commitment proceedings." Interestingly, this reference guide does provide some considerations that may explain why the legislature recommends law enforcement officers wear plain clothes and drive unmarked vehicles:

> It is important to remember that individuals taken into custody under the involuntary commitment statutes have

2. We note that the Mental Health Commission did adopt a rule stating that "[t]he governing body responsible for each facility or service shall develop and implement written policies for . . . transportation, including the accessibility of emergency information for a client[.]" 10A NCAC 27G.0201 (December 2025). This rule, however, was not in effect when the Full Commission entered its order.

> not committed a criminal offense. Law enforcement officers, to the extent possible, shall advise respondents when taking them into custody that they are not under arrest, but are being transported to receive treatment and for their own safety and for the safety of others. N.C.G.S. § 122C-251(c).
>
> Because the involuntary commitment process can be frightening and disorienting to the respondent, the law enforcement officer should make every effort to assure the respondent that he or she is there to help. The statute also says that, to the extent feasible, the transporting officer should be in plain clothes and travel in an unmarked vehicle. In addition, if the transporting officer is not of the same sex as the respondent, then an attendant of the same sex should accompany the law enforcement officer during transport. There is no requirement that this attendant be a sworn law enforcement officer. It may be appropriate to allow a member of the respondent's family to accompany the respondent during transport.

Nevertheless, the reference guide does not indicate that NCDHHS "retains the right to control and direct the manner in which the details of the work are to be executed" by the counties or law enforcement in the transportation of involuntarily committed respondents. *See Vaughn*, 296 N.C. at 686. Therefore, we hold the MCSO is not an agent for NCDHHS when transporting respondents who have been involuntarily committed under the Mental Health Act; consequently, NCDHHS is not vicariously liable for Deputy Mitchell's negligence under the Tort Claims Act.

B. Nondelegable Duty

Plaintiff also argues that NCDHHS had a nondelegable duty to provide for Mr. Baggott's safe transportation.

Generally, an employer will not be held vicariously liable for the torts of an independent contractor. *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62 (1968). "The nondelegable duty theory[, however,] is an exception to the rule of nonliability by a principal for the work of independent contractors." *Medley*, 330 N.C. at 841. "Imposition of this nondelegable duty of safety reflects 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.' " *Woodson v. Rowland*, 329 N.C. 330, 352 (1991) (quoting C. Daye and M. Morris, North Carolina Law of Torts, § 23.31, at 393 (1991)). "Where a principal has a nondelegable

duty, one with whom the principal contracts to perform that duty is as a matter of law an agent for purposes of applying the doctrine of respondeat superior." *Medley*, 330 N.C. at 845.

In *Medley*, our Supreme Court considered whether an inmate could sue the State Department of Correction under the Tort Claims Act for an injury caused by the medical negligence of a private physician who was acting as an independent contractor for a State prison. *Id.* at 838. The Department of Correction moved to dismiss the plaintiff's claim, arguing that, at the time of the injury, the physician was not acting as an employee or agent within the meaning of the Tort Claims Act. *Id.* Our Supreme Court held that, regardless of whether the physician was an employee or an independent contractor, the physician, as a matter of law, was acting as an agent of the State because he was performing the State's nondelegable duty of providing adequate medical care to inmates. *Id.* at 839.

Here, however, the nondelegable duty theory is not appliable for three reasons. First, N.C.G.S. § 122C-251 places the duty of transportation of an involuntarily committed respondent on the county—or, in some instances, the city—but not the State. *See* N.C.G.S. § 122C-251(b) ("Transportation between counties under the involuntary commitment proceedings of this Article for discharge of a respondent from a 24-hour facility *shall* be provided by the county of residence of the respondent." (emphasis added)); *see also Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 863 (2018) ("As used in statutes, the word 'shall' is generally imperative or mandatory." (citation omitted)).

Second, the plain language of N.C.G.S. § 122C-251 also indicates that the duty to transport involuntarily committed individuals is a delegable duty. Specifically, under subsection (g), counties are permitted to create a transportation agreement that allows "private personnel or agencies [to] contract for transportation services to transport respondents under involuntary commitment from one entity to another." N.C.G.S. § 122C-251(g)(2). Further, the county must "retain and be required to perform the responsibilities set forth in this Article, *except as set forth in a plan developed, agreed upon, and adopted in compliance with this subsection*." N.C.G.S. § 122C-251(g)(4) (emphasis added).

Third, even if the State had a duty to provide transportation for involuntarily committed respondents, here, there is only evidence of Macon County contracting with Western Carolina Public Safety, LLC d/b/a/ Sheriffs Transport Service for the provision of non-emergency transportation. In other words, there is no evidence that the State

specifically delegated this assumed duty to MCSO. *Cf. Medley*, 330 N.C. at 845 ("Where a principal has a nondelegable duty, one with whom the principal *contracts* to perform that duty is as a matter of law an agent for purposes of applying the doctrine of respondeat superior." (emphasis added)). As such, Plaintiff has failed to show NCDHHS had a nondelegable duty to transport Mr. Baggott.

In sum, Plaintiff has not shown that Deputy Mitchell was acting as an agent for NCDHHS at the time of the fatal accident. Plaintiff's claim under the Tort Claims Act is therefore barred by the doctrine of sovereign immunity. *See Meyer*, 347 N.C. at 104. As such, the Full Commission did not err by granting Defendant's motion for summary judgment and dismissing Plaintiff's claim based on the defense of sovereign immunity. *See Smith*, 117 N.C. App. at 381.

Having concluded the Full Commission did not err in granting Defendant's motion for summary judgment, we need not address Plaintiff's second argument that the Full Commission erred by failing to award summary judgment in Plaintiff's favor. Since Plaintiff's claim is barred by the doctrine of sovereign immunity, the Full Commission properly granted Defendant's motion for summary judgment and dismissed Plaintiff's claim. *See id.*

V. Conclusion

Upon careful review, we conclude the Full Commission properly granted summary judgment for NCDHHS with respect to Plaintiff's claim under the Tort Claims Act, where Plaintiff's claim was barred by sovereign immunity. Therefore, the Full Commission's order granting summary judgment for NCDHHS is affirmed.

AFFRIMED.

Judges ZACHARY and STADING concur.

IN RE M.B.

[303 N.C. App. 17 (2026)]

IN THE MATTER OF M.B.

No. COA25-290

Filed 18 February 2026

Child Abuse, Dependency, and Neglect—permanency planning order—restriction on contact with child—prohibition on social media discussion

In a permanency planning order entered in a juvenile neglect and dependency proceeding, the trial court's restriction that respondent-mother have no contact with her child and not discuss the case (or people involved with the case) on social media were fully supported by the court's findings of fact and not an abuse of the court's discretion. The no-contact decree was supported by uncontested findings detailing respondent-mother's history of verbal abuse, profanity, and threats of violence directed at social workers—in some instances, in the presence of, and with negative effects upon, the child. The decree that respondent-mother not discuss the case or individuals associated with it on any social media platform was supported by findings that respondent-mother had threatened suicide, claimed child abuse, and named specific people involved in the case in her social media posts, some of which were menacing. Respondent-mother's constitutional argument regarding the decrees was not raised in the trial court and thus was waived for consideration on appeal.

Appeal by respondent-appellant-mother from order entered 12 November 2024 by Judge Erin S. Hucks in District Court, Union County. Heard in the Court of Appeals 27 January 2026.

Marc S. Gentile for petitioner-appellee Union County Division of Social Services.

Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., by Vanessa N. Garrido, for guardian ad litem.

Parent Defender Annick Lenoir-Peek, by Sr. Assistant Parent Defender J. Lee Gilliam, for respondent-appellant-mother.

STROUD, Judge.

Respondent-appellant-mother appeals a permanency planning order. Mother contends the trial court erred by ordering her not to have contact with her child or discuss the case or people involved on social media. Because the trial court's findings of fact regarding Mother's conduct fully support the restrictions, we conclude the trial court did not abuse its discretion in ordering Mother to have no contact with the child and not to post about the case or people involved on social media. Furthermore, Mother waived any constitutional arguments regarding the social media provision. Accordingly, we affirm.

I. Background

On 11 December 2023, the Union County Department of Social Services (DSS) filed an amended juvenile petition alleging Maggie was neglected and dependent.[1] On 29 February 2024, Maggie was adjudicated neglected and dependent, in part due to Mother's "emotional/mental health, parenting skills, substance use and child characteristics." The allegations in the petition and determinations in the adjudication order are not relevant to this appeal. Mother does not challenge the adjudication or the disposition except as to the provisions regarding contact with Maggie and the social media provision. For purposes of this appeal, the following findings of fact and conclusions of law in the 12 November 2024 permanency planning order (Order) are relevant:

> 18. This [c]ourt had a hearing on May 7, 2024 in which the Order was filed on June 3, 2024. This [c]ourt did find, amongst other things:
>
> (A) "Visitation between the juvenile and the mother occurred on February 20, 2024, February 27, 2024, March 5, 2024, and March 12, 2024. Those visits went well."
>
> (B) "On March 19, 2024, the mother appeared physically different during the visit and the social worker ended the visit 30 minutes early. On that day, the social worker overheard the juvenile ask the mother why she was recording the visit and that it made her uncomfortable."

1. Pseudonyms are used for every individual involved in this case without the use of brackets. One of the main issues in this case was Mother's pattern of threats and disturbing comments regarding some of these individuals on social media, so we have opted not use real names throughout this opinion.

(C) "During the March 26, 2024 visit, it appeared to the social worker that the mother was visibly agitated. [Mother] screamed at the juvenile the SBI was involved and that her and the juvenile's life was in danger. Social Worker Hughes told the mother that her behavior was not appropriate and ended the visit. [Mother] appeared at that time to have forgotten how to leave the building and was very agitated when she left."

(D) "It appears that the mother has been taking pictures and videos of various employees of the Department of Social Services and additionally, she has been taking pictures and videos of others, such as the GAL, while in the hallway of the courthouse. It also appears that she has done internet searches of individuals employed by DSS and the GAL."

(E) "[Mother] did follow her former attorney, Michelle Oates, to Ms. Oates' home. She indicated to Social Worker Hughes that she fired Ms. Oates, but the Court notes that she cannot fire an attorney she did not hire."

. . . .

19. To address the identified need of emotional and mental health, [Mother] did complete psychological assessment with Dr. Greg Packard. Dr. Packard did examine [Mother] on June 25, 2024, July 3, 2024, July 8, 2024, July 31, 2024 and August 16, 2024. Amongst other things, Dr. Packard did find that:

(A) "Consistent with [Mother]'s lifestyle, there are indications that she may abuse or depend on prescription medications, illicit drugs, or both. She likely uses these substances within recreational pattern of adolescent-like, and stimulus-seeking behavior. Also consistent with her personality style is the image of drug use as a symbol of disdain for conventional social values. Moreover, drug use flouts establishment authorities and serves to express her assertive independence."

(B) In Dr. Packard's recommendations, he state[d]: "[Mother] may be convinced that if she were just

> left alone, she could work matters out on her own. However, this conviction can often lead to regression and recurrences of her less than socially acceptable behavior."

20. It appears from [Mother]'s testimony that she is participating in some sort of therapy. Her testimony is that she is going once per week for DBT therapy at Daymark as well as once per week for individual therapy and at least once per month with Dr. Owens with Atrium Behavioral Health.

21. Despite doing that and having that therapy, there have been several text messages sent back and forth between [Mother], the GAL Ms. Chase[,] and Social Worker Hughes that are incredibly disturbing to this Court.

22. [Mother] did send a text message in the group text messages that includes Social Worker Hughes, Katie Chase[,] and [Mother] in which [Mother] did screenshot and text picture of Social Worker Hughes's daughter to Social Worker Hughes and Ms. Chase. It followed with a text message that says "This is your baby? I bet you know she's safe and well. It would be nice if I knew my baby was. It's only humane to let me know. Just saying."

23. [Mother] also sent a text message in response to Social Worker Hughes sending a message stating "Maggie Bunch is a girl after my own heart. Maggie is growing and blossoming. As you can see, Maggie is going through a hat phase where she likes wearing stylish hats with dresses." The response to that text message was "F*** you bitch. Yes Maggie is great without mommy. No worries. Get the paperwork done. Terminate my rights."

24. [Mother] also sent a message, which included a picture of what appears to be a desk with a picture of Maggie on it, stating "my blood is on your hands you bitches explain to my daughter why I'm dead I hope y'all are happy now goodbye".

25. Further, [Mother] also sent messages that said "Y'all lucky I'm not violent. It takes everything inside me to not kick your ass every time I see you. Everytime I hear your voice. Why am I on the summer school phone list? Is that your way of tormenting me?? F*** YOU Keep it up."

26. In a Facebook message, [Mother] posted "When I end up dead, I want all these f**** to be charged with conspiracy to commit murder. And child abuse. Because that's exactly what this is" and then listed the following names: [list of names].

27. During this court's hearing the [c]ourt did observe erratic behavior from [Mother], including but not limited to [Mother] packing up her things and storming out of the courtroom not once but twice, once during the court's ruling.

28. Although it appears that [Mother] is attempting to address some of her mental health issues, there is no resolution to those mental health issues as it stands today.

29. It is unclear to this [c]ourt whether [Mother] has addressed substance use issues because she has not obtained a substance use assessment or followed through with any potential treatment.

30. Contact between the juvenile and [Mother] is not in the juvenile's best interest as it does not appear, from at least some of the mother's text messages to Social Worker Hughes and Katie Chase, that she has been at various points in time suicidal or at least threatening to commit suicide and is putting the onus of informing her daughter on Ms. Hughes and Ms. Chase. In no way is this healthy for the juvenile to know or be exposed to.

. . . .

33. Pursuant to [North Carolina General Statute Section] 7B-906.2(d) the court makes the following findings:

. . . .

(B) The mother is not making adequate progress within a reasonable period of time under the plan.

. . . .

(D) The mother is not actively participating in or cooperating with the plan, DSS, and the guardian ad litem for the juvenile.

. . . .

(G) The mother is acting in manner inconsistent with the health or safety of the juvenile. . . .

. . . .

39. Visitation between the juvenile and the mother is not in the best interest of the juvenile.

. . . .

Based on the above findings, the [c]ourt CONCLUDES AS A MATTER OF LAW

. . . .

9. It is not in the best interest of the juvenile to visit-with her mother, [Mother].

. . . .

11. Termination of parental rights should not be considered.

12. The undersigned makes the following specific findings as to the best plan of care to achieve safe, permanent home for the juvenile within a reasonable period of time.

THEREFORE, based on the above FINDINGS OF FACT and CONCLUSIONS OF LAW, the [c]ourt ORDERS that the following is in the best interest of the juvenile:

. . . .

3. [Mother] shall have no contact with the juvenile. [Mother] may not go near the juvenile's school, residence or any other place she is known to be.

4. [Mother] shall have no contact with Social Worker . . . [names redacted].

5. [Mother] shall abide by previous orders not modified herein, including prior no contact orders.

6. [Mother] shall not discuss this case or individuals associated with this matter on any social media platform, including but not limited to Facebook, Facebook Live or YouTube.

> 7. To address visitation and/or contact with the juvenile, the mother may file Motion for Review at any time.
>
> 8. [Mother] shall continue to address her identified needs of mental and emotional health, parenting, substance use and child characteristics by engaging in services as previously ordered.
>
> . . . .

The trial court granted Maggie's father full legal and physical custody. Defendant filed notice of appeal from the Order on or about 10 December 2024.

II. Communication

Mother makes three main arguments on appeal.

A. No Contact

Mother first contends "[a] mother must be allowed to respond to a child's initiation of communication to her. This complete ban on [Mother]'s contact with her daughter is an abuse of the trial court's discretion. It should be reversed and modified." Mother, in her approximately one-page argument, addresses abuse of discretion but does not challenge the findings of fact made by the trial court, so they are binding on appeal:

> This Court reviews disposition orders, including visitation determinations, for abuse of discretion. When reviewing for abuse of discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. Further, appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.

In re D.E., 298 N.C. App. 7, 10-11, 913 S.E.2d 447, 450 (2025) (citations, quotation marks, and brackets omitted).

Both Mother and DSS cite to *In re J.C.-B.*, 276 N.C. App. 180, 856 S.E.2d 883 (2021), wherein a mother was told not to contact her child

and thereafter did. 276 N.C. App. at 183, 856 S.E.2d at 886. Mother correctly points out that in *J.C.-B*, the no contact disposition was vacated. *See id.* at 194, 856 S.E.2d at 893. But DSS also correctly points out, "[t]he *J.C.-B* facts are distinguishable from the facts of this appeal." *See generally id.* In *J.C.-B*, the trial court had placed the discretion for the no-contact disposition with the child's therapist but that discretion must be exercised only by the trial court. *Id.* at 194, 856 S.E.2d at 893.

Here, the trial court exercised its own discretion and did not place the decision regarding contact with the child with anyone else. The trial court based this restriction on its uncontested findings detailing Mother's history of verbal abuse, profanity, and threats of violence directed at social workers, and in some instances in the presence and hearing of the child and the negative effects this behavior had on Maggie. For example, "[o]n March 19, 2024, the Mother appeared physically different during the visit and the social worker ended the visit 30 minutes early[;] [o]n that day, the social worker overheard the juvenile ask the mother why she was recording the visit and that it made her uncomfortable[;]" Mother appeared "visibly agitated" and "screamed at the juvenile the SBI was involved and that her and the juvenile's life was in danger. . . . [Mother] appeared at that time to have forgotten how to leave the building and was very agitated when she left" (quotation marks omitted); "[d]espite doing that and having that therapy, there have been several text messages sent back and forth between [Mother], the GAL Ms. Chase and Social Worker Hughes that are incredibly disturbing to this Court[;]" including sending the social worker a photo of her own daughter and saying, "This is your baby? I bet you know she's safe and well. It would be nice if I knew my baby was. It's only humane to let me know. Just saying[;]" when given information about how well Maggie was doing Mother responded, "F*** you bitch. Yes Maggie is great without mommy. No worries. Get the paperwork done. Terminate my rights[;]" "[Mother] also sent a message, which included a picture of what appears to be a desk with a picture of Maggie on it, stating my blood is on your hands you bitches explain to my daughter why I'm dead I hope y'all are happy now goodbye[;]"

> [Mother] also sent messages that said Y'all lucky I'm not violent. It takes everything inside me to not kick your ass every time I see you. Everytime I hear your voice. Why am I on the summer school phone list? Is that your way of tormenting me?? F*** YOU Keep it up[;]"

"In a Facebook message, [Mother] posted 'When I end up dead, I want all these f**** to be charged with conspiracy to commit murder. And

child abuse. Because that's exactly what this is' " and then listed names; "[d]uring this court's hearing the [c]ourt did observe erratic behavior from [Mother], including but not limited to [Mother] packing up her things and storming out of the courtroom not once but twice, once during the court's ruling[;] "[a]lthough it appears that [Mother] is attempting to address some of her mental health issues, there is no resolution to those mental health issues as it stands today[;]" "[i]t is unclear to this Court whether [Mother] has addressed substance use issues because she has not obtained a substance use assessment or followed through with any potential treatment[;]"

> [c]ontact between the juvenile and [Mother] is not in the juvenile's best interest as it does not appear, from at least some of the mother's text messages to Social Worker Hughes and Katie Chase, that she has been at various points in time suicidal or at least threatening to commit suicide and is putting the onus of informing her daughter on Ms. Hughes and Ms. Chase. In no way is this healthy for the juvenile to know or be exposed to.

(Quotation marks omitted.)

Based on the unchallenged findings of fact, we cannot say the trial court's decision to cease contact between Mother and Maggie was "so arbitrary that it could not have been the result of a reasoned decision." *In re D.E.*, 298 N.C. App. at 11, 913 S.E.2d at 450. Furthermore, in the future, Mother is free to file a motion to review as the trial court specifically noted in its Order. This argument is overruled.

B. "Gag Order"

Mother's next two arguments are regarding what she refers to as a "gag order" due to the trial court ordering she shall "not discuss this case or individuals associated with this matter on any social media platform, including but not limited to Facebook, Facebook Live or YouTube."

Mother contends the "gag order" "exceeded the trial court's dispositional authority" noting its limited power under North Carolina General Statute Section 7B-904 to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(d1)(3) (2023), *amended* 2025. Mother attempts to frame this question under a *de novo* standard of review as she is challenging the trial court's failure to follow a statutory mandate. But Mother is actually challenging the authority for the trial court's disposition, but

there is no legal question as to the trial court's ability to make dispositions. *Id.* Accordingly, "[t]he trial court's dispositional choices . . . are reviewed for abuse of discretion." *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 826 (2021). Mother's needs to address her own "emotional/mental health, parenting skills, substance use and child characteristics" were reasons Maggie was removed from her care and could not be returned to her, but Mother does not challenge the adjudication or the relevant findings of fact which resulted in Maggie's removal from her. *See generally* N.C. Gen. Stat. § 7B-904(d1)(3).

Mother is correct that the trial court's dispositional authority is not unlimited, but it is broad. *See* N.C. Gen. Stat. § 7B-904. The disposition must be based upon the particular circumstances of the parents and the child. *See generally id.* "For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015). Here, Mother's actions noted in the findings of fact were part of the same types of behavior that "led to or contributed to" the adjudication. The trial court specifically found Mother threatened suicide, claimed child abuse, and then listed the specific names of people involved with the case Mother had targeted in her social media posts and threats. The trial court also found "[i]n no way is this healthy for the juvenile to know or be exposed to." The trial court did not order Mother not to use social media for other purposes nor did it order her not to speak to people about the case; all the trial court required was that she not discuss the case or the people involved in it *on social media*. Mother's established pattern of threatening suicide, claiming child abuse, and then blaming specific DSS employees and others attempting to assist her and the child may discourage those people from working with Maggie and that would certainly not be in her best interest. In addition, as DSS points out, as Mother was posting her comments to publicly available social media platforms the child could potentially see, Mother's comments could be directly harmful to the child also. The trial court included this provision based on Mother's own conduct in the case. There was a nexus between Mother's behaviors and the trial court's limitation of Mother's discussion of the case and people involved on social media based on Mother's own pattern of abusive and threatening posts. The trial court did not abuse its discretion in ordering this provision. This argument is overruled.

C. Constitutional Rights

Mother's final argument is that the "gag order" violated her constitutional rights. Despite her failure to object at trial, she suggests this Court

should invoke Rule 2. Mother concedes she made no constitutional argument before the trial court. "[T]he existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal." *In re J.N.*, 381 N.C. at 131, 133, 871 S.E.2d 495, 497 (2022). Furthermore, in our discretion, we see no basis to invoke Rule 2 to address any injustices or to expediate a case of public interest. *See generally* N.C. App. P. Rule 2 (allowing this Court to vary or modify the rules of appellate procedure in order to prevent manifest injustice or expediate a case of public interest). This argument is waived.

III. Conclusion

We conclude the trial court did not abuse its discretion in ordering Mother to have no contact with the child and not to post about the case or people involved on social media; furthermore, Mother waived any constitutional arguments regarding the social media provision. The Order is affirmed.

AFFIRMED.

Judges STADING and FREEMAN concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
MARK A. KEY, Attorney, Defendant

No. COA25-597

Filed 18 February 2026

Attorneys—disciplinary hearing—choice of sanction—suspension of license—abuse of discretion analysis

On remand from a prior appellate decision, the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar did not abuse its discretion by suspending an attorney from practicing law for five years—with reinstatement possible after three years upon meeting certain conditions—rather than disbarring him despite the attorney's pattern of misconduct, commission of multiple felonies, and obstructive behavior during the disciplinary process. Based on the whole record test, the DHC's choice of punishment was not

manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision where the DHC clearly set forth its evaluation of numerous factors from 27 N.C. Admin. Code 1B.0116(f) and its reason for imposing suspension rather than disbarment, including by noting defendant's record of representing indigent clients and the personal losses that he experienced during the relevant time period.

Judge MURRY concurring by separate opinion.

Appeal by Plaintiff from order entered 27 February 2025 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 29 January 2026.

The North Carolina State Bar, by Counsel Carmen H. Bannon and Deputy Counsel Savannah P. McLamb, for Plaintiff-Appellant.

Mark A. Key, Pro se, for Defendant-Appellee.

COLLINS, Judge.

The North Carolina State Bar ("Plaintiff") appeals from an order of discipline entered on remand by the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC"), which suspended Mark Key ("Defendant") from practicing law for five years and allowed him to seek a stay of the balance of the suspension after three years if he complies with certain conditions. Plaintiff argues that the DHC abused its discretion by suspending, rather than disbarring, Defendant. For the reasons stated below, we affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

A detailed summary of the procedural and factual background underlying this appeal is set forth in *N.C. State Bar v. Key*, 294 N.C. App. 372 (2024). In *Key*, we held that the DHC did not err by finding in its original order of discipline that Defendant engaged in a pattern of misconduct and concluding that Defendant violated the Rules of Professional Conduct. 294 N.C. App. at 381-409. However, we held that the DHC erred by failing to consider Defendant's commission of multiple felonies and bad faith obstruction of the disciplinary process in imposing discipline. *Id.* at 413-16. We therefore vacated the portion of the order of discipline suspending Defendant's law license and remanded for further proceedings. *Id.* at 419.

Following a two-day hearing on remand, the DHC entered a new disciplinary order that incorporated substantially the same findings regarding the underlying misconduct, along with additional findings, including:

> 17. Defendant's law license was suspended pursuant to the original Order of Discipline in this case on 24 March 2023, and remained suspended until the Court of Appeals' mandate vacating the discipline was issued on 8 July 2024. During that period of suspension, Defendant failed to comply with the conditions set forth in the original order of discipline:
>
> a. Defendant did not file with the DHC the required affidavit indicating that he properly wound down his law practice in compliance with 27 N.C.A.C. § .0128.
>
> b. Defendant did not pay the costs and administrative fees of the disciplinary action within 30 days after being served with the statement of costs and fees.
>
> c. Defendant continued to hold himself out as an attorney by sending emails identifying himself as "Attorney at Law" over a signature block indicating his affiliation with "The Key Law Office."
>
> d. Defendant failed to respond to notices of six fee dispute petitions filed by former clients with the North Carolina State Bar.
>
> e. Defendant failed to timely return a client's file, despite repeated requests to do so.
>
> f. Defendant did not comply with multiple conditions in the original order of discipline requiring him to provide to the State Bar's Office of Counsel his income tax returns, proof of extensions for filing tax returns, proof of payment of taxes, all correspondence with tax authorities.
>
> g. Defendant did not execute NC DOR Forms 93 authorizing the Office of Counsel to obtain records relating to Defendant's State income taxes for the preceding year.

In accordance with our prior opinion, the DHC considered, inter alia, Defendant's commission of multiple felonies and bad faith obstruction of the disciplinary process and ultimately imposed the same discipline as in its original order.[1] Plaintiff appealed.

II. DISCUSSION

The crux of Plaintiff's argument is that the DHC abused its discretion by suspending, rather than disbarring, Defendant.

There are two phases in an attorney disciplinary case: "(1) an adjudicatory phase in which the DHC determines whether the defendant committed the misconduct; and (2) a disposition phase in which the DHC determines the appropriate discipline." *N.C. State Bar v. Adams*, 239 N.C. App. 489, 493 (2015) (citation omitted). Our Supreme Court has emphasized that the whole record test applies in our review of attorney discipline cases and has expressly disavowed the notion that this examination includes a proportionality review. *N.C. State Bar v. Talford*, 356 N.C. 626, 641 n.4 (2003). In applying the whole record test, we determine whether the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether those findings of fact support the DHC's conclusions of law. *Id.* at 632. "Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion." *Id.* (citation omitted).

The whole record test "also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *N.C. State Bar v. Demayo*, 292 N.C. App. 435, 439 (2024). To satisfy the evidentiary requirements of the whole record test in an attorney disciplinary action, "the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing." *N.C. State Bar v. Megaro*, 286 N.C. App. 364, 372 (2022) (citation omitted). Clear, cogent, and convincing "describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354 (1985) (citation omitted). "It has been defined as evidence which should fully convince." *Id.* (quotation marks and citation omitted).

The whole record test must be applied separately to the adjudicatory phase and the disposition phase. *Megaro*, 286 N.C. App. at 372. We

1. Although the new order of discipline does not include bad faith obstruction of justice among the factors considered, the DHC chairman explicitly noted during the hearing that the panel considered this factor in determining the appropriate discipline.

undertake a three-part inquiry to determine whether the DHC's decision has a rational basis in the evidence under the whole record test: "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *Talford*, 356 N.C. at 634. Plaintiff does not challenge any aspects of the adjudicatory phase, and we thus limit our review to the DHC's determination of the appropriate sanction for his misconduct.

"We review the DHC's imposition of sanctions for an abuse of discretion." *N.C. State Bar v. Merritt*, 285 N.C. App. 534, 554 (2022) (citation omitted). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Adams*, 239 N.C. App. at 493 (quotation marks and citation omitted).

Here, the order of discipline sets out findings of fact regarding discipline, including:

> 2. Defendant has significant experience in the practice of law, as he has been a licensed attorney for 25 years.
>
> 3. The failure to comply with tax obligations described herein is part of a pattern of misconduct: The tax liens of record against Defendant reflect that he was also delinquent in paying personal income taxes in 1998, 2000, 2001, 2003, 2004, 2005, 2006, 2008, and 2010.
>
> 4. Defendant's refusal to pay Zephir's income taxes as promised caused significant harm to Zephir: It was a financial hardship for her to pay the taxes that Defendant had agreed to be responsible for, and she had to travel to North Carolina from out of state to pursue legal action against Defendant.
>
> . . . .
>
> 7. Both the prosecutor and the presiding judge in the Langley case testified that they had never seen courtroom conduct by a lawyer that was as aggressive and disrespectful as Defendant's conduct during the Langley trial. . . .
>
> 8. Defendant acted with selfish and dishonest motive when he knowingly provided false information and false documentation to Navy Federal in connection with his mortgage loan application.

9. . . . Defendant was only partially cooperative with the State Bar's investigation of his misconduct, made false statements in response to State Bar inquiries, and gave testimony before the DHC that was not credible. . . .

. . . .

11. Senior Resident Superior Court Judge Winston Gilchrist testified that Defendant was a valued member of the Harnett County Bar and provided legal services to many indigent defendants in criminal matters. Judge Gilchrist also testified that Defendant served a unique and valuable role in his representation of a particular subset of that County's population. Judge Gilchrist also testified that although he had many interactions with Defendant during Defendant's years of practice (both as opposing counsel and as a judge), he never observed Defendant engage in inappropriate courtroom conduct. . . .

12. Defendant is an effective criminal defense lawyer and can be an asset to clients in that role.

13. Defendant has assisted those less fortunate in his community, and the best version of Defendant is a positive lawyer role model for young men.

14. Defendant experienced several major stressors during part of the time during which his misconduct occurred: In September 2019, one of Defendant's sisters died. In January 2020, another of Defendant's sisters died. In January 2021, Defendant's brother suffered serious injuries and has been substantially if not entirely dependent upon Defendant since that time.

15. Defendant has a history of professional discipline and criminal convictions . . . .

16. Defendant has not fully acknowledged that he violated the Rules of Professional Conduct, instead conceding some "technical" violations, and has been slow to express any remorse.

. . . .

18. During his testimony in the November 2024 hearing, Defendant characterized State Bar employees as liars, criticized the original members of the DHC Hearing Panel,

> and accused the Court of Appeals judges who rendered the opinion in this case of unethical conduct. This testimony indicates that Defendant continues to minimize responsibility for his actions, deflect blame, and attribute his situation to others' purported malfeasance rather than his own.

Based on these findings, the DHC concluded that the following factors listed in 27 N.C. Admin. Code 1B.0116(f)(1), which are to be considered in imposing suspension or disbarment, were applicable:

> (a) circumstances reflecting the Defendant's lack of honesty, trustworthiness, or integrity;
>
> (b) negative impact of Defendant's actions on clients or the public's perception of the profession;
>
> (c) negative impact of the Defendant's actions on the administration of justice;
>
> (d) effect of the Defendant's conduct on third parties; and
>
> (e) acts of dishonesty, misrepresentation, deceit, or fabrication.

The DHC also concluded that several factors listed in 27 N.C. Admin. Code 1B.0116(f)(2), which require consideration of disbarment, were present, including: acts of dishonesty, misrepresentation, deceit, or fabrication; impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts; commission of multiple felonies; and bad faith obstruction of the disciplinary process.

The DHC finally concluded that the following factors from 27 N.C. Admin. Code 1B.0116(f)(3), which are to be considered in all disciplinary cases, were present:

> (a) prior disciplinary offenses;
>
> (b) dishonest or selfish motive;
>
> (c) indifference to making restitution;
>
> (d) a pattern of misconduct;
>
> (e) multiple offenses;
>
> (f) effect of any personal or emotional problems on the conduct in question;

> (g) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
>
> (h) refusal to acknowledge wrongful nature of conduct;
>
> (i) character or reputation;
>
> (j) vulnerability of victim; and
>
> (k) degree of experience in the practice of law.

The DHC then made the following relevant conclusions regarding discipline:

> 6. Defendant has a successful criminal defense practice where Defendant has represented many indigent clients and has been a valuable member of the defense bar in not only representing indigents but giving them a complete defense.
>
> 7. Defendant has received prior discipline, but Defendant's prior discipline has not been a deterrent.
>
> 8. The Hearing Panel concludes that by complying with the conditions placed on Defendant by the original panel, Defendant could be a contributing member of the legal community he has served. The original panel concluded that, should Defendant satisfy all of the conditions contained in its order, he should have an opportunity to be a contributing member of the legal community, and this Hearing Panel, which is additionally charged with following the COA mandate, concludes that Defendant should retain an opportunity to return to the practice of law in the future.
>
> 9. Defendant experienced significant loss in his personal life during the period wherein the alleged misconduct occurred. . . .

After considering all forms of discipline available, the DHC concluded that "admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the harm and potential harm to the public, clients, the administration of justice, and the profession in the present case[,]" and that "a five-year suspension of Defendant's license to practice law, with an opportunity after three years to seek a stay of the remainder of the suspension upon compliance with conditions, is the appropriate discipline in this case."

By expressly setting forth its reasoning for imposing suspension rather than disbarment, the record shows that the DHC weighed the factors listed in 27 N.C. Admin. Code 1B.0116(f) in determining the appropriate discipline. We disagree with the DHC's decision not to disbar Defendant and invite the Supreme Court's review, but we cannot say that the DHC's evaluation of those factors was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *Adams*, 239 N.C. App. at 493. Accordingly, the DHC did not abuse its discretion by suspending, rather than disbarring, Defendant.

III. CONCLUSION

For the foregoing reasons, we affirm the DHC's order suspending Defendant from practicing law.

AFFIRMED.

Judge FLOOD concurs.

Judge MURRY concurs by separate opinion.

MURRY, Judge, concurring.

I concur in this opinion because it correctly acknowledges the broad discretion afforded to the DHC in its adjudicational and dispositional application of the whole-record test as a matter of law. *Accord N.C. State Bar v. DeMayo*, 292 N.C. App. 435, 439 (2024). But discernment accompanies that discretion, and in this respect I believe "the consequence here should be more than mere finger wagging." *In re Kimble*, 387 N.C. 462, 474 (2025) (Berger, J., concurring).

The record below fully documents the DHC's consideration of whether to rescind Defendant's law license; however, I struggle to comprehend how its allowance of a lifeline back into the State Bar and the practice of law does not contradict our profession's aspiration to self-regulation. Defendant here is credibly accused of offenses so baldly sanctionable that a typical lawyer only encounters them in a legal-ethics casebook, *e.g.*, Lisa G. Lerman, Philip G. Schrag, & Robert Rubinson, *Ethical Problems in the Practice of Law* (Aspen Casebook Sers., 5th ed. 2020), to wit[1]:

1. As the majority notes, a fuller recitation of these offenses can be found in our previous encounter with Defendant. *See N.C. State Bar v. Key*, 294 N.C. App. 372, 375–80 (2024).

(1) Underpaying (and even concealing) income taxes owed under State and Federal law over several years, *cf. id.* at 101–02 (citing *In re Walker*, 597 N.E.2d 1271, *modified*, 601 N.E.2d 327 (Ind. 1992)) ("disallowing practice by unfit lawyer[ ]" based on "criminal act . . . that reflects dishonesty");

(2) Commingling trust and personal funds without any bookkeeping, *cf. id.* at 552 n.151 (citing *In re O'Hagan*, 450 N.W.2d 571 (Minn. 1990) (disbarring lawyer for "possessi[ng] funds that belonged to his client [but] neither notif[ying] client nor distribut[ing] funds" (ellipses omitted));

(3) Disclosing confidential client information to an unrelated third party *qua* representative without permission, *cf. id.* at 251 (citing *In re Lehman*, 3 N.E.3d 536 (Ind. 2014) (suspending lawyer for two years based on confidential disclosures "that evidenced lack of competence and diligence");

(4) Disrupting the proceedings of his then-client's criminal trial so extensively as to merit a mistrial, *cf. id.* at 699 (citing *In re Abele*, 184 Wash. 2d 1 (2015) ("suspend[ing] from practice for a year" a lawyer who "often got angry in court when things did [not] go [her] way"); and

(5) Committing *mortgage fraud* to purchase his ex-girlfriend's house without her knowledge, *cf. id.* at 760 (citing *In re Sargent*, No. BD-2013-061 (Sup. Jud. Ct. Suffolk Cnty., Mass. 2013) (suspending Dean from legal practice for three years for "submit[ting] inflated LSAT scores and [GPAs] . . . to increase" his law school's *U.S. News & World Report* rankings).

Standing alone, any one of these offenses plausibly merits punishment short of disbarment. But taken together, they illustrate a pattern of conduct MPRE compilers would reject as too fanciful for a practice exam.

The legal profession's legitimacy rests on the public's trust in our ability to both police our own and expel bad actors. *Contra*, *e.g.*, *N.C. State Bar v. Ford*, No. 94 DHC 4, at 7–8 (N.C. Discply. Hear'g Comm'n 1994) (disbarring lawyer for "failing to preserve and maintain [clients'] funds," "failing to pay . . . 1991 county taxes," and "failing to adequately supervise" employees). I agree with the majority's abuse-of-discretion analysis as a matter of law and thus concur in its opinion. But I am nonetheless disappointed with the DHC's decision to give Defendant a

second (fourth?[2]) chance he does not deserve. He should reflect on that fact as he works to repair the damage of his actions to date.

PHILIP LEE ROESEL, PLAINTIFF
v.
ELIZABETH MAE WHITEMAN ROESEL, DEFENDANT

No. COA25-612

Filed 18 February 2026

1. Appeal and Error—interlocutory order—denial of motion to intervene—substantial right

In an equitable distribution action, where the primary dispute concerned the assets of an insurance brokerage company that the parties formed during their marriage, the Court of Appeals had jurisdiction to review the company's appeal from an order denying its motion to intervene in the action where, although the order was interlocutory, it was immediately appealable as affecting a substantial right.

2. Parties—intervention—as matter of right—equitable distribution action—insurance brokerage owned as marital property

In an equitable distribution action, in which the primary dispute concerned the assets of an insurance brokerage company that the parties formed during their marriage, the trial court properly denied the company's motion to intervene where the company failed to demonstrate an entitlement to intervene as a matter of right under Civil Procedure Rule 24(a)(2). The company alleged that plaintiff had used its property and records to form a competing business and, therefore, it had a direct interest in protecting its assets from further wrongful action by plaintiff in the equitable distribution action. However, the company failed to show how it would be better suited than the parties—the owners of the company, with defendant as its sole shareholder—to protect its assets, or how the valuation and distribution of those assets would impair its ability to protect

2. *See generally N.C. State Bar v. Key*, No. 02 DHC 22 (N.C. Discply. Hear'g Comm'n 2002) (first suspension); *N.C. State Bar v. Key*, No. 10 DHC 12 (N.C. Discply. Hear'g Comm'n 2010) (first censure); *In re Key*, No. 21 G 124 (N.C. Grievance Comm. 2021) (second censure).

its interests. Since the company shares were defendant's personal property, the court could classify, value, and distribute them without requiring the company to act as a party. Further, absent a showing that defendant's interests were adverse to the company's, or that defendant had engaged in any collusion or nonfeasance, the company failed to overcome the presumption that its interests were adequately represented by defendant.

Appeal by defendant from judgment entered 16 December 2024 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 28 January 2026.

Ward & Smith, P.A., by J. Albert Clyburn, Christopher S. Edwards, and Mark S. Wigley, for the plaintiff-appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III for the plaintiff-appellee.

Cranfill Sumner LLP, by Stephen J. Bell, and Chad E. Rhoades, for the intervenor-appellant-Fenix Contracting, Inc.

Mincey Bell Milnor, by Patrick M. Mincey for the intervenor-appellant-Fenix Contracting, Inc.

TYSON, Judge.

Fenix Contracting, Inc. ("Fenix") appeals from the trial court's order denying its motion to intervene in the equitable distribution action pending between Philip Lee Roesel ("Plaintiff") and Elizabeth Mae Whiteman Roesel ("Defendant"). We affirm.

I. Background

Plaintiff and Defendant were married in 2013 and separated on 12 October 2021. During their marriage, Plaintiff and Defendant formed Fenix, an insurance brokerage company. Fenix's business assists individuals to procure "Affordable Care Act" health insurance policies. Defendant is the sole "100% woman-owned" shareholder and serves as the company's president, while Plaintiff managed all the company's daily operations, customer and revenue generation, and business practices. Fenix acquired thousands of clients, raised substantial revenue, and its assets are the primary source of dispute in the equitable distribution action.

Plaintiff filed a verified complaint against Defendant on 8 June 2023, to assert claims for custody of the parties' minor child and equitable distribution of the marital property, including Fenix. Defendant answered, asserted a counterclaim, and sought equitable distribution.

The parties engaged in considerable litigation regarding Fenix. As the equitable distribution case progressed, Plaintiff moved on three occasions for the trial court to restrain or enjoin Defendant's ability to withdraw or dispose of funds held by Fenix. Those motions were denied.

Defendant and Fenix sued Plaintiff in a civil action in New Hanover County Superior Court on 18 October 2023. Defendant and Fenix alleged Plaintiff had formed a new corporation with a similar name, and had purportedly used Fenix's property and records to divert customers, agents, and business away from Fenix and to his new corporation. The complaint asserts claims for conversion, unfair and deceptive trade practices, civil liability for theft by employee/embezzlement, misappropriation of trade secrets, unjust enrichment, computer trespass, tortious interference with prospective contracts or economic advantage, and piercing the corporate veil.

The case was designated as a complex business case to establish jurisdiction in the North Carolina Business Court. The Business Court required Plaintiff to return certain business records and property belonging to Fenix by order entered 29 November 2023, but the court stayed further proceedings until the outcome of this equitable distribution action. *Roesel v. Roesel*, 2023 NCBC LEXIS 157 (November 29, 2023).

Fenix filed its motion to intervene in the equitable distribution action on 15 March 2024. The motion was heard before the trial court on 16 December 2024. The trial court concluded the "court can classify, value and distribute Fenix between the two existing parties to the action, without ordering Fenix itself to do anything (sell or buy assets, expand or contract advertising, etc[.])" and denied the motion. Fenix appeals.

II. Jurisdiction

[1] Interlocutory orders are generally not immediately appealable to invoke jurisdiction. *Duquesne Energy, Inc. v. Shiloh Indus. Contractors*, 149 N.C. App. 227, 229, 560 S.E.2d 388, 389 (2002). This Court has held a trial court's denial of a motion to intervene affects a substantial right. *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 2, 7, 753 S.E.2d 691, 696 (2014); *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 204 N.C. App. 55, 62, 693 S.E.2d 361 367 (2012). This Court has jurisdiction to review the trial court's ruling on a motion to intervene

pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) (an appeal of right lies from an interlocutory order of the superior or district court which "affects a substantial right"). This appeal is properly before us.

III. Standard of Review

This Court reviews the denial of a motion to intervene *de novo*. *Anderson*, 232 N.C. App. at 8, 753 S.E.2d at 697. Under *de novo* review, this Court considers "the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (citation and quotation marks omitted).

IV. Intervention of Right

[2] Rule 24 of the North Carolina Rules of Civil Procedure addresses both interventions as a matter of right and permissive interventions. N.C. Gen. Stat. § 1A-1, Rule 24 (2023). Fenix asserts it should have been permitted to intervene under subsection (a)(2) of the statute, which provides an applicant with an intervention of right

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (2023).

A. Fenix's Interest

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show . . . [:] (1) it has a direct and immediate interest relating to the property or transaction[;] (2) denying intervention would result in a practical impairment of the protection of that interest[;] and[,] (3) there is inadequate representation of that interest by existing parties." *Anderson*, 232 N.C. App. at 8, 753 S.E.2d at 697 (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 458-59, 515 S.E.2d 675, 682 (1999)). Fenix argues it meets these three criteria and the trial court should have permitted it to intervene as a matter of right in the equitable distribution action under Rule 24(a)(2). N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). We disagree.

Fenix asserts Plaintiff used Fenix's records, website, email addresses and industry reputation to form and operate a competing business, placed Fenix in a position of irreparable harm, and Fenix has a direct interest in protecting its assets from further wrongful action by

Plaintiff. Even if Plaintiff has caused harm to Fenix by his competing business, Fenix has failed to show how it would be better suited to protect its assets as a party to the equitable distribution litigation between the true owners thereof.

The trial court's function in an equitable distribution action is: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988) (citing *Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 856 (1985)). The trial court found and it is undisputed the ownership of Fenix is marital property and Defendant is the sole shareholder.

The trial court's role is limited to calculating the value of Fenix and distributing it, along with the remainder of the marital estate, among the parties. *Id*. Fenix has failed to show how the valuation and distribution of the company's assets might, as a practical matter, impair or impede its ability to protect its interests. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (2023). This argument is overruled.

Fenix also claims an interest in the equitable distribution action, because a distributive award may force it to take action, such as issue shares or transfer assets to Plaintiff. *See Campbell v. Campbell*, 241 N.C. App. 227, 231, 773 S.E.2d 93, 96 (2015) ("[W]here a separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act."). We disagree.

If Fenix is distributed to Plaintiff, it would not be required to issue shares. All of the Fenix shares are the sole individual property of Defendant "not the property of the corporation." *Brown v. Jackson*, 179 N.C. 363, 368, 102 S.E. 739, 742 (1920). Any distributive award which grants Plaintiff shares in Fenix would require only for Defendant to assign or transfer her shares to Plaintiff. *Id*. Fenix's assets and liabilities, including cash accounts and debts, establish the value of Defendant's shares. When the trial court distributes those shares, it will do so by "using [their] net value." N.C. Gen. Stat. § 50-20(c) (2023). The shares are Defendant's personal property, in which Fenix has no interest, and of which the court found it "can classify, value and distribute" as it would any other personal property of the parties. *See Brown*, 179 N.C. at 368, 102 S.E. at 742.

Fenix cites this Court's decisions in *Campbell*, 241 N.C. App. 227, 773 S.E.2d 93 and *Geoghagan v. Geoghagan*, 254 N.C. App. 247, 803

S.E.2d 172 (2017) to support its argument. In both cases, this Court opined a closely held business was a necessary party, requiring the trial court to include the business in the equitable distribution proceeding. In *Campbell*, the Court determined the LLC at issue was a necessary party because the trial court had directed and ordered it to distribute $350,000 cash to one of the former spouses. 241 N.C. App. at 239-30, 773 S.E.2d at 95. The Court held "[b]ecause [the LLC] was not made a party to the present action, the trial court did not have the authority to exercise control over [it]" and vacated the preliminary injunction order. *Id.* at 232, 773 S.E.2d at 96.

Likewise, in *Geoghagan*, this Court determined the corporation at issue and its subsidiaries were necessary parties because the equitable distribution order had prohibited it from paying one of the former spouses his regular salary. 254 N.C. App. at 251, 803 S.E.2d at 176. In both cases, and unlike the case before us, the entities being joined was necessary because the trial court's distributive award ordered them to take, or to refrain from taking, action as an entity. Fenix has not demonstrated the reasonable likelihood of a scenario where the court would require authority over it, and to compel intervention as a party, in order, as the trial court found, for it to "classify, value and distribute" the marital estate between the parties. *Brown*, 179 N.C. at 368, 102 S.E.2d at 742.

B. Adequate Representation

A proposed intervenor must also show there is an inadequate representation of its interest by the existing parties. *Anderson*, 232 N.C. App. at 8, 753 S.E.2d at 697. When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises its interests are adequately represented, against which the petitioner must demonstrate an adversity of interest, collusion, or nonfeasance. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (citing *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844, 845 (5th Cir. 1973)).

While Fenix has not succinctly identified its ultimate objective in the outcome of the case, it appears from the record and claims against Plaintiff are to preserve and protect its business. Fenix has produced nothing tending to show its interests are adverse to Defendant, or any collusion or nonfeasance exists. *Id.* Fenix's sole shareholder is a party to the equitable distribution proceeding and Fenix was also represented before the trial court by her counsel. Presuming Fenix had shown a direct and immediate interest in the action, it failed to meet its burden to overcome the presumption its interests are adequately represented by Defendant. *Id.*

V. Conclusion

The trial court properly concluded Fenix has not demonstrated and does not have an intervention of right under Rule 24. N.C. Gen. Stat. § 1A-1, Rule 24. We affirm the trial court's order denying Fenix's motion to intervene in the equitable distribution action between Plaintiff and Defendant. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge CARPENTER concur.

TERESA SLOAN-OUDEH, PLAINTIFF
v.
STATE FARM FIRE AND CASUALTY COMPANY, A STOCK COMPANY WITH HOME OFFICES IN BLOOMINGTON, ILLINOIS, DEFENDANT

No. COA25-636

Filed 18 February 2026

Attorneys—motion to disqualify—plaintiff's attorney—likely necessary witness at trial—Rule 3.7—exceptions inapplicable

In an action filed against a fire and casualty insurance company (defendant) following a dispute over plaintiff's claim for water damage to her home, the trial court did not abuse its discretion by disqualifying plaintiff's counsel from representing her at trial. The court found that the attorney would likely be a necessary witness at trial, since it was the attorney—not plaintiff—who was primarily involved in handling and communicating with defendant about plaintiff's insurance claim. Further, none of the exceptions to Rule 3.7 of the Rules of Professional Conduct—precluding lawyers from acting as an advocate at trials in which they are likely to be necessary witnesses—applied here, where: much of the attorney's testimony would concern contested issues raised in plaintiff's complaint; this testimony would likely not relate to the nature and value of legal services rendered in the case; and, given that defendant repeatedly notified the attorney that he may be called to testify as a necessary witness, and that the attorney had ample time to hand over plaintiff's case to another lawyer at his firm (some of whom were already familiar with and had assisted on the case), disqualifying the attorney would not work substantial hardship on plaintiff.

Appeal by Plaintiff from order entered 2 May 2025 by Judge Paul A. Holcombe, III, in Johnston County Superior Court. Heard in the Court of Appeals 20 November 2025.

Brent Adams & Associates, by Brenton D. Adams, for Plaintiff-Appellant.

Butler Snow, LLP, by Scott Lewis and Diane Pappayliou, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Teresa Sloan-Oudeh appeals from an order granting Defendant's motion to disqualify counsel and denying Plaintiff's motion to quash. Plaintiff argues there is a lack of evidence to support the motion to disqualify counsel and she will be irreparably harmed by the granting of this motion. For the following reasons, we affirm the trial court's order.

I. Factual and Procedural Background

On 28 June 2021, Plaintiff reported a claim to Defendant State Farm Fire and Casualty Company for water damage to her home in Benson, North Carolina. About three months later, Defendant fully denied Plaintiff's claim. Since Plaintiff and Defendant disagreed on the applicable scope of damage, the necessary repairs, and what damage was covered in the insurance policy, Plaintiff hired counsel, Brenton Adams, to assist with the claim. After sending Defendant his letter of representation, Adams became Defendant's point of contact.

From the beginning of 2022 to early 2023, Defendant negotiated the cost of a tear-in wall inspection with Adams. Ultimately, Defendant sent two insurance adjusters to Plaintiff's home to analyze the hole where Plaintiff had removed a portion of sheetrock, as requested by Defendant. The adjusters then determined that a sudden water leak indeed occurred at Plaintiff's home, but preexisting conditions contributed to the damage caused by the water leak and Plaintiff failed to mitigate the damage. Consequently, Defendant issued payments to Plaintiff strictly for the damage directly caused by the sudden water leak.

On 18 September 2023, Plaintiff filed a complaint by and through Adams. Plaintiff alleges Defendant breached its contract with Plaintiff, committed unfair and deceptive acts, acted in bad faith, and proceeded in such a manner as to give rise to punitive damages. Within her complaint,

Plaintiff alleges Defendant ignored her claim, delayed its response, and more. Defendant filed its answer on 19 December 2023.

Plaintiff testified that she only had limited communication with Defendant after hiring Adams and that Adams was the one who coordinated the claim investigation with Defendant. Further, Plaintiff asserted Adams and Greg Bagley, Plaintiff's contractor, were the ones who primarily communicated with Defendant concerning the tear-in inspection.

After considerable discovery, on 6 December 2024, Defendant moved for summary judgment on all of Plaintiff's claims. A few weeks later, the trial court denied Defendant's summary judgment motion. Upon this denial, on 8 January 2025, Defendant informed Adams that Adams is likely a necessary witness for trial. Moreover, in March 2025, Defendant identified Adams as a witness it intended to call at trial.

On 11 March 2025, Defendant notified Adams it was going to move to disqualify him as Plaintiff's counsel. Defendant then issued a subpoena to Adams, requesting his appearance to testify at the trial. Four days later, Plaintiff filed a motion to quash the subpoena. On 27 March 2025, Defendant filed its motion to disqualify Adams as Plaintiff's attorney. On the scheduled trial date, Plaintiff filed her response to Defendant's motion.

The trial court granted Defendant's motion to disqualify Adams and denied Plaintiff's motion to quash. Plaintiff timely appeals.

II. Analysis

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). A party is only entitled to appeal from an interlocutory order disqualifying her counsel when the order deprives the party of a substantial right which would be lost without review before a final determination. *Id.* at 726, 392 S.E.2d at 736. A party ordinarily has a fundamental right to select his or her attorney in a lawsuit. *Id.*

" 'Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal.' " *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003) (citation omitted). Thus, a trial court's disqualification decision may only be reversed upon a showing that its decision was manifestly unsupported by reason or so arbitrary that it could not have been produced by reasoned decision. *Rosenthal Furs, Inc. v. Fine*, 282 N.C. App. 530, 536, 871 S.E.2d 153, 157 (2022) (citation omitted).

North Carolina Rules of Professional Conduct state, in Rule 3.7:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

N.C. R. Prof. Conduct 3.7.

Here, while Plaintiff appeals from an interlocutory order, we review her appeal because her Plaintiff's counsel's disqualification deprives her of the right to choose her representation.

In granting the motion to disqualify Plaintiff's counsel and denying the motion to quash, the trial court determined Adams is likely to be a necessary witness. Plaintiff admits she lacks direct knowledge of much of the communications between State Farm and Adams. Moreover, Plaintiff testified Adams and Bagley were the two people privy to the communications about the tear-in wall inspection. Also, Plaintiff's complaint rests heavily on Adams' chief involvement in handling the claim. Therefore, we cannot say the trial court abused its discretion deciding to disqualify Adams because he is likely to be a necessary witness.

Rule 3.7's exceptions are not so apparent to show the trial court abused its discretion. First, Adams' anticipated testimony involves more than a year's worth of communication with Defendant, especially concerning details of the tear-in inspection. Plaintiff alleges Defendant continually ignored Plaintiff's claim and suspended its response. Such allegations could contribute to contested issues of bad faith, unfair and deceptive trade practices, and punitive damages. Further, Adams' testimony, which will concern negotiations and communications with Defendant concerning the insurance claim, will not relate to the nature and value of legal services rendered in the case.

While the trial court disqualified Adams, it did not disqualify Adams' firm. In fact, other attorneys at Adams' firm have previously assisted Plaintiff in a deposition, mediation, and hearing in this case. Moreover, Defendant notified Adams multiple times over multiple months that he may be a necessary witness and that Defendant may call Adams as a witness. These notifications provided Adams with time to prepare in handing over the case to another attorney. In consideration of other attorneys

familiar with this case and Adams' understanding of potentially being called as a witness, the trial court's decision that disqualification would not be a substantial hardship on the client was not so arbitrary that it could not have been produced by reasoned decision.

The trial court was within its reasoned discretion to grant the motion to disqualify Plaintiff's counsel.

III. Conclusion

As the trial court did not abuse its discretion, we affirm its granting of the motion to disqualify and denying the motion to quash.

AFFIRMED.

Judges MURRY and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
SHANTINA NICOLE ALSTON

No. COA25-291

Filed 18 February 2026

1. Appeal and Error—preservation of right to appeal—denial of motion to suppress—guilty plea—notice of intent to appeal

On appeal from a judgment entered upon an *Alford* plea to driving while impaired, the appellate court had jurisdiction to review the trial court's denial of defendant's pretrial motion to suppress. Although defendant's right to appeal was circumscribed by statute because she entered a guilty plea, defendant properly gave notice before plea negotiations were finalized of her intent to appeal both the judgment entered upon her conviction and the denial of her motion to suppress.

2. Search and Seizure—motion to suppress—toxicology report—probable cause—evidentiary support

In a prosecution for driving while impaired, the trial court properly denied defendant's pretrial motion to suppress the results of a toxicology test measuring defendant's blood alcohol level, where sufficient competent evidence in the form of a law enforcement officer's testimony and bodycam footage supported the trial court's

findings of fact, including that defendant: exhibited bad driving when she almost hit the officer with her car; used the car door for balance when exiting the vehicle; had slurred speech; had a strong odor of alcohol and red, glassy eyes; admitted to driving on the date in question; and refused to perform field sobriety testing. Given the totality of the circumstances, the officer had probable cause to arrest defendant for driving while under the influence of an intoxicating substance.

3. Appeal and Error—appellate jurisdiction—denial of motion in limine—guilty plea—no statutory right to appeal

In a prosecution for driving while impaired, the appellate court lacked jurisdiction to review the denial of defendant's motion in limine (to exclude a toxicology report and expert testimony) because defendant entered a guilty plea to the charge, which limited her right to appeal. By statute, defendant was not entitled to appeal from an improper denial of a motion in limine and she did not request review by writ of certiorari; therefore, this portion of defendant's appeal was dismissed.

Appeal by defendant from judgment entered 31 January 2024 by Judge Andrew Hanford in Alamance County Superior Court. Heard in the Court of Appeals 13 January 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Liliana R. Lopez, for the State.

Cooper Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Shantina Nicole Alston appeals from the trial court's judgment entered upon her *Alford* plea to driving while impaired.[1] On appeal, Defendant argues that the trial court erred by denying her pretrial motion to suppress and motion in limine. After careful review, we conclude that the trial court did not err by denying Defendant's motion

1. "A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *State v. Crawford*, 278 N.C. App. 104, 105 n.1, 861 S.E.2d 18, 21 n.1 (2021) (cleaned up), *disc. review denied*, 382 N.C. 728, 879 S.E.2d 582 (2022); *see also North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

to suppress and that this Court lacks jurisdiction to review the court's order denying Defendant's motion in limine.

I. Background

In Alamance County District Court, Defendant was found guilty of driving while impaired. On 2 March 2023, Defendant appealed this judgment to Alamance County Superior Court.

On 24 January 2024, Defendant filed a motion in limine to exclude a toxicology report of her blood and any related documentation as well as the testimony of certain expert witnesses. On 29 January 2024, Defendant filed a motion to suppress "all evidence against her beyond arrest in this matter and dismiss the charges against her." These motions came on for hearing on 30 January 2024 in Alamance County Superior Court.

At the hearing, Officer Jack Snow of the Burlington Police Department testified to the following: On 9 October 2021, he responded to a call regarding "a physical altercation possibly involving some firearms" at the Pho Bar. Officer Snow arrived at the Pho Bar, parked, and began walking toward the front of the establishment. As he was walking, a car driven by Defendant "came from [Officer Snow's] left side [at] approximately 10 to 15 miles per hour[,] driving straight at [him]." The car's trajectory "caused [him] to have to move to the left to avoid being hit by the vehicle."

Defendant stopped and Officer Snow asked her to exit the vehicle. Officer Snow testified that "she had slurred speech" and her "eyes were glossy, yellow[,] and hazed over." He noted that "[t]here was immediately a strong odor of alcoholic beverage coming from [Defendant]'s breath and from the vehicle." Defendant admitted that she had been at the Pho Bar and, when Officer Snow asked how many drinks she had consumed, Defendant responded: "Not much at all." Defendant submitted to a portable breathalyzer test but "refused or did not wish to complete any" field sobriety tests and Officer Snow placed Defendant under arrest.[2] Footage of the encounter from Officer Snow's bodycam was admitted into evidence as State's Exhibit No. 1 and played for the court. The court then heard the arguments of counsel and orally denied Defendant's motion to suppress.

At the hearing, the trial court also addressed Defendant's motion in limine. The court heard the arguments of counsel and orally denied the motion.

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2. Defendant submitted to field sobriety tests after being placed under arrest.

The trial court accepted Defendant's *Alford* plea on 31 January 2024; pursuant to the plea arrangement, Defendant agreed to plead guilty to driving while impaired and reserved the right to appeal the denial of her pretrial motion to suppress "all evidence against her beyond arrest" and the denial of her motion in limine to exclude the toxicology report, any related documentation, and certain expert witness testimony. That same day, the court entered judgment sentencing Defendant to 60 days' imprisonment in the custody of the North Carolina Department of Adult Correction and suspending her sentence for 18 months of supervised probation.

Defendant gave oral notice of appeal. The trial court entered written orders on 1 February 2024, recording its findings of fact and conclusions of law pursuant to its oral denial of Defendant's pretrial motion to suppress and motion in limine.

II. Discussion

Defendant argues that the trial court erred by denying her pretrial motion to suppress and motion in limine.

A. Motion to Suppress

First, Defendant asserts that "[t]he trial court erred by denying [her] motion to dismiss for lack of probable cause based on the unsupported observations of Officer Snow."[3] We disagree.

1. Appellate Jurisdiction

[1] We initially address whether this Court has jurisdiction over Defendant's appeal from the superior court's judgment. "The superior court has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless she is first tried, convicted and sentenced in district court and then appeals that judgment for a trial de novo in superior court." *State v. McNeil*, 262 N.C. App. 497, 500, 822 S.E.2d 317, 321 (2018) (cleaned up), *disc. review denied*, 372 N.C. 718, 831 S.E.2d 91 (2019), *cert. denied*, 590 U.S. 907, 206 L. Ed. 2d 827 (2020). Here, Defendant was tried, convicted, and sentenced in Alamance Court District Court and she timely appealed from district court to superior court. After her conviction in superior court, Defendant timely appealed to this Court.

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3. We note that Defendant initially identifies this pretrial motion as a motion to *dismiss*. However, given our review of the record and the remainder of Defendant's appellate argument on this issue, we conclude that the motion is most properly characterized as a motion to *suppress*.

Next, "we note that although the written [superior court] order denying [D]efendant's motion to suppress was entered after [D]efendant orally appealed the denial of her motion to suppress, the trial court had jurisdiction to enter the written order, and it is properly before this Court." *State v. Jordan*, 242 N.C. App. 464, 468, 776 S.E.2d 515, 518, *disc. review denied*, 368 N.C. 358, 778 S.E.2d 85 (2015). Additionally, Defendant was not required to file an amended notice of appeal after entry of the trial court's written order. *See id.* at 469, 776 S.E.2d at 518-19 (concluding that this Court had jurisdiction where the defendant gave notice of appeal after the trial court rendered its oral ruling but before the court entered its written judgment); N.C. R. App. P. 4(a)(1), (2).

Moreover, a defendant who has pleaded guilty must properly preserve her right to appeal an order denying a motion to suppress. "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Hannah*, 299 N.C. App. 266, 271, 917 S.E.2d 904, 909 (citation omitted), *disc. review denied*, 388 N.C. 743, 923 S.E.2d 236 (2025). "Generally, a defendant who pleads guilty does not have a statutory right of appeal. However, the General Assembly has, by statute, allowed a defendant to appeal an adverse ruling in a pretrial suppression hearing despite the defendant's conviction based upon a guilty plea." *State v. Moua*, 289 N.C. App. 678, 683, 891 S.E.2d 14, 19 (2023) (citation omitted), *disc. review denied*, 386 N.C. 280, 900 S.E.2d 671 (2024); *see* N.C. Gen. Stat. § 15A-979(b) (2023) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.").

"This statutory right to appeal is conditional and not absolute." *Moua*, 289 N.C. App. at 683–84, 891 S.E.2d at 19. As our Supreme Court has determined, "when a defendant intends to appeal from a denial of a motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b)," the defendant "must give notice of [his or her] intent to the prosecutor and the court *before plea negotiations are finalized*, or [the defendant] will waive the appeal of right provisions of the statute." *Id.* at 684, 891 S.E.2d at 19 (citing *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980)).

In the instant case, Defendant properly gave notice of her intent to appeal both the judgment entered upon her conviction and the denial of her motion to suppress, as evidenced by the transcript of the hearing below. Accordingly, this issue was properly preserved for appellate review, and we will address its merits. *See State v. Stephens*, 300 N.C. App. 208, 213, 920 S.E.2d 238, 242 (2025) (concluding that the defendant

preserved appellate review of the denial of his motion to suppress where he "gave notice of his intention [to appeal] to the prosecutor and to the court before plea negotiations were finalized, demonstrated by [the d]efendant's preservation of his right to appeal in the transcript of the plea" (cleaned up)).

2. Standard of Review

"In reviewing a trial court's determination on a motion to suppress, the trial court's findings of fact are conclusive on appeal if supported by competent evidence." *State v. Springs*, 292 N.C. App. 207, 214, 897 S.E.2d 30, 36 (2024) (cleaned up). "A trial court's conclusions of law . . . are reviewed de novo and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (cleaned up).

3. Analysis

[2] "Motions to suppress necessarily present preliminary questions concerning the admissibility of evidence: whether there is both a factual and legal basis to exclude the evidence at issue." *State v. Ezzell*, 277 N.C. App. 276, 282, 858 S.E.2d 375, 379–80 (2021), *appeal dismissed*, 381 N.C. 277, 871 S.E.2d 528 (2022).

> A person commits the offense of impaired driving if he [or she] drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he [or she] has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration.

N.C. Gen. Stat. § 20-138.1(a)(1), (2).

Our Supreme Court has explained the meaning of the phrase "under the influence":

> A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he [or she] has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him [or her] to lose the normal

> control of his [or her] bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties.

State v. Parisi, 372 N.C. 639, 649–50, 831 S.E.2d 236, 243–44 (2019) (cleaned up).

"A person is appreciably impaired when [his or her] impairment can be recognized and estimated." *State v. Venable*, 299 N.C. App. 788, 793, 919 S.E.2d 343, 348 (2025) (cleaned up).

"Before arresting a person, an officer must have probable cause to suspect him [or her] of a crime at the time of the arrest." *State v. Woolard*, 385 N.C. 560, 570, 894 S.E.2d 717, 725 (2023) (cleaned up). "According to well-established federal and state law, probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Parisi*, 372 N.C. at 650, 831 S.E.2d at 244 (cleaned up); *see also Woolard*, 385 N.C. at 571, 894 S.E.2d at 726 ("[T]he key question is whether a reasonable officer would find a supported, good faith, and objectively rational basis to suspect a person of a crime." (cleaned up)). "An officer has probable cause to arrest for impaired driving when, under the totality of the circumstances, he reasonably believes that a motorist consumed alcoholic beverages and drove in a faulty manner or provided other indicia of impairment." *Woolard*, 385 N.C. at 571, 894 S.E.2d at 726 (cleaned up).

In the case at bar, Defendant challenges certain findings made by the trial court in its written order denying her pretrial motion to suppress: (1) "[D]efendant exhibited bad driving in that she almost hit [Officer Snow] with the vehicle in the parking lot"; (2) "the strong odor of alcohol coming from . . . [D]efendant"; (3) "[D]efendant us[ed] the car door for balance"; (4) "[D]efendant's slurred speech"; (5) "[D]efendant's red, glassy eyes"; (6) "[D]efendant's admission to drinking prior to driving on the date in question"; and (7) "[D]efendant's refusal to perform field sobriety testing." She asserts that these "subjective observations" did not provide Officer Snow with probable cause to arrest her for driving while impaired.

"Appellate courts accord great deference to the trial court when reviewing findings of fact because the trial court is entrusted with the duty to hear testimony, weigh the evidence, and resolve any conflicts in the evidence." *State v. Hagaman*, 292 N.C. App. 194, 198, 897 S.E.2d

163, 166 (2024) (cleaned up). Thus, even where "there is evidence in the record to support a contrary finding," the trial court's findings are binding on appeal if supported by any competent evidence. *State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002).

a. "[D]efendant exhibited bad driving in that she almost hit [Officer Snow] with the vehicle in the parking lot."

First, Defendant argues that the court's finding that she "exhibited bad driving in that she almost hit [Officer Snow] with the vehicle in the parking lot" was "not supported by the record because his testimony directly contradicts his bodycam footage in material respects." Officer Snow testified that as he was walking toward the Pho Bar, Defendant's vehicle "came from [his] left side [at] approximately 10 to 15 miles per hour[,] driving straight at [him], which caused [him] to have to move to the left to avoid being hit by the vehicle." However, Defendant merely describes that event as it played out on the bodycam footage and does not explain how the court's finding differed from the footage. Our review of the bodycam footage aligns with Officer Snow's testimony. Accordingly, we conclude that both Officer Snow's testimony and the bodycam footage support the trial court's finding that "[D]efendant exhibited bad driving in that she almost hit [Officer Snow] with the vehicle in the parking lot."

b. "[D]efendant us[ed] the car door for balance."

Next, Defendant asserts that Officer Snow's bodycam footage did not support the finding that she "us[ed] the car door for balance." Officer Snow testified that Defendant had "to continually hold on to the door handle to stand straight." The bodycam footage shows Defendant holding the vehicle handle and touching various places on the car door after she exited the car and started speaking with Officer Snow. As they spoke, Defendant repeatedly adjusted her footing. This footage, coupled with Officer Snow's testimony, supports the trial court's finding that "[D]efendant us[ed] the car door for balance."

c. "[D]efendant's slurred speech."

Defendant contends that the bodycam footage does not support a finding that she "had slurred speech, particularly without any evidence of how she normally speaks." Officer Snow testified that when he interacted with Defendant, "she had slurred speech" and "[w]as very mush mouth." During cross and redirect examinations, he repeatedly confirmed that Defendant exhibited "slurred speech" throughout their interaction. Officer Snow's testimony supports the finding that Defendant had "slurred speech."

d. "[T]he strong odor of alcohol coming from . . . [D]efendant" and "[D]efendant's red, glassy eyes."

Defendant does not specifically challenge the evidence supporting the court's findings of "the strong odor of alcohol coming from . . . [D]efendant" and "[D]efendant's red, glassy eyes" but asserts that "these findings alone do not support probable cause under these circumstances."

Officer Snow testified that Defendant's "eyes were glossy, yellow[,] and hazed over" and "[t]here was immediately a strong odor of alcoholic beverage coming from [Defendant]'s breath." Both of these observations contributed to Officer Snow's opinion that Defendant was appreciably impaired. On cross-examination, Officer Snow confirmed that Defendant's eyes were "bloodshot and glassy, red." The trial court's findings concerning a strong odor of alcohol coming from Defendant and the condition of her eyes are therefore supported by competent evidence. Moreover, contrary to Defendant's argument on appeal, these findings do not constitute the sole support for the trial court's determination of probable cause; the court's conclusion of law is buttressed by multiple other findings addressed herein.

e. "[D]efendant's admission to drinking prior to driving on the date in question."

Officer Snow testified that when he spoke to Defendant, "[s]he advised that she had had several drinks at [the Pho Bar] that night." Defendant argues that she "did not make this admission" but instead, as shown by Officer Snow's bodycam footage, "she only stated 'not much at all' " when he asked her if she had been drinking. On cross-examination, Officer Snow conceded his misstatement. Regardless, the trial court found that Defendant admitted "to drinking prior to driving on the date in question." Accordingly, both Officer Snow's testimony and the bodycam footage support this finding, which notably *does not address how much alcohol Defendant had consumed*. Defendant's challenge to this finding, therefore, lacks merit.

f. "[D]efendant's refusal to perform field sobriety testing."

Next, Defendant argues that the trial court erred by finding as a factor her "refusal to perform field sobriety testing." Bodycam footage shows Officer Snow asking Defendant, "Would you be willing to do any tests for me?" to which Defendant immediately responded, "No, like seriously - - like, why would I?" The footage then shows Officer Snow placing Defendant under arrest. After Defendant was placed under arrest,

she consented to the tests. During the hearing, Officer Snow stated that "prior to advising [Defendant] that she was under arrest I did ask her to complete standardized field sobriety tests and at that time she refused or did not wish to complete any of the tests." This finding was supported both by Officer Snow's testimony and the bodycam footage.

In sum, competent evidence supports each of the challenged findings of fact. The trial court's findings are thus binding on appeal. *Springs*, 292 N.C. App. at 214, 897 S.E.2d at 36.

Moreover, probable cause to arrest for impaired driving is determined by the totality of the circumstances. *See Woolard*, 385 N.C. at 575, 894 S.E.2d at 728–29 (cleaned up) (concluding that a State Highway Patrol Officer had probable cause to arrest a defendant for impaired driving due to the defendant's "erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test"). Here, under the totality of the circumstances, Officer Snow had probable cause to arrest Defendant for impaired driving. Thus, the trial court properly denied Defendant's pretrial motion to suppress. Defendant's challenge is overruled.

B. Motion in Limine

[3] Next, Defendant contends that "[t]he trial court erred by denying [her] motion in limine to exclude her toxicology report and expert testimony." However, we lack jurisdiction to review this issue.

1. Appellate Jurisdiction

As stated above, "[i]n North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute," *Hannah*, 299 N.C. App. at 271, 917 S.E.2d at 909 (citation omitted), and a defendant who pleads guilty has no statutory right of appeal, subject to limited exception, *see Moua*, 289 N.C. App. at 683, 891 S.E.2d at 19.

A "defendant who pleads guilty has a right of appeal limited to the following":

> 1. Whether the sentence "is supported by the evidence." This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range . . . ;
>
> 2. Whether the sentence "results from an incorrect finding of the defendant's prior record level under [N.C. Gen. Stat. §] 15A-1340.14 or the defendant's prior conviction level under [N.C. Gen. Stat. §] 15A-1340.21[ ]" . . . ;

3. Whether the sentence "contains a type of sentence disposition that is not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and prior record or conviction level[ ]" . . . ;

4. Whether the sentence "contains a term of imprisonment that is for a duration not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and prior record or conviction level[ ]" . . . ;

5. Whether the trial court improperly denied [the] defendant's motion to suppress . . . ;

6. Whether the trial court improperly denied [the] defendant's motion to withdraw his guilty plea.

State v. Tinney, 229 N.C. App. 616, 619–20, 748 S.E.2d 730, 733 (2013) (cleaned up) (citing N.C. Gen. Stat. §§ 15A-979, 15A-1444). The improper denial of a motion in limine is not one of the enumerated instances for which a defendant who has pleaded guilty has the right of appeal.

In the present case, Defendant seeks appellate review of the court's order denying her motion in limine—review to which she is not statutorily entitled. Nonetheless, in such a circumstance, a defendant "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e). Here, however, Defendant has not filed a petition for writ of certiorari. Accordingly, we lack jurisdiction to review this issue, and we must dismiss this portion of Defendant's appeal.

III. Conclusion

For the foregoing reasons, we conclude that 1) the trial court did not err by denying Defendant's pretrial motion to suppress, and 2) we lack jurisdiction to review the court's order denying Defendant's motion in limine.

NO ERROR IN PART; DISMISSED IN PART.

Judges COLLINS and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
DUSTIN NEAL COOKE, DEFENDANT

No. COA25-527

Filed 18 February 2026

Constitutional Law—competency to stand trial—prior adjudication of incompetency—no order restoring competency—new trial granted

In a prosecution for felony larceny, felony possession of stolen goods, and felony conspiracy to commit felony larceny, where a prior judicial incompetency order had been entered and remained in effect, the trial court violated defendant's constitutional due process right not to be tried while incompetent by proceeding to trial without holding a new competency hearing or entering findings restoring competency. Where the record did not permit a retrospective determination of defendant's competency at the time of trial—although defendant had been deemed competent after a second evaluation, that report was not adopted by the trial court and, moreover, a substantial amount of time had passed between that evaluation and trial—defendant's convictions were vacated and the matter was remanded for a new trial upon a judicial determination of defendant's competency.

Appeal by defendant from judgment entered 11 December 2024 by Judge George Cooper Bell in Caldwell County Superior Court. Heard in the Court of Appeals 19 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State-appellee.

Nelson Mullins Riley & Scarborough LLP, by Jeffrey A. Wald, for defendant-appellant.

GORE, Judge.

Defendant Dustin Neal Cooke appeals from judgment entered upon jury verdicts finding him guilty of felony larceny, felony possession of stolen goods, and felony conspiracy to commit felony larceny. This Court has jurisdiction pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a),

which provide for appellate review of final criminal judgments of the superior courts.

The case presents two interlocking questions: (1) whether a prior judicial incompetency order remains operative absent an express judicial finding restoring competency, and (2) whether the trial court's failure to hold a new competency hearing or issue findings violated due process and N.C.G.S. § 15A-1002. Because the record contains an unvacated order adjudicating defendant incompetent to proceed and no subsequent judicial determination of restored competency, we conclude that the trial court erred by proceeding to trial and entering judgment without first determining that defendant's competency had been restored. Accordingly, the proper remedy is to vacate defendant's convictions and remand for a new trial upon a judicial determination that defendant is competent to proceed.

I.

On 13 March 2023, defense counsel moved for a forensic evaluation of defendant, stating that defendant was not taking prescribed medication, exhibited disorganized thoughts, appeared confused, and "at times does not seem to understand the gravity of [the] situation." The trial court granted the motion and appointed a certified forensic evaluator.

After two subsequent orders were entered in April and May 2023 when the evaluation could not be completed because defendant could not be located, forensic evaluator Michelle Stroebel of Breathe Wellness Counseling PLLC conducted an evaluation on 23 May 2023. Ms. Stroebel opined that defendant was not competent to proceed, noting disorganized and delusional thought processes, impaired communication, poor understanding of his legal situation, and psychotic symptoms including delusions, confused speech, and social withdrawal.

Relying on that evaluation, the Honorable Steven Warren entered an order on 12 June 2023 finding defendant incompetent to proceed and directing that an updated evaluation be completed in September 2023.

A second evaluation was performed at Central Regional Hospital by Dr. Amy Leeper, who issued a report dated 11 March 2024. Dr. Leeper concluded that defendant was competent to proceed, though she acknowledged his prior psychotic symptoms and cautioned that substance use could negatively influence his ability to assist in his defense. The trial court, however, never issued an order adopting Dr. Leeper's report or finding defendant competent, nor did it make any oral finding of restored competency.

At an administrative hearing on 1 July 2024, the prosecutor asked whether "the last eval found that [defendant] was capable to proceed" and whether the court "need[ed] to go through anything in Chapter 15A." Defense counsel responded, "I don't think so." The court made no further inquiry or finding on competency.

Defendant's case was tried before the Honorable George C. Bell at the 10 December 2024 Criminal Session of Caldwell County Superior Court. The State presented evidence that catalytic converters had been removed from several vehicles at a local dealership and that police apprehended defendant in a nearby storage unit containing tools and extension cords matching those seen on surveillance video. The jury returned verdicts of guilty on all three charges.

At sentencing, the trial court arrested judgment on the possession-of-stolen-goods and conspiracy charges and imposed a mitigated sentence of five to fifteen months, suspended for thirty-six months of supervised probation. The court found in mitigation that defendant's "limited mental capacity at the time of the commission of the offense significantly reduced [his] culpability." Defendant filed timely notice of appeal on 17 December 2024.

II.

Defendant contends that the trial court erred by proceeding to trial without first holding a new competency hearing or entering findings restoring competency, as required by N.C.G.S. § 15A-1002 and the Due Process Clause of the Fourteenth Amendment. He argues that because the June 2023 order adjudicating him incompetent to proceed was never vacated or superseded by a subsequent judicial determination of competency, he remained legally incompetent at the time of trial. The State responds that any error was waived or forfeited because defendant did not request a hearing or object before trial, and that the March 2024 forensic report finding defendant competent effectively restored his capacity to proceed. The State further maintains that the trial court's reliance on that report, even without a written order, satisfied its statutory obligations and rendered any procedural omission harmless.

Because defendant's claims concern the trial court's alleged noncompliance with statutory requirements and alleged violations of constitutional due process, our review is de novo. *State v. Flow*, 384 N.C. 528, 546 (2023). Under this standard, we consider the matter anew and freely substitute our judgment for that of the trial court. *State v. Wilkins*, 386 N.C. 923, 928 (2024).

III.

A defendant may not be "tried, convicted, sentenced, or punished for a crime" if, "by reason of mental illness or defect he is unable to understand the nature and object of the proceedings[,] . . . comprehend his own situation" in relation to those proceedings, or "assist in his defense in a rational or reasonable manner." N.C.G.S. § 15A-1001(a) (2023). This statutory protection embodies a constitutional guarantee that is "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). A defendant who cannot rationally understand the proceedings or consult with counsel is, "though physically present in the courtroom, . . . in reality afforded no opportunity to defend himself." *Id.* Accordingly, "[f]ailure of the trial court to protect a defendant's right not to be tried or convicted while mentally incompetent deprives him of his due process right to a fair trial." *State v. McRae*, 139 N.C. App. 387, 389 (2000) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)).

Section 15A-1002 requires the trial court to conduct a hearing whenever a defendant's capacity to proceed is in question and to enter findings supporting its determination. N.C.G.S. § 15A-1002(b1) (2023). Although the statute does not explicitly state that an incompetency adjudication remains effective until vacated, our appellate decisions compel that conclusion. In *McRae*, the defendant had been found incompetent in several prior hearings and later deemed competent for a limited period before a mistrial. When the trial court retried him without a new competency hearing, this Court held that the omission violated due process and remanded for a retrospective determination of competency. 139 N.C. App. at 389–91. That holding presumes that a prior judicial finding of incompetence continues in effect until the court enters a subsequent finding of restored competency.

The State argues that defendant waived any further inquiry by failing to request a new hearing or object before trial. But North Carolina law distinguishes between the statutory right to a competency hearing—which may be waived—and the constitutional right not to be tried while incompetent—which may not. *State v. Wilkins*, 386 N.C. 923, 930–31 (2024). A defendant forfeits the statutory claim under § 15A-1002 by failing to raise it "in apt time," *id.*, but the constitutional protection arises directly from due process and cannot be lost through silence or consent, *Pate*, 383 U.S. at 384; *State v. Sides*, 376 N.C. 449, 457–58 (2020) (holding that even if the defendant failed to preserve her statutory right, she retained a constitutional due process right to a hearing). Consistent with these principles, *McRae* held that "defendant's failure to request a hearing or object . . . does not bar him from seeking relief on appeal."

139 N.C. App. at 391. That rule reflects the trial court's independent constitutional duty to act *sua sponte* whenever "substantial evidence . . . indicat[es] that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568 (1977). When a defendant remains under an unvacated order of incompetence, such evidence exists as a matter of law, and the court's duty to conduct a competency hearing is automatically triggered.

Accordingly, although defendant may have forfeited any statutory claim, he did not waive appellate review of his constitutional challenge. We recognize that defendant did not object below and that postconviction competency claims can appear to invite a "second bite at the apple." But where, as here, a prior adjudication of incompetence remains unvacated and no subsequent judicial finding of competency was entered, the trial itself proceeded without the prerequisite assurance of due process. The question is therefore not whether defendant should receive another opportunity to litigate an issue he abandoned, but whether he was ever afforded a constitutionally valid trial in the first instance. By proceeding to trial without conducting a new competency hearing or entering findings restoring competency, the trial court failed to discharge its constitutional obligation to ensure defendant's capacity to stand trial.

Having determined that the trial court erred by proceeding to trial without entering a judicial determination that defendant's competency had been restored, we next consider the appropriate remedy.

When a trial court fails to ensure a defendant's competency to proceed, a new trial is not automatically required if a meaningful retrospective determination of competency remains possible. *McRae*, 139 N.C. App. at 391–92. Such a determination, however, is permissible only where the trial court can reliably assess the defendant's competency at the time of trial based on contemporaneous evidence and prior judicial findings. *Id.*

This case does not permit such a retrospective determination. The trial court's last operative order, entered on 12 June 2023, adjudicated defendant incompetent to proceed. Although a subsequent forensic evaluation dated 11 March 2024 opined that defendant was competent, the trial court never adopted that evaluation or entered findings restoring competency. Defendant's trial did not commence until 10 December 2024, approximately nine months later.

Under these circumstances, any retrospective determination would necessarily rely on stale evidence or contradict the trial court's last judicial finding. Given the absence of a contemporaneous competency

determination and the substantial passage of time, the record does not permit a meaningful or reliable assessment of defendant's competency at the time of trial.

Accordingly, defendant's convictions must be vacated, and this matter remanded for a new trial upon a judicial determination that defendant is competent to proceed.

IV.

The trial court previously adjudicated defendant incompetent to proceed and thereafter conducted his trial without holding a new competency hearing or entering findings restoring competency. Because the court's duty to ensure a defendant's capacity arises from the constitutional guarantee of due process, that obligation could not be waived by silence or consent. The failure to conduct a new competency hearing or enter findings of restored capacity therefore violated defendant's constitutional right not to be tried while incompetent. Because the record does not permit a meaningful retrospective determination of defendant's competency at the time of trial, defendant's convictions are vacated, and this matter is remanded for a new trial upon a judicial determination that defendant is competent to proceed.

VACATED AND REMANDED FOR NEW TRIAL.

Judges CARPENTER and WOOD concur.

STATE OF NORTH CAROLINA
v.
RAYMOND RASHON CROWDER, DEFENDANT

No. COA25-384

Filed 18 February 2026

1. Jury—juror fitness—impartiality—inquiry before impanelment—statutory procedures followed—untimely challenge for cause

In a trial for firearm- and drug-related crimes where, before the jury was impaneled, the trial court reopened voir dire of a juror who had expressed concerns about her ability to remain impartial, the court did not abuse its discretion in choosing not to excuse the juror sua sponte. The court properly followed the statutory procedures (laid out in N.C.G.S. § 15A-1214(g)) for inquiring into the juror's fitness, allowing both parties to question the juror and determining that there was no basis for a challenge for cause. Further, because defendant did not challenge the juror for cause during the reopened voir dire, at which point he had not yet exhausted his peremptory challenges, defendant could not seek reversal on the ground that the court declined to sustain his challenge for cause lodged after the jury had been impaneled.

2. Constitutional Law—effective assistance of counsel—tactical decision or deficient performance—cold record insufficient

In an appeal from a final judgment convicting defendant of firearm- and drug-related crimes, defendant's claim for ineffective assistance of counsel—based on his trial attorney's failure to use a peremptory strike on a juror who had expressed concerns about her impartiality—was dismissed without prejudice (so defendant could raise the claim in a motion for appropriate relief before the trial court) where, based solely on the cold record, there was insufficient evidence to determine on direct appeal whether the attorney's decision was a matter of sound trial strategy or deficient performance.

Appeal by Defendant from judgment entered 28 June 2022 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 29 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Herman M. Little, Jr., for the State.

Reid H. Cater for defendant-appellant.

STADING, Judge.

Raymond Rashon Crowder ("Defendant") appeals from final judgment after a jury found him guilty of possession of a firearm by a convicted felon, carrying a concealed gun, and possession of marijuana up to one-half ounce. Defendant contends the trial court erred by allowing a juror to remain on the jury. Defendant also contends that he received ineffective assistance of counsel ("IAC"). After careful consideration, find no error and dismiss Defendant's IAC claim without prejudice.

I. Background

On 18 November 2019, the Forsyth County Grand Jury returned true bills of indictment charging Defendant with possession of a firearm by a convicted felon, having attained habitual felon status, carrying a concealed gun, and possession of marijuana up to one-half ounce. Defendant's trial commenced on 13 June 2022.

The evidence in the record tends to show when the jury had not yet been impaneled, a potential juror—Juror Smith, had already been examined and passed on by both the State and Defendant's counsel when she expressed a concern:

> [Juror Smith]: I have a quick concern that over break it bothered me quite a bit. Am I allowed to share that concern? It potentially could put me into a bias situation and I want to make sure that everybody is aware.

In response, the trial court excused the other potential jurors while Juror Smith remained in the courtroom. Juror Smith informed the trial court:

> Before we took a break, I noticed the defendant several times put his head down and fell asleep, which to me is disrespect to the current situation and lack of concern for what's happening. I'm just afraid that I'm going to come in tomorrow and not be able to hear evidence and see it as equal sides. I just wanted to share that concern.

The trial court replied: "If I instruct you to disregard that and base your decision on the evidence that's presented during trial, can you accept that instruction?" To which Juror Smith stated, "I don't know that I can, in full faith. I feel like that was hugely disrespectful to the situation."

The trial court asked whether the prosecutor or Defendant's counsel had any response to Juror Smith's statement. The prosecutor responded in the negative. Defendant's counsel asked Juror Smith if she "talk[ed] to anybody else in the jury pool about [her] concern?" She replied: "I did not speak to any other person." Defendant's counsel informed the trial court it had "[n]o other questions[.]" The trial court then requested the prosecutor and Defendant's counsel to approach and held an off-the-record bench conference with the prosecutor and Defendant's counsel. At this time, Defendant's counsel did not move to strike Juror Smith.[1] After the bench conference, the trial court brought the potential jurors back into the courtroom for the resumption of voir dire. Once the last potential alternate juror was questioned, Defendant's counsel stated, "we're satisfied," and the jury was impaneled. The trial court gave precautionary instructions to the jury, followed by the parties' opening statements.

After opening statements, the trial court excused the jury for the day. The trial court then noted: "Counsel, we had two or three brief bench conferences . . . during the course of the afternoon. One of which was to address comments made by . . . [Juror] Smith. Anything from the State with regard to her comments?" The State responded in the negative. Defendant responded in the affirmative:

> Yes, Your Honor. Thank you. On behalf of [Defendant], at the bench conference it became clear that any further challenge that I would make was going to be denied, as to whether or not [Juror] Smith would be able to remain and be fair and impartial under the circumstances. I know that the Court did give some instruction and will certainly do that again at a later date, but in terms of a ground for a challenge for cause pursuant to 15(a)12-12, I certainly was concerned by hearing [Juror] Smith indicate that she might not be able to treat [Defendant] fairly and impartially based on her observations during jury selection.
>
> I, of course, had already passed on her. I do not believe I would have been able to raise any other challenge, except for the for cause challenge. So I would just object for the record about including [Juror Smith] in the panel. That's all.

1. Defendant's counsel exercised peremptory strikes to excuse three jurors but did not do so to excuse Juror Smith.

The trial court thanked Defendant's counsel and replied, "the motion to strike or replace [Juror Smith] is denied. I'll note your exception for the record." After this discussion, the trial court recessed court for the evening.

The next day, the State presented testimony from Deputy Cline of the Forsyth County Sherriff's Office, who was employed by the Kernersville Police Department at the time of his encounter with Defendant on 21 August 2018. Deputy Cline recounted initiating a traffic stop after noticing a blue passenger vehicle without illuminated taillights. Upon initiating a traffic stop, he approached the vehicle's passenger side, told Defendant the reason for the stop, and requested Defendant's identification. Defendant was operating the vehicle with two passengers inside. Deputy Cline could not recall whether Defendant produced a driver's license or identification card but noted Defendant's license was not active. Deputy Cline then approached the driver's side of the vehicle and detected an odor of marijuana emanating from the vehicle. Deputy Cline inquired about the odor and Defendant replied he had smoked outside the vehicle at an earlier time. Deputy Cline then requested Defendant to step outside the vehicle. Sometime thereafter, Defendant pulled out a $20 bill, which contained "a green vegetable substance that was emitting a raw odor of marijuana."

After taking the substance and placing it on his patrol car, Deputy Cline conducted a search of Defendant's person. During the search, Deputy Cline recounted Defendant removed one of his shoes, and he "heard a metallic sound hit the ground." Deputy Cline was alerted to a gun lying on the ground near Defendant. The firearm was later described as a "Phoenix Arms Raven 25" handgun. Defendant was handcuffed and placed in the back of Deputy Cline's patrol car.

The State also presented testimony from Officer Wemlinger of the Kernersville Police Department. Upon arrival to assist with the stop, Officer Wemlinger "stood by with the passengers of the vehicle" while Deputy Cline searched Defendant. At some point, Officer Wemlinger heard a "metal noise colliding with the ground." Officer Wemlinger shined his flashlight on "the area right underneath" Defendant and saw Defendant's "left foot stand on -- or basically step on a pistol, firearm." Officer Wemlinger immediately notified the other officers of the firearm and assisted Deputy Cline with handcuffing Defendant. Upon retrieving the firearm, Officer Wemlinger "noticed there was a live unspent round inside the chamber . . . ."

Defendant stipulated he had a felony conviction with a date of 21 April 2015. On 14 June 2022, the jury returned its verdict, finding

Defendant guilty of all charges and that he had obtained habitual felon status. On 28 June 2022, the trial court sentenced Defendant to 90–120 months' imprisonment. Defendant entered an oral notice of appeal but later withdrew his appeal. Defendant thereafter petitioned for writ of certiorari, which this Court granted.

II. Analysis

Defendant first argues the trial court committed error by failing to remove Juror Smith on its own accord or by failing to allow Defendant's counsel to strike Juror Smith. Defendant last argues he received ineffective assistance of counsel ("IAC") due to his counsel's failure to use a peremptory strike on Juror Smith. After a careful review, we hold the trial court did not commit error, and we dismiss Defendant's IAC claim without prejudice.

A. Juror Removal

[1] Defendant contends the trial court was obligated under N.C. Gen. Stat. § 15A-1214(g) (2023) to sua sponte excuse Juror Smith. Further, Defendant argues the trial court deprived him of the opportunity to use a peremptory strike on Juror Smith. Defendant maintains the trial court violated its statutory mandate to excuse Juror Smith and he was therefore denied his right to an impartial jury. Our review of the record leads us to disagree.

"The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury." *State v. Carey*, 285 N.C. 497, 506, 206 S.E.2d 213, 220 (1974). "The trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (cleaned up).

Our statutes articulate the procedure for inquiring into a juror's fitness before the jury is impaneled:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other *good reason* exists:
>
> (1) The judge *may* examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

> (2) *If* the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> (3) *If* the judge determines there is no basis for challenge for cause, any party who has *not exhausted his peremptory challenges* may challenge the juror.
>
> Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

N.C. Gen. Stat. § 15A-1214(g) (2023) (emphasis added).

In *State v. Boggess*, the North Carolina Supreme Court explained:

> [A] trial judge has leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* under N.C.G.S. § 15A-1214(g). As part of this initial investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen voir dire or take other steps suggested by the circumstances.

358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004). When "the judge at any point allows the attorneys to question the juror directly, *voir dire* has necessarily been reopened and the procedures set out in N.C.G.S. § 15A-1214(g)(1)-(3) are triggered." *Id.* Upon reopening the examination of a juror, "the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Id.* (quoting *State v. Rogers*, 316 N.C. 203, 216, 341 S.E.2d 713, 721 (1986)). And it would constitute error if the trial judge permitted counsel to question such juror but did not thereafter allow the exercise of remaining peremptory challenges. *Id.* at 683, 600 S.E.2d 453, 457–58.

Here, the record tends to show the trial court followed the provisions of N.C. Gen. Stat. § 15A-1214(g). The trial court heard Juror Smith's concern and determined "good reason" existed under section 15A-1214(g) to make an initial inquiry. In its discretion under subsection 15A-1214(g)(1), the trial court then allowed the parties to ask additional questions—which reopened voir dire. *See Boggess*, 358 N.C. at 683, 600 S.E.2d at 457. Defendant's counsel asked a single question of Juror Smith and informed the trial court he had no other questions. Defendant's counsel did not object to Juror Smith's fitness and challenge her for cause on the

record, nor did he exercise a peremptory challenge on the record at this time.[2] Contrary to Defendant's argument, the record does not show that the trial court precluded Defendant's counsel from lodging a peremptory challenge on the record to preserve his right to bring forward this assignment of error. Further, Juror Smith was not excused by the trial court since it discretionarily determined there was not a basis for challenge for cause under subsection § 15A-1214(g)(2). The trial court did not fail to comply with N.C. Gen. Stat. § 15A-1214; we thus need not consider Defendant's prejudice argument.

After the jury was impaneled, Defendant's counsel objected to Juror Smith's fitness. Defendant maintains the trial court erred by not sustaining his challenge lodged after the jury was impaneled. An application of the relevant precedent compels us to disagree.

For a defendant seeking reversal on the ground that the trial court erred by refusing to allow a challenge for cause, the defendant must have:

> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section;[3] and
>
> (3) Had his renewal motion denied as to the juror in question.

N.C. Gen. Stat. § 15A-1214(h) (2023).

In this matter, Defendant's counsel exercised only three of the six peremptory challenges available to him under N.C. Gen. Stat. § 15A-1217(b)(1) (2023). Defendant therefore cannot seek reversal on account of the trial court's declining to sustain his challenge lodged after impanelment. *See* N.C. Gen. Stat. § 15A-1214(h)(1); *see also State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991) ("Compliance with these provisions[, N.C. Gen. Stat. §§ 15A-121(h), (i),] is a mandatory predicate to defendant's right to assert this argument on appeal."); *see also*

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2. N.C. Gen. Stat. § 15A-1214(g)(3) states: "If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror."

3. N.C. Gen. Stat. § 15A-1214(i) states: "A party who has exhausted his peremptory challenges may move . . . to renew a challenge for cause previously denied if the party either: (1) Had peremptorily challenged the juror; or (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted."

State v. Carter, 335 N.C. 422, 428, 440 S.E.2d 268, 271 (1994) ("Failure to comply with these requirements forecloses defendant's appeal of the denial of the challenge for cause."). For this reason, Defendant's reliance on *State v. Hightower* is misplaced. 331 N.C. 636, 637, 417 S.E.2d 237, 238 (1992). In *Hightower*, our Supreme Court noted, "[t]he defendant preserved his right to bring forward this assignment of error by following the procedure of N.C.G.S. § 15A-1214(h)" since "[h]e peremptorily challenged the juror" and "then exhausted his peremptory challenges and renewed his challenge for cause to the juror, which was denied." 331 N.C. at 637, 417 S.E.2d at 238.

The trial court did not violate the provisions of N.C. Gen. Stat. § 15A-1214(g). Additionally, Defendant did not exhaust his peremptory challenges and therefore cannot seek reversal of the trial court's declination to strike Juror Smith for cause. *See* N.C. Gen. Stat. § 15A-1214(h)(1)-(3).

B. Ineffective Assistance of Counsel

[2] Defendant next argues that his trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by failing exercise a peremptory strike under subsection 15A-1214(g)(3) on Juror Smith. For the following reasons, we dismiss Defendant's IAC claim without prejudice.

"The Sixth Amendment to the United States Constitution guarantees to all defendants the right to counsel in criminal proceedings." *State v. Oglesby*, 382 N.C. 235, 242, 876 S.E.2d 249, 256 (2022). "The right to counsel necessarily encompasses 'the right to effective assistance of counsel.' " *Id.* To claim IAC, a defendant must show: (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "[T]his Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "IAC claims should only be decided on the merits in a direct appeal when 'the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. Gillard*, 386 N.C. 797, 867, 909 S.E.2d 226, 279 (2024) (quoting *State v. Fair*, 354 N.C. 131, 166–67, 557 S.E.2d 500 (2001)).

"The decision to exercise a peremptory challenge is necessarily a tactical one for trial counsel." *Jaynes*, 353 N.C. at 548, 549 S.E.2d at 191. "Trial counsel are free to allocate their peremptory challenges as they see fit, within constitutional boundaries, and are not required to exercise them each time a challenge for cause is denied regardless of whether they argued strenuously that grounds for a challenge for cause existed." *Id.* "Where the claim raises potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Santillan*, 259 N.C. App. 394, 402, 815 S.E.2d 690, 696 (2018) (cleaned up). "Particular strategic decision remains a question of fact, and is not something which can be hypothesized." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017) (cleaned up).

Here, the cold record does not permit us to assess Defendant's challenge of his counsel's strategy to not exercise a peremptory strike after the trial court reopened voir dire. Accordingly, Defendant's IAC claim is dismissed without prejudice as the record is insufficient to discern whether Defendant's counsel's failure to use a peremptory strike for Juror Smith was a matter of sound trial strategy or deficient performance. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (holding, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding."); *see also State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (citation omitted) ("Where the claim raises 'potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.' ").

III. Conclusion

For the reasons above, the trial court did not abuse its discretion by not excusing Juror Smith. Defendant's IAC claim is dismissed without prejudice for him to assert the claim in trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Chief Judge DILLON and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
SCOTTIE DEWAYNE DAVIDSON, DEFENDANT

No. COA25-478

Filed 18 February 2026

1. Appeal and Error—preservation of issues—criminal case—failure to object or seek plain error review

In the prosecution of a registered sex offender charged with willfully failing to report a change of address under N.C.G.S. § 14-208.11(a)(2), defendant failed to preserve for appellate review his argument that the trial court erred by failing to define the term "willfully" in response to a question made by the jury during deliberation, since he neither objected at trial nor sought plain-error review of the issue on appeal.

2. Sexual Offenders—willful failure to report changed address—specific intent—voluntary intoxication instruction—plain error analysis

In the prosecution of a registered sex offender charged with willfully failing to report a change of address under N.C.G.S. § 14-208.11(a)(2), where defendant partially attributed his six-week absence from his registered address to "getting high" on drugs and losing track of time, the trial court erred by instructing the jury that the charged offense did not require any specific intent and that defendant's intoxication was therefore irrelevant. Because the legislature amended section 14-208.11(a)(2) to criminalize only "willful" registration violations, the offense did constitute a specific intent crime and, since voluntary intoxication is a recognized defense to specific intent crimes, defendant's intoxication would have been relevant to the question of his guilt. However, the court's error did not amount to plain error where defense counsel repeatedly declined to raise voluntary intoxication as a defense and where the State offered sufficient evidence that defendant's failure to update his address was willful.

Appeal by Defendant from judgment entered 21 August 2024 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 20 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Alex R. Williams, for the State.

King & Moss PLLC, by John W. Moss, for Defendant-Appellant.

MURRY, Judge.

Scottie D. Davidson (Defendant) is a registered sex offender. He appeals a jury conviction of willfully failing to report a change of address within three days of moving from his registered address under N.C.G.S. § 14-208.11(a)(2) (WFR-Address). Defendant argues that the trial court erred by failing to define the term *willfully* in response to the jury's question during deliberation, and that the trial court plainly erred by instructing the jury that the WFR-Address offense "d[id] not require a specific intent and therefore [D]efendant's intoxication ha[d] no bearing on [his] guilt or innocence." For the following reasons, we dismiss Defendant's appeal as to his first assignment of error and hold no plain error as to his second.

I. Background

In 2015, a jury convicted Defendant of second-degree rape, a reportable sex offense under N.C.G.S. § 14-27.3(a) (recodified as N.C.G.S. § 14-27.22), in Iredell County Superior Court. *See* N.C.G.S. § 14-208.6(4)-(5) (2025) (establishing second-degree rape under N.C.G.S. § 14-27.22 as a sexually violent offense and reportable conviction). The trial court sentenced him to 67–141 months' imprisonment and required him to register as a sex offender upon his release. As part of his registration, Defendant reviewed and initialed an Offender Acknowledgement Form, which required him to "report the address or a detailed description of every location where [he] reside[d] or live[d,] . . . even if it d[id] not have a street address," within three business days of relocating.

In April 2023, Defendant updated his address as required when he moved into his grandmother's home at 116 Thyme Lane in Statesville, N.C. (the home). On 16 August 2023, Deputy Brad Stroud conducted a compliance visit at the home, but Defendant was not there. Defendant's uncle informed Deputy Stroud that Defendant had not "live[d] there" since around July 2023. Upon learning from Defendant's probation officer that Defendant wore an ankle monitor for satellite-based monitoring (SBM) purposes, Deputy Stroud obtained Defendant's SBM location data. The SBM data showed that, between 30 June and 24 August 2023, Defendant spent less than two hours at the home, moving among locations in and around Statesville. On 27 August 2023, officers arrested Defendant and charged him with WFR-Address.

On 6 December 2023, a grand jury indicted Defendant for WFR-Address and for obtaining habitual-felon status. Prior to trial,

Defendant stipulated to his conviction for a reportable sex offense and his duty to comply with the sex-offender registration statute. At trial on 19 August 2024, the State introduced Defendant's sex-offender registration documents, which included the signed Offender Acknowledgement Form; Deputy Stroud's testimony; the uncle's written and oral statements; and Defendant's SBM data. Defendant's uncle testified that Defendant left the home after arguing with his grandmother, but that both Defendant and his grandmother considered the home to be Defendant's residence. The State's SBM data showed Defendant's absence from the home between 30 June and 24 August 2023 other than for a short amount of time between 5 and 6 July 2023. Defendant's grandmother testified that she told him to leave the home after he became "disrespectful" and "unruly" during their argument. She believed that he "never moved out," as his clothes and other personal items remained in his room at the home. Defendant also testified that he believed the home to be his residence. Around the time the SBM data showed his absence from the home, Defendant testified that he had begun using cocaine and fentanyl, spending his days "just getting high," moving among various locations in Statesville "for free drugs," and losing track of time such that the six-week period felt like "three or four days."

At the close of evidence, the trial court instructed the jury using North Carolina Pattern Jury Instruction 207.75, which discusses willful failure to comply with the sex-offender registration law. *See* N.C.P.I.—Crim. 100.35. The trial court explained that it was the State's burden to prove that Defendant "willfully failed" to report a change of address "no later than three business days after the change of address." Defense counsel did not object or request any additional instructions. When the trial court then directly asked defense counsel whether he desired any "corrections, comments, [or] concerns to the instructions," he replied, "No, sir."

During deliberations, the jury asked the trial court: "How does *willfully* relate to being under the influence of drugs[?]" (Italicization added.) In response, the State requested that the trial court give the jury either an additional instruction on voluntary intoxication according to N.C.P.I.—Crim. 305.10 or explain that "voluntary intoxication is no defense to a general[-]intent crime." Defense counsel objected to this instruction "in the strongest possible terms." He argued that "[i]ntoxication was not offered as [a] defense," that the "defense was . . . willfulness," "that [Defendant] did not move and did not change his address," that a voluntary-intoxication instruction "would confuse the issue" and "severely prejudice" Defendant "at worst." Instead, he asked the trial court to "remind the jury what the instructions [were] and instruct them

to deliberate and come to a decision between themselves." Defense counsel explained that he could "understand" "if the Court wanted to instruct the [jury] on the definition of willfulness" and asked the trial court to define it "as an answer to the jury's question." The trial court asked defense counsel to submit his preferred definition of *willfulness*, to which he replied, "I'm looking and the one I found so far is from a civil[-]contempt proceeding. I'm not sure that it is necessarily applicable . . . . I don't think that will work for us."

The trial court decided to answer the jury's question with a supplemental voluntary-intoxication instruction in accordance with N.C.P.I.—Crim. 305.10. The State asked the trial court to remove the second and fourth paragraphs of N.C.P.I.—Crim. 305.10 because they apply only to specific-intent crimes, arguing that WFR-Address is a general-intent crime. Defendant's counsel agreed, explicitly conceding that WFR-Address was not a specific-intent crime and explaining that, although he maintained his objection to reading N.C.P.I.—Crim. 305.10, should the trial court read the voluntary-intoxication instruction, paragraphs "one and three would be the appropriate paragraphs to read." The trial court then read the proposed instructions "word for word" for the parties. Defense counsel, citing his previous objection, agreed to the trial court's removal of paragraphs two and four.

Ultimately, the trial court answered the jury's question with the following instruction:

> You may find there is evidence which tends to show that [D]efendant was drugged at the time of the acts alleged in this case. Generally, a voluntary drugged condition is not a legal excuse for crime. The law does not require any specific intent for [D]efendant to be guilty of the crime of failing to register a new address as a sex offender not requiring specific intent. Thus[, D]efendant's drugged condition can have no bearing upon your determination of [D]efendant's guilt or innocence of this crime.

The trial court did not define *willfully*.

On 21 August 2024, the jury found Defendant guilty of WFR-Address and attaining habitual-felon status. The trial court deemed Defendant to be a prior-record level III and sentenced him to 78–106 months' imprisonment with 361 days of pretrial-confinement credit. The trial court also recommended substance-abuse and mental-health treatments, then entered attorney's fees as a civil judgment. Defendant timely appealed.

II. Jurisdiction

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

III. Analysis

Defendant argues that the trial court erred by failing to define the term *willfully* in response to the jury's question during deliberation, and that it plainly erred by instructing the jury that WFR-Address "does not require a specific intent and therefore [D]efendant's intoxication has no bearing on [his] guilt or innocence." For the following reasons, we dismiss Defendant's first assignment of error and hold no plain error as to his second.

A. Defining *Willfully*

[1] First, Defendant argues the trial court erred by failing to define the term *willfully* in response to the jury's question. As a threshold matter, we consider whether Defendant properly preserved this argument for review. *See* N.C. R. App. P. 10(a)(1). Because Defendant neither objected at trial nor sought plain-error review on appeal, he has waived further review of this issue. We dismiss it accordingly. *See id.* 10(a)(4).

B. Voluntary-Intoxication Instruction

[2] Second, Defendant argues that the trial court plainly erred by instructing the jury that WFR-Address does "not require a specific intent and therefore [D]efendant's intoxication ha[d] no bearing on [his] guilt or innocence." He also believes that the trial court plainly erred by instructing the jury that Defendant's intoxication was irrelevant because WFR-Address does not require any specific-intent. For the following reasons, we hold that the trial court did not plainly err.

Plain error is a "fundamental error . . . so prejudicial[and] lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660 (1983) (quotation omitted). Under plain-error review, "a defendant must demonstrate that a fundamental error occurred at trial" by showing that (1) "the trial court fundamentally erred"; (2) "the jury probably would have returned a different verdict" "absent the error"; and (3) the error "seriously affect[ed] 'the fairness, integrity or public reputation of judicial proceedings.' " *State v. Reber*, 386 N.C. 153, 150 (2024) (quoting *State v. Lawrence*, 365 N.C. 506, 518–19 (2012)). To show fundamental error, a defendant must establish prejudice—that,

after examination of the entire record, "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518.

North Carolina law states that, "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address." N.C.G.S. § 14-208.9(a) (2025). Defendant was charged with violating N.C.G.S. § 14-208.11(a)(2), a Class F felony that criminalizes a registered sex offender's "willful[ ] fail[ure] to notify the last registering sheriff of a change of address." N.C.G.S. § 14-208.11(a)(2). Because the voluntary-intoxication defense applies only to specific-intent crimes, Defendant's contention of plain error posits that WFR-Address is a specific-intent crime. *See State v. Jones*, 300 N.C. 363, 365 (1980). Given the facts of this case and the contradictory caselaw, the more precise issue before this Court is whether the trial court should have instructed the jury on § 14-208's meaning of *willfully* and its implication of specific intent.[1] Accordingly, we first address whether N.C.G.S. § 14-208.11(a)(2) requires proof of specific intent before addressing whether the trial court committed plain error.

1. Sections 14-208.11, -269.2

Except as limited by the State and Federal Consitutions, the General Assembly has the inherent power to "define crimes and ordain their punishment." *State v. Hill*, 272 N.C. 439, 443 (1968) (quotation omitted); *see* N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly."). This power includes the ability to impose certain intent or *mens rea* requirements. *See State v. French*, 273 N.C. App. 601, 606 (2020) (The General Assembly can require the State to prove a defendant's "specific intent," such as *willfulness*, when committing an offense.). Generally, "[s]pecific-intent crimes . . . have as an essential element a specific intent that a result be reached," while "[g]eneral-intent crimes . . . only require the doing of some act." *State v. Jones*, 339 N.C. 114, 148 (1994). *Mens rea* refers to "[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime." *Mens Rea*, *Black's Law Dictionary* (12th ed. 2024).

This Court "determines whether a particular criminal offense constitutes a general or specific intent crime by examining the elements

1. Our Court interpreted N.C.G.S. § 14-208.11(a)(2) before it was amended to include the word *willfully* in 2006. Since then, our caselaw is unclear as to the criminal-intent requirement under N.C.G.S. § 14-208.11(a)(2).

which must be proved . . . to support a conviction for committing that offense." *State v. Barnes*, 229 N.C. App. 556, 560 (2013). The question of "[w]hether a criminal intent is a necessary element of a statutory offense is a matter of construction" determined "from the language of the statute in view of its manifest purpose and design." *State v. Watterson*, 198 N.C. App. 500, 505 (2009). Accordingly, "[w]e first look to the plain language, as the actual words of the legislature are the clearest manifestation of its intent." *Cohane v. Home Missioners of Am.*, 387 N.C. 1, 7–8 (2025) (quotation omitted). "When the language of a statute is clear and unambiguous, there is no[ ] room for judicial construction and the courts must give the statute its plain and definite meaning." *Hill*, 291 N.C. App. at 638 (quotation omitted). Generally, statutory language requiring "that a defendant act 'willfully' creates a specific intent crime." *French*, 273 N.C. App. at 606.

Because this Court follows a statute's plain language, we will not infer a criminal-intent requirement where the statute omits it. For instance, we declined to read a specific-intent element into a statute where the "plain terms . . . d[id] not include any reference to criminal intent or *mens rea*." *State v. Haskins*, 160 N.C. App. 349, 352 (2003), *superseded by statute on other grounds*, Act of June 17, 2011, S.L. 2011-268, sec. 4, 2011 N.C. Sess. Laws 1002, 1005; *see* N.C.G.S. § 14-269.2(b). But after the General Assembly amended § 14-269.2 to include the word *knowingly*, sec. 4, 2011 N.C. Sess. Laws at 1003–04, this Court "acknowledged the amendment and recognized the added *mens rea* requirement" as that of specific intent. *French*, 273 N.C. App. at 606.

Like § 14-269.2, the WFR-Address statute reveals a similar legislative pattern of abrogating specific-intent requirements with a specified *mens rea*. In 1995, the General Assembly enacted the "Amy Jackson Law," which had previously provided that a person who was required to register as a sex-offender in accordance with Article 27A and failed to do so "knowingly and with the intent to violate the provisions of this Article" would be guilty of certain classes of offenses. Amy Jackson Law, ch. 545, sec. 1, 1995 Sess. Laws 2046, 2049 (codified as amended at N.C.G.S. § 14-208.11). But in 1997, the General Assembly amended this statute to remove the *mens rea* language. Act of Aug. 28, 1997, ch. 516, sec. 1, 1997 N.C. Sess. Laws 2276, 2282.

Since that amendment, this Court has consistently held that N.C.G.S. § 14-208.11 no longer requires proof of specific intent. In *State v. White*, 162 N.C. App. 183, 189 (2004) (brackets omitted), this Court noted that, "by deleting the specific-intent requirement, the General Assembly expressed its intent to make N.C.G.S. § 14-208.11 a strict-liability offense"

and held "as a matter of statutory construction, that N.C.G.S. § 14-208.11 did not require a showing of knowledge or intent." Likewise, in *State v. Harris*, 171 N.C. App. 127, 131 (2005),[2] this Court held that a defendant was not entitled to a voluntary-intoxication defense because N.C.G.S. § 14-208.11 "no longer include[d] a specific intent element."

Our subsequent decisions followed the same reasoning that a conviction under § 14-208.11 requires no specific intent. *See*, *e.g.*, *State v. Holmes*, 149 N.C. App. 572, 577 (2002) (excluding specific intent from recitation of § 14-208.11(a)(2)'s essential elements); *State v. Young*, 140 N.C. App. 1, 8 (2000) (clarifying that § 14-208.11 does not require "the State [to] prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address."). But our courts based these decisions on the "1997 amendment . . . deleting the statutory *mens rea* requirement." *State v. Bryant*, 359 N.C. 554, 562 (2005).

In 2006, the General Assembly amended N.C.G.S. § 14-208.11(a) to provide that a person who was required to comply with the requirements of Article 27A and "willfully" failed to do so on or after 1 December 2006 would be guilty of a Class F felony. Act of July 27, 2006, S.L. 2006-247, sec. 8, § 14-208.11(a), 2005 N.C. Sess. Laws 1065, 1070–71. In doing so, the General Assembly "re-introduced intent-based language into the provision, effectively reviving the original *mens rea* requirement that had first been removed by the 1997 amendment and had rendered a violation of the statute a strict[-]liability offense." *State v. Fox*, 216 N.C. App. 153, 156 (2011).

2. Section 14-208.9

At this point, we recognize that those cases interpreting the pre-2006 version of N.C.G.S. § 14-208.11 are obsolete to the extent they rely on a superseded statute. Although Defendant was convicted of violating N.C.G.S. § 14-208.11, because this offense "deals with the same subject matter" as N.C.G.S. § 14-208.9, we must construe the statutes "*in pari materia* to give effect to each." *Holmes*, 149 N.C. App. at 766. When a sex offender "changes address," he must "report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had

2. At trial, the State submitted *State v. Harris*, 171 N.C. App. 127, 131 (2005) in support of its argument that WFR-Address is a general-intent crime. To the extent that the trial court relied on this decision or any others interpreting outdated versions of state law, it did so erroneously.

last registered." N.C.G.S. § 14-208.9(a). If he "willfully . . . [f]ails to notify the last registering sheriff of a change of address as required by this Article," then he is guilty of a Class F felony. *Id.* § 14-208.11(a)(2).

When used in a criminal statute, *willful* "means something more than an intention to do a thing," *State v. Dickens*, 215 N.C. 303, 305 (1939); it requires an act "purposely and deliberately in violation of law," *State v. Ramos*, 363 N.C. 352, 355 (2009). By adding *willfully* to subsection (a), the 2006 amendment "increased the required level of intent" to "criminalize[ ]" "only 'willful' registration violations." *State v. Lamp*, 383 N.C. 562, 571 (2022). In other words, the WFR-Address statute requires the State to prove three essential elements: "(1) the defendant is required to register; (2) the defendant changes his or her address; and (3) the defendant willfully fails to notify the last registering sheriff of the change of address, not later than the third day after the change." *State v. Abshire*, 363 N.C. 322, 328 (2009) (citation modified). The General Assembly's deliberate addition of *willfully* makes WFR-Address a specific-intent crime. *See id.* (noting that "heightened level of intent required by statute is no accident"); *French*, 273 N.C. App. at 606 (crimes with "willfulness" element require a showing of specific intent).

Accordingly, a jury must consider whether the defendant *willfully* violated N.C.G.S. § 14-208.11. *See* N.C.G.S. § 14-208.11. More specifically, the State must show that a defendant *willfully* failed to provide written notice of a change of address within three business days. As a result, we hold that the trial court erred by instructing the jury that the crime of willful failure to change address does "not require a specific intent and therefore [D]efendant's intoxication ha[d] no bearing on [his] guilt or innocence." *See State v. Howie*, 116 N.C. App. 609, 613 (1999) ("Voluntary intoxication may negate the existence of specific intent as an essential element of a crime.").

3. Prejudice

In any event, the trial court's error does not rise to plain error unless Defendant can show that "the jury probably would have returned a different verdict" absent the error. *Reber*, 386 N.C. at 162. Voluntary intoxication *may* provide a defense against specific-intent crimes. *See State v. Bunn*, 283 N.C. 444, 458 (1973). But a defendant is not entitled to a voluntary-intoxication instruction every time he "consum[es] intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462 (1992). To obtain a voluntary-intoxication instruction, a defendant "must show that at the time of the [crime,] the defendant's mind and reason were so completely intoxicated and overthrown as to render

him utterly incapable of forming" the specific intent required. *State v. Meader*, 377 N.C. 157, 162 (2021) (quotations omitted). Our appellate courts have consistently held that "it must appear that [the] defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act." *Bunn*, 283 N.C. at 457 (quotations omitted).

Because WFR-Address is a specific-intent crime requiring the State to show "willfulness," Defendant could have obtained a voluntary-intoxication instruction by producing "substantial evidence" "that he was so intoxicated that he could not" have willfully failed to update his address. *Meader*, 337 N.C. at 162. He did not do this. Defense counsel repeatedly declined to raise voluntary intoxication as a defense, asserting instead the defense of "willfulness and . . . that [Defendant] did not move and did not change his address[,] . . . not intoxication." Because Defendant expressly rejected intoxication as a ground for negating intent, the trial court's instruction explaining the unavailability of voluntary intoxication as a defense could not have prejudiced Defendant.

The State also offered sufficient evidence to allow the jury to reasonably conclude that Defendant's failure to update his registered address was willful. The State's evidence tended to show that Defendant had explicit knowledge of his reporting obligations based on his review and initialing of the Offender Acknowledgment Form. Defendant also successfully updated his address in April 2023, indicating his knowledge of the requirement to do so. The SBM data demonstrated that he spent approximately six weeks away from the home while remaining capable of movement and communication. Despite this, Defendant failed to report any new address or claim homelessness. *See State v. Worley*, 198 N.C. App. 329, 338 (2009) ("[T]he sex[-]offender registration statutes operate on the premise that everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge[,] or some similar place."). Taken cumulatively, the evidence supports the conclusion that Defendant "purposely and deliberately" failed to comply with the statutory reporting requirement of reporting his change of address. *Ramos*, 363 N.C. at 355.

Based on the State's evidence of Defendant's guilt, Defendant fails to show that "the jury probably would have returned a different verdict" absent the challenged portions of the voluntary-intoxication instruction. *Reber*, 386 N.C. at 162. Even if Defendant had offered the proper evidence to obtain a voluntary-intoxication defense, it is implausible that Defendant's alleged intoxication persisted without interruption for

over three months, twenty-four hours a day, seven days a week, to have rendered him unable "to formulate the specific intent" of willfulness. N.C.P.I.—Crim. 305.10. Therefore, Defendant fails to show the probability of a different jury verdict absent the trial court's error in giving the supplemental instruction. *See Reber*, 386 N.C. at 162.

IV. Conclusion

For the reasons discussed above, this Court dismisses Defendant's challenge to the trial court's failure to define *willfully* as unpreserved and holds that the trial court did not plainly err in its supplemental instructions regarding the offense and the relevance of Defendant's intoxication.

DISMISSED IN PART; NO PLAIN ERROR IN PART.

Judges GRIFFIN and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
JERRY LOCKLEAR, DEFENDANT

No. COA25-287

Filed 18 February 2026

1. Constitutional Law—effective assistance of counsel—recordation of closing arguments—not requested by defense counsel

In a second-degree murder prosecution arising from defendant speeding after his ex-girlfriend's vehicle and causing her fatal crash, defendant did not receive ineffective assistance when his counsel failed to request recordation of closing arguments, during which defendant asserted his counsel may have conceded defendant's guilt without defendant's consent. Although the North Carolina Indigent Defense Services Manual recommends recordation of closing arguments, N.C.G.S. § 15A-1241 explicitly exempts closing arguments from the general mandate that the trial court ensure that a court reporter makes a record of all statements from the bench and all other proceedings, and controlling precedent holds that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of items specifically excepted from the recording statute.

2. Appeal and Error—Rule 2—due process—failure to request recordation of closing arguments—manifest injustice not shown

In a second-degree murder prosecution arising from defendant speeding after his ex-girlfriend's vehicle and causing her fatal crash, where defendant asserted his counsel may have conceded defendant's guilt during closing arguments without defendant's consent, the appellate court declined to invoke Appellate Rule 2 to reach defendant's unpreserved argument that his trial attorney's failure to request recordation of closing arguments violated defendant's constitutional right to due process. These circumstances showed no manifest injustice because a defendant's due process rights are not violated when defense counsel fails to request recordation of matters not required to be recorded under N.C.G.S. § 15A-1241, such as closing arguments.

Appeal by Defendant from judgment entered 15 April 2024 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 19 November 2025.

Law Office of Caryn Strickland, by Attorney Caryn Strickland, for defendant-appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General Brenda Menard, for the State.

STADING, Judge.

Jerry Locklear ("Defendant") appeals from final judgment entered pursuant to a jury verdict convicting him of second-degree murder. On appeal, Defendant asserts his trial attorney's failure to request recordation of closing arguments amounted to ineffective assistance of counsel ("IAC"). Alternatively, Defendant asks this Court to invoke N.C. R. App. P. 2 to review whether his trial attorney's failure to request recordation of the full trial proceedings violated his constitutional right to due process. After careful consideration, we conclude that Defendant did not receive IAC and decline to invoke Rule 2.

I. Factual & Procedural Background

This case deals with the death of Melissa Lowry ("Decedent") after Defendant ran her motor vehicle off a road in Robeson County. On 21 January 2022, the Robeson County Grand Jury returned a true bill of

indictment, charging Defendant with second-degree murder and felony hit and run. The State, however, dismissed the felony hit and run charge at the outset of trial.

Defendant's trial commenced on 9 April 2024, wherein the evidence tended to show that on the night of 23 June 2020, Defendant operated his sport utility vehicle ("SUV") on Cabinet Shop Road.[1] In a recorded non-custodial interview[2] with the Robeson County Sheriff's Office, Defendant conceded that: he and Decedent had previously dated; Decedent came over to his house on the night in question asking for money; he followed Decedent in his SUV at the time of the wreck; he began speeding when Decedent began speeding; and, after seeing Decedent run off the road, he returned to the scene, but did not stop.

Lieutenant Graham with the Robeson County Sheriff's Office responded to the scene of the accident. Lieutenant Graham testified to his observations upon arriving at the scene:

> A. . . . [W]hen I was walking up to try to see, I started observing some what we call yaw marks on the pavement, and they were leading up under the fire truck. At the time I was documenting all this down and then being at the point, you know, I got the Evans Cross Roads Fire Department to move their truck so I could see which way these yaw marks was leading to the vehicle.
>
> Q. Yaw marks, what is that?
>
> A. Yaw marks is when a rotating tire starts to slide on its axis across pavement. It's showing that the tire is actually sliding instead of turning with the pavement.

Lieutenant Graham testified that Defendant's SUV sustained "damage to the front license plate," damage "to the right of the license plate," and damage to "the front bumper." He added that Decedent's vehicle sustained damage to the rear bumper where the license plate should have been located. Upon reviewing the photographic evidence, Lieutenant Graham noted that the damage to both vehicles was similar

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1. Decedent contacted 911 during the incident, stating: "there is a car that is trying to run me off the road on Cabinet Shop Road." She stated the vehicle following her was a Suburban, and that the vehicle struck her vehicle numerous times. The recording of this 911 call was introduced into evidence as an exhibit and published to the jury.

2. Defendant's interview was admitted into evidence and published to the jury.

in size—approximately five-to-six inches to Decedent's vehicle, and approximately six-to-seven inches to Defendant's SUV.

Several other witnesses near the scene of the accident also testified at trial. Chief Dial, the Chief of the Evans Fire Department, testified to observing two vehicles driving erratically near the 1500 block of Cabinet Shop Road. Chief Dial noted that shortly after midnight, he was traveling down Cabinet Shop Road when he saw two vehicles rapidly approaching him. Chief Dial added that he had to pull onto "the grass to keep the vehicles from hitting" him. Chief Evans observed the vehicles traveling at a "high rate of speed" and were less than a car-length apart. Shortly thereafter, Chief Evans was dispatched to the accident in question, which occurred near the 200 block of Cabinet Shop Road. Mr. Barnes, a local resident who was parked in the Cabinet Shop Road area, heard "eeek, boom, boom" while parked in his vehicle. He noted that the sounds were consistent with a vehicle striking another "two or three times." Upon looking up, Mr. Barnes saw Decedent's vehicle in a ditch, prompting him to drive up to Decedent to find out if she needed assistance. Mr. Barnes testified that when he was talking to Decedent, "a SUV type, big vehicle" drove by the scene.

After the State rested its case-in-chief, Defendant moved to dismiss the second-degree murder charge. The trial court denied his motion. Defendant thereafter elected not to present evidence and renewed his motion to dismiss at the close of all evidence. Again, the trial court denied his motion.

At the close of the charge conference, the trial court asked whether defense counsel planned to make any concessions in his closing argument:

> THE COURT: Anything else we need to address? Here's the verdict sheet. Guilty of second degree or guilty of involuntary manslaughter or guilty of misdemeanor death by vehicle or not guilty. So when you make your closing you are not conceding anything, are you?
>
> [DEFENSE COUNSEL]: If between now and Monday morning I decide that we will, I will let you know so that we can cross that bridge. But at this point in time I don't anticipate that.
>
> THE COURT: Here's the verdict sheet. Let me know if you do.

Upon reconvening after the weekend, and immediately before closing arguments, the trial court twice asked whether the parties had any further matters to address:

> THE COURT: All right. Anything we need to address?
>
> [THE STATE]: Nothing for the State, Your Honor.
>
> THE COURT: So you'll go first?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: Then you'll go last?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: Then I'll give the instructions, then we'll send them out. And we're getting rid of the two alternates, right?
>
> . . . .
>
> THE COURT: Anything else?
>
> [THE STATE]: I would like the podium, if one of the bailiffs could move it.
>
> THE COURT: You want the podium?
>
> [THE STATE]: Yes, please.
>
> THE COURT: You want the blinds closed, or is that good?
>
> [THE STATE]: No, Judge.
>
> THE COURT: All right. If y'all are ready then–or do you need a minute to get set up.
>
> [THE STATE]: No, Your Honor. That's fine. I'm good.
>
> THE COURT: So we heard all the motions. We did all of that, didn't we?

At this time, defense counsel did not inform the trial court that his position had changed with respect to concessions. Each party gave a closing argument, and neither was recorded.

Following deliberations, the jury delivered a guilty verdict, convicting Defendant of second-degree murder. The trial court sentenced Defendant, as a prior record level VI, to a consolidated term of 450–552 months' imprisonment. Defendant entered oral notice of appeal after sentencing.

II. Analysis

Defendant argues that his trial attorney rendered IAC by failing to request recordation of closing arguments under N.C. Gen. Stat.

§ 15A-1241 (2023). Alternatively, Defendant asks this Court to invoke N.C. R. App. P. 2 to address whether his trial attorney's failure to request recordation of closing arguments violated his constitutional right to due process. For the reasons below, we disagree with Defendant's IAC contentions and decline to invoke Rule 2.

A. IAC

[1] Defendant maintains that his trial counsel rendered IAC by failing to request that closing arguments be recorded pursuant to N.C. Gen. Stat. § 15A-1241 because: the North Carolina Indigent Defense Services Manual ("IDS manual") recommends recordation under section 15A-1241; defense counsel's failure to request recordation of the closing arguments denied him meaningful appellate review, amounting to prejudice; no other reconstructed record of the closing arguments would suffice as a substitute for the transcript; and the recordation of closing arguments is relevant to the claims raised on appeal. Our review of applicable precedent leads us to disagree.

"Whether a defendant received IAC at trial is a question of law reviewable *de novo*." *State v. Parker*, 290 N.C. App. 650, 653, 893 S.E.2d 544, 547 (2023). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Clemons*, 274 N.C. App. 401, 409, 852 S.E.2d 671, 676 (2020) (cleaned up).

"A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). Our jurisprudence establishes "a two-pronged test for determining whether a defendant has received ineffective assistance of counsel." *Todd*, 369 N.C. at 710, 799 S.E.2d at 837. That test provides:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose

> result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). "Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *Todd*, 369 N.C. at 711, 799 S.E.2d at 837.

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). That said, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, Defendant asserts he received IAC because his trial counsel failed to request that closing arguments be recorded under N.C. Gen. Stat. § 15A-1241(a). Defendant's arguments are rooted in a hypothetical assertion—that defense counsel *may* have conceded guilt during closing argument without his permission, a violation of *State v. Harbison*, and it is impossible to discern whether such concession occurred since no record of the closing arguments exists. 315 N.C. 175, 180, 337 S.E.2d 504, 507–508 (1985) (noting that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent").

Subsection 15A-1241(a) provides the trial court must ensure that a court reporter makes a record "of all statements from the bench and all other proceedings except" as follows:

> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.

Id. That said, "*[u]pon motion* of any party or on the judge's own motion," jury selection, opening statements, and closing arguments must be recorded. *Id.* § 15A-1241(b) (emphasis added).

The North Carolina Supreme Court's decision in *State v. Hardison* is particularly instructive. 326 N.C. 646, 392 S.E.2d 364 (1990). In that case, the defendant asserted he received IAC since his trial attorney did not request recordation "of the jury selection, the bench conferences, and the opening and closing arguments of counsel." *Id.* at 660–61, 392 S.E.2d at 372. The defendant maintained he satisfied the first prong of *Strickland*—deficient performance—by "showing that his counsel failed to request a transcript of all proceedings." *Id.* at 661, 392 S.E.2d at 373. Upon analyzing the issue, the Court held that under a plain reading of section 15A-1241, recordation of jury selection, opening statements, and closing arguments is permissive as opposed to mandatory. *Id.* Further, the defendant did "not assign any error regarding the selection of the jury in this case." *Id.* The Court also determined that since the "defendant . . . made no attempt to reconstruct the record of any particular bench conference and . . . [made] no specific allegations as to a particular conference," he failed to demonstrate IAC. *Id.* at 661–62, 392 S.E.2d at 373 (cleaned up).

Following *Hardison*, prior panels of this Court have consistently held that a trial attorney's failure to request recordation did not amount to IAC for varying reasons. *See, e.g.*, *State v. Thomas*, 187 N.C. App. 140, 147, 651 S.E.2d 924, 928 (2007) (citation modified) ("A defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript. Moreover, this Court has held that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute."); *State v. Verrier*, 173 N.C. App. 123, 130, 617 S.E.2d 675, 680 (2005) (declining to find IAC where defense counsel failed to request recordation of jury selection, bench conferences, opening statements, and closing arguments since these portions of trial are excluded under G.S. 15A-1241); *State v. Clodfelter*, 203 N.C. App. 60, 69, 691 S.E.2d 22, 28 (2010) ("This Court has repeatedly applied [G.S. 15A-1241] to uphold cases in which these statements and more were omitted from the record."); *State v. Sutton*, 169 N.C. App. 90, 94, 609 S.E.2d 270, 274 (2005) (holding that the defendant failed to demonstrate IAC as a result of defense counsel's failure to request recordation of the full trial proceedings since the defendant did not make a specific assertion of improper conduct at trial and failed to sufficiently demonstrate prejudice); *State v. Crawford*, 163 N.C. App. 122, 129, 592 S.E.2d 719, 724 (2004) (holding that the defendant failed to demonstrate IAC as a result of defense counsel's failure to request recordation of jury selection since the defendant

failed to make a specific allegation of juror partiality and failed to sufficiently demonstrate prejudice).

In *Clodfelter*, a prior panel of this Court was faced with a similar task. 203 N.C. App. 60, 691 S.E.2d 22. There, the defendant asserted he received IAC as a result of his trial attorney's failure to request that opening and closing statements be recorded. *Id.* at 69, 691 S.E.2d at 28. Upon analyzing the issue, this Court reasoned that a failure to request recordation does not amount to "a severe error by trial counsel" since the statute does not require such a motion to be made. *Id.* at 69–70, 691 S.E.2d at 28. The Court further reasoned that the defendant failed to sufficiently argue prejudice as a result thereof since he relied on the *mere possibility* that errors *might* have been made:

> As to the second requirement—the showing of prejudice—defendant Jessup does not suggest how the omission of the opening and closing statements prejudiced his case, except that various errors *might* have been made therein upon which an argument *might* be made on appeal. [A] defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript. Moreover, this Court has held that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute.

Id. at 70, 691 S.E.2d at 28 (cleaned up). Accordingly, the Court overruled the defendant's IAC argument for failure to demonstrate error, much less prejudice. *Id.*

Here, Defendant maintains: "trial counsel's failure to request . . . [recordation] constituted [IAC] because appellate counsel has no meaningful record to review to determine whether trial counsel made *Harbison* admissions without his consent." But Defendant does not allege that a *Harbison* admission occurred. Instead, he argues, "it is reasonable to believe a *Harbison* admission could have occurred here." Defendant therefore has failed to make a specific allegation pertaining to an improper closing argument; instead, like *Clodfelter* and *Sutton*, Defendant's assertions are rooted in the mere possibility of an error, as he is uncertain whether defense counsel conceded guilt at any juncture during closing argument without his permission. *See Clodfelter*, 203 N.C. App. at 70, 691 S.E.2d at 28 (noting that the "defendant . . . does not

suggest how the omission of the opening and closing statements prejudiced his case, except that various errors *might* have been made therein upon which an argument *might* be made on appeal."); *see also Sutton*, 169 N.C. App. at 94, 609 S.E.2d at 273 (citation modified) ("Defendant first argues that his attorney was ineffective in that he failed to request recordation of jury selection, opening statements, and closing arguments because recording these portions of the trial would have shown whether the prosecutor used improper argument to persuade the jury to convict [defendant] of the charges. Defendant does not assert that any such improper conduct actually occurred at trial."). Moreover, precedent reveals that a failure to request recordation of closing arguments does not amount to "a severe error by trial counsel" since section 15A-1241 does not require such a motion to be made. *Clodfelter*, 203 N.C. App. at 69–70, 691 S.E.2d at 28. The cold record reveals that Defendant has not met the first prong of *Strickland*. *See Fair*, 354 N.C. at 166–67, 557 S.E.2d at 524–25.

Defendant argues since closing arguments are unavailable for review in the absence of recordation, the inability to review for a hypothesized *Harbison* admission amounts to prejudice. But even if we were to assume, arguendo, that defense counsel rendered deficient performance and Defendant made an adequate attempt to reconstruct the record, "a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute." *Thomas*, 187 N.C. App. at 147, 651 S.E.2d at 928 (citing *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005)); *see also Hardison*, 326 N.C. 646, 661–62, 392 S.E.2d 364, 373, (wherein, "our Supreme Court held that a defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript"). Accordingly, Defendant has neither demonstrated deficient performance nor prejudice. *Todd*, 369 N.C. at 711, 799 S.E.2d at 837.

Defendant attempts to distinguish the *Clodfelter* decision, discussed above, by relying upon provisions of the IDS Manual. *See* Danielle M. Carman, *Preserving the Record on Appeal*, Indigent Defense Manual Series (John Rubin, ed., 2020) (citation modified) (noting counsel "should ALWAYS move to have everything recorded under G.S. 15A-1241(b)"). But unlike the plain language of N.C. Gen. Stat. § 15A-1241(a)–(b), *Hardison*, and *Hardison*'s progeny, the IDS Manual is not binding precedent. Defendant's arguments in favor of a departure from *Clodfelter* are unmeritorious.

We also note that Defendant conflates our IAC precedents about a failure to request recordation under N.C. Gen. Stat. § 15A-1241 with our precedents dealing with whether a defendant is denied meaningful appellate review as a result of a missing transcript. *Compare Clodfelter*, 203 N.C. App. at 70, 691 S.E.2d at 28 (quoting *Thomas*, 187 N.C. App. at 147, 651 S.E.2d at 928) (cleaned up) (emphasis added) ("A defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no *specific* allegations of error were made and no attempts were made to reconstruct the transcript."); *with State v. Yates*, 262 N.C. App. 139, 141, 821 S.E.2d 650, 652 (2018) (first quoting *In re Shackleford*, 248 N.C. App. 357, 360, 789 S.E.2d 15, 18 (2016) (then quoting *State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974) (cleaned up) ("This Court has explained that [o]ur caselaw contemplates the possibility that the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and that, in such cases, the absence of the transcript would itself constitute a basis for appeal. . . . To determine whether the right to a meaningful appeal has been lost, our Courts conduct a three-step inquiry.")).

Defendant cites *In re Shackleford* to support the proposition that a defendant need not identify a specific error or defect in a missing transcript to demonstrate prejudice for his IAC claim. 248 N.C. App. 357, 789 S.E.2d 15 (2016). But *Shackleford* dealt with whether the respondent was "entitled to a new involuntary commitment hearing" since the verbatim transcript was missing in its entirety. *Id.* at 360, 789 S.E.2d at 17. In that case, "no transcript of the hearing could be prepared because the recording equipment in the courtroom had failed to record the hearing and there had not been a court reporter present in the courtroom." *Id.* As a result, the defendant maintained he was entitled to a new hearing "because the lack of a verbatim transcript of the underlying hearing denied him his right to meaningful appellate review." *Id.* Moreover, *Shackleford* dealt with the requirements of N.C. Gen. Stat. § 122C-268(i) (2023), which notes, "a copy of all documents admitted into evidence and a transcript of the proceedings shall be furnished to the respondent on request by the clerk upon the direction of a district court judge." (citation modified). And unlike this case, the *Shackleford* decision did not deal with allegations of IAC. *Cf. id.* at 360, 789 S.E.2d at 18. Accordingly, Defendant's reliance upon *Shackleford* is misplaced.

Defendant also erroneously relies on *Yates* for similar reasons. 262 N.C. App. 139, 821 S.E.2d 650. *Yates* dealt with the fact that "a portion of the trial transcript" was completely missing. *Id.* at 141, 821 S.E.2d at

652. Notably, the portion that was missing involved the State's direct and cross-examination of the alleged victim. *Id.* at 142, 821 S.E.2d at 653. On appeal, the defendant asserted "that he [was] entitled to a new trial because the incomplete transcript ha[d] deprived him of a meaningful appeal." *Id.* at 141, 821 S.E.2d at 652 (citation modified). However, the *Yates* decision did not concern allegations of IAC as a result of a failure to request recordation under section 15A-1241; it dealt with whether the defendant was "denied a meaningful appeal because a portion of the trial transcript" was missing. *Id.* at 141, 821 S.E.2d at 652.

Finally, Defendant's reliance on *Hardy v. United States*, 375 U.S. 277, 84 S. Ct. 424 (1964), and *Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774 (1963), is likewise misplaced. The *Hardy* decision addressed the inability of a defendant to access a trial transcript on appeal, including the presentation of the defendant's case-in-chief and the trial court's charge to the jury. *Hardy*, 375 U.S. at 282, 84 S. Ct. at 428. That decision did not concern IAC; it dealt with whether an indigent defendant possessed a right to a free trial transcript on appeal under the United States Code and the Federal Rules of Criminal Procedure when submitting "an appeal *in forma pauperis*." *Id.* at 278–89, 84 S. Ct. at 425–26. Also, the *Draper* decision concerned petitioners who did not have "any portion of a stenographic transcript of the jury trial." 372 U.S. at 493, 83 S. Ct. at 778. The *Draper* decision did not involve allegations of IAC; instead, it dealt with the constitutional rights of indigent defendants to free transcripts under Washington State law. *Id.* at 494–95, 83 S. Ct. at 778.

Defendant relies on other precedents in furtherance of his IAC contentions, including *Entsminger v. Iowa*, 386 U.S. 748, 752, 87 S. Ct. 1402, 1404 (1967), *Mayer v. Chicago*, 404 U.S. 189, 195, 92 S. Ct. 410, 415 (1971), and *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 433 (1971). Like *Hardy* and *Draper*, we fail to see the relevance of these decisions to the IAC question before us.

For all these reasons, we hold that Defendant has failed to demonstrate IAC as a result of defense counsel not requesting recordation of closing arguments under section 15A-1241. Accordingly, Defendant's IAC claim is overruled.

B. Rule 2

[2] Defendant next asks this Court to invoke N.C. R. App. P. 2 to address whether defense counsel violated his constitutional right to due process by failing to request full recordation of the trial proceedings. For the reasons below, we decline to invoke Rule 2.

It is well settled that "when a defendant fails to raise a constitutional argument at the trial court level, it is unpreserved for appellate review pursuant to" N.C. R. App. P. 10. *State v. McClinton*, 301 N.C. App. 99, 109–10, 922 S.E.2d 190, 198 (2025) (citation modified); *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) (noting that "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal").

That said, N.C. R. App. P. 2 "allows us to set aside Rule 10, and consider" a defendant's unpreserved constitutional argument when certain criteria are met. *McClinton*, 301 N.C. App. at 110, 922 S.E.2d at 199; *State v. Griffin*, 298 N.C. App. 85, 93, 914 S.E.2d 8, 13 (2024). Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

"The text of Rule 2 provides two instances in which an appellate court may waive compliance with the appellate rules: (1) '[t]o prevent manifest injustice to a party'; or (2) 'to expedite decision in the public interest.' " *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007) (cleaned up). "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *Id.* at 315–16, 644 S.E.2d at 205 (cleaned up). "The exercise of Rule 2 [is] intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Id.* at 316, 644 S.E.2d at 205 (cleaned up).

"This assessment—whether a particular case is one of the rare instances appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017). That is, "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." *Id.* at 603, 799 S.E.2d at 603.

In this case, Defendant contends that this Court should invoke Rule 2 since his substantial rights have been impacted. Defendant maintains: "This case is unlike the run-of-the [mill] case where a defendant has made generalized allegations of error due to a missing transcript but is unable to show any specific prejudice," citing to *State v. Hardison*, 326 N.C. at 661–62, 391 S.E.2d at 373. Defendant further argues that the gravity of the charge, the severity of the punishment, and the age of Defendant must be taken into consideration, as they "weigh heavily in favor of Rule 2 review." In Defendant's view, denying Rule 2 review under these circumstances would amount to manifest injustice.

Our review leads us to conclude that Defendant has failed to demonstrate sufficient error warranting our discretionary invocation of Rule 2 to prevent manifest injustice. Contrary to Defendant's urging, we have already concluded that he failed to make a specific assertion of error like the defendants in *Hardison* and *Clodfelter*—illustrated in section A of this opinion. Defendant's argument to this effect merely amounts to a recitation of his argument pertaining to IAC. Moreover, when addressing the defendant's similar IAC argument in *Verrier*, our Court concluded that the defendant's due process rights were not violated in light of defense counsel's failure to request recordation of matters not required under N.C. Gen. Stat. § 15A-1241. *See Verrier*, 173 N.C. App. at 130, 617 S.E.2d at 680 (overruling the defendant's argument—that his due process rights were violated as a result of defense counsel's failure to request recordation of the full trial proceedings—since recordation of opening statements, closing arguments, and jury selection is permissive as opposed to mandatory under section 15A-1241, and it is not the Court's function "as the judiciary to modify statutory law").

Defendant has failed to establish error to sufficiently warrant the invocation of Rule 2. *See Griffin*, 298 N.C. App. at 93, 914 S.E.2d at 14 ("Although a constitutional right is a substantial right, Defendant has failed to demonstrate error relating to a substantial right."); *see also State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017). Accordingly, we decline to invoke Rule 2 in our discretion.

III. Conclusion

For the reasons above, we conclude that Defendant has failed to show that he received ineffective assistance of counsel from his trial attorney. We also decline to invoke Rule 2.

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
ROBERT MICHAEL REDFEAR, JR.

No. COA25-368

Filed 18 February 2026

1. Appeal and Error—denial of motion to suppress—waiver—failure to object to evidence at trial

In a prosecution for failure to report a new address as a sex offender, defendant waived his right to have the trial court's denial of his motion to suppress reviewed on appeal because defendant failed to object to the evidence (testimony from a sheriff's deputy regarding statements that defendant made about his residence before being read his *Miranda* rights) when it was introduced at trial.

2. Appeal and Error—preservation of issues—pre-Miranda statements introduced—constitutional issue not raised in trial court

In a prosecution for failure to report a new address as a sex offender, defendant failed to preserve for appellate review his argument that the trial court committed plain error by allowing testimony about statements defendant made during custodial interrogation before he was read his *Miranda* rights. Defendant failed to object to the evidence when it was introduced at trial, thereby waiving the constitutional issue. In the absence of exceptional circumstances, the appellate court declined to exercise its discretion to invoke Appellate Rule 2 to review the issue.

3. Sexual Offenders—failure to report new address—change of address—sufficiency of evidence

In a prosecution for failure to report a new address as a sex offender pursuant to N.C.G.S. § 14-208.11(a)(2), the State presented substantial evidence from which a jury could conclude that defendant willfully changed his address and failed to report the new address to the registering sheriff within three business days of the change. Deputies were unable to locate defendant at the only registered address, which was defendant's father's home; mail sent to the registered address by the State Bureau of Investigations was returned undelivered; when defendant was apprehended at his sister's home, he told law enforcement that he had been living there for

one week and that he had been going back and forth between his father's home and his sister's home; and defendant's sister informed law enforcement that defendant had been living with her for six to eight weeks.

Appeal by defendant from judgment entered 17 September 2024 by Judge Mike Adkins in Iredell County Superior Court. Heard in the Court of Appeals 19 November 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Tiffany Hoyd, for the State.

Jason R. Page for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Michael Redfear, Jr., appeals from the trial court's judgment entered upon a jury's verdict finding him guilty of failure to report a new address as a sex offender and his guilty plea to attaining habitual-felon status. On appeal, Defendant argues that the trial court (1) erred by failing to provide its rationale for denying his motion to suppress; (2) committed plain error by admitting at trial a portion of testimony regarding statements that Defendant made to a law enforcement officer when he had not been read his *Miranda* rights; and (3) erred by denying his motion to dismiss the charge of failure to report a new address as a sex offender. After careful review, we conclude that (1) Defendant waived any argument regarding the denial of his motion to suppress; (2) Defendant's argument regarding the alleged violation of his constitutional rights was not preserved for appellate review; and (3) the trial court did not err in denying Defendant's motion to dismiss.

I. Background

Defendant's case came on for jury trial in Iredell County Superior Court on 24 October 2023. The evidence at trial tended to show the following:

As a registered sex offender, Defendant is required by law to provide his address to the sheriff's office of the county of his residence. *See* N.C. Gen. Stat. § 14-208.9(a) (2023). Defendant submitted the address of his father's house on Monticello Road in Statesville to the Iredell County Sheriff's Office. Despite multiple attempts, however, deputies were unable to locate Defendant at that address.

On 21 June 2021, Iredell County Sheriff's Deputy Alyssa Guadalupe, a compliance unit officer for registered sex offenders, traveled to Defendant's provided address to investigate his registry compliance after the Sheriff's Office received an SBI letter that was posted to the registered address but returned undelivered. She could not locate Defendant there, either. After ascertaining Defendant's sister's address on Kodak Drive, Deputy Guadalupe and Deputy Justin Roberts went to that location in search of Defendant.

When the officers arrived, Defendant and his brother-in-law's brother were sitting in lawn chairs in the front yard of the residence. Deputy Roberts engaged Defendant in conversation while Deputy Guadalupe spoke to the other man. Without being apprised of his *Miranda*[1] rights, Defendant responded to Deputy Roberts's questions.

At trial, Deputy Roberts testified that Defendant stated that "he had been staying there [on Kodak Drive] for one week" and did not "contest not living at that residence [on Monticello Road]." In addition, Defendant explained that "he was trying to get some money together to take care of [an outstanding] child support warrant before he came to [the Sheriff's] [O]ffice and registered that particular address [on Kodak Drive] as being his address." Following their conversation, Deputy Roberts placed Defendant under arrest for the outstanding child support warrant.

Deputy Roberts further testified that when he spoke to Defendant's sister that day, she "confirm[ed] that [Defendant] had been living" at her house. In addition, Defendant's sister signed a written statement averring that in June 2021, Defendant was "back and forth" between the two homes, but that he was living with her at that time and had been living there for approximately "six to eight weeks." This statement was admitted into evidence and published to the jury. Defendant's sister also testified to that effect at trial.

Defendant testified in his own defense at trial. According to Defendant, during the six- to eight-week timeframe in which he was

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1. *See Miranda v. Arizona*, 384 U.S. 436, 457–58, 16 L. Ed. 2d 694, 713–14 (1966). "Under *Miranda*, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *State v. Knight*, 245 N.C. App. 532, 544, 785 S.Ed.2d 324, 334 (2016) (cleaned up), *aff'd as modified*, 369 N.C. 640, 799 S.E.2d 603 (2017). "These safeguards include warning a criminal suspect being questioned that he has the right to remain silent, that anything he says can be used against him in a court of law, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* (cleaned up).

"back and forth" between his father's and sister's homes, Defendant's registered address was at his father's house on Monticello Drive; Defendant explained, however, that due to a continuing conflict with his stepmother—Defendant's father's wife—Defendant would sometimes go stay with his sister "just to cool things off" after a heated argument. Defendant testified that he would generally stay at his sister's house for "a couple [of] days" at a time. Defendant further testified that when the deputies discovered him at his sister's house on 21 June 2021, he had only intended to stay with her for "the weekend" and he was unaware of the outstanding warrant for his arrest.

Defendant was indicted and tried for failure to report a new address as a sex offender and attaining the status of a habitual felon. Before opening statements, on the second day of trial, defense counsel made a motion to suppress testimony regarding certain statements made by Defendant to Deputy Roberts. A voir dire hearing was held outside the presence of the jury, at the conclusion of which the trial court denied the motion.

During trial, defense counsel moved to dismiss the charges at the close of the State's evidence and renewed the motion at the close of all evidence; the trial court denied the motion both times.

On 26 October 2023, the jury returned its verdict finding Defendant guilty of failure to report a new address as a sex offender. On 17 September 2024, Defendant entered into a plea arrangement pursuant to which he agreed to plead guilty to attaining habitual-felon status and reserved the right to appeal his conviction for failure to report a new address. That same day, the trial court entered judgment consolidating Defendant's convictions and sentencing him to 95 to 126 months' imprisonment in the custody of the North Carolina Department of Adult Correction.

Defendant entered oral notice of appeal.

II. Discussion

Defendant asserts that the trial court (1) erred by failing to provide its rationale for denying his motion to suppress; (2) committed plain error by admitting at trial a portion of Deputy Roberts's testimony regarding statements that Defendant made when he had not been read his *Miranda* rights; and (3) erred by denying his motion to dismiss the charge of failure to report a new address as a sex offender.

A. Motion to Suppress

[1] Defendant contends that "the trial court erred by failing to provide the rationale for its ruling denying [his] motion to suppress" the testimony of Deputy Roberts regarding statements that Defendant made when he had not been apprised of his *Miranda* rights. However, we conclude that Defendant waived appellate review of the trial court's denial of his motion to suppress.

A defendant waives appellate review of the denial of the defendant's motion to suppress "if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (cleaned up), *disc. review denied*, 376 N.C. 544, 851 S.E.2d 634 (2020); *see also State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (concluding that the defendant's failure to object to the admission of evidence after the denial of the defendant's motion to suppress that same evidence constituted a waiver of the defendant's "right to have this issue reviewed on appeal"), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

In the present case, on the second day of trial, the State noted its intent to introduce into evidence certain statements that Defendant made to Deputy Roberts regarding his residence when he had not been read his *Miranda* rights. Defendant objected. The court and defense counsel then engaged in a colloquy, which ended with the court construing Defendant's objection as a motion to suppress.

The trial court conducted a voir dire hearing in which it heard testimony from Deputy Guadalupe and Deputy Roberts.[2] Defense counsel cross-examined Deputy Roberts but declined to put on evidence. The trial court denied the motion to suppress without making oral or written findings of fact, stating: "After hearing the arguments of counsel and hearing the evidence that has been presented, the [c]ourt, in its discretion, is going to deny . . . [D]efendant's motion."

Later during trial, Deputy Roberts testified regarding Defendant's statements to him that "he had been staying [at his sister's house] for one

2. N.C. Gen. Stat. § 15A-975(b)(1) provides, in relevant part: "[a] motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel . . . sooner than 20 working days before trial, of its *intention to use the evidence*, and the evidence is . . . [e]vidence of a statement made by a defendant." N.C. Gen. Stat. § 15A-975(b)(1) (emphasis added). Here, while "the statement was included in the discovery," the State noted that it "didn't file a notice that would trigger a time period for which . . . [D]efendant had to object."

week" and did not "contest not living at that residence [on Monticello Road]." Defendant failed to "object to that evidence at the time it [wa]s offered at trial." *Anthony*, 271 N.C. App. at 752, 845 S.E.2d at 455 (cleaned up). Accordingly, Defendant waived appellate review of the trial court's denial of his motion to suppress.

B. Plain-Error Review

[2] Defendant also contends that "the trial court committed plain error by allowing Deputy Roberts to testify as to statements made by [Defendant] during a custodial interrogation when he had not been given a *Miranda* warning." (Italics added). This argument was not preserved for appellate review.

In criminal cases, certain evidentiary and instructional issues that were not properly preserved by objection at trial and that are not otherwise "deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

Here, however, the evidence to which Defendant failed to object, and for which he seeks plain-error review, presents a constitutional issue and an evidentiary issue intertwined. As our Supreme Court has explained, "constitutional questions not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Lemons*, 352 N.C. 87, 91, 530 S.E.2d 542, 545 (2000) (cleaned up), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001); *see also Golphin*, 352 N.C. at 405, 533 S.E.2d at 198–99. "[E]ven constitutional challenges are subject to the same strictures of Rule 10(a)(1)." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019).

As Defendant acknowledges, he did not object to the admission of Deputy Roberts's testimony to Defendant's inculpatory statements, which were made without the benefit of a *Miranda* warning. Therefore, "Defendant cannot prevail on this issue without our invoking Rule 2, because his constitutional argument was waived." *State v. Spinks*, 277 N.C. App. 554, 571, 860 S.E.2d 306, 320 (2021) (cleaned up).

Rule 2 is a discretionary rule which permits this Court "to suspend or vary the requirements or provisions of any Rules of Appellate Procedure in a case pending before it upon application of a party or upon its own initiative to prevent manifest injustice to a party, or to expedite decision in the public interest." *State v. Radomski*, 294 N.C. App. 108, 112, 901 S.E.2d 908, 912 (cleaned up), *disc. review denied*, 386 N.C. 557, 904

S.E.2d 542 (2024); *see* N.C. R. App. P. 2. Our Supreme Court has advised that "Rule 2 must be applied cautiously, and it may only be invoked in exceptional circumstances." *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305 (cleaned up).

Notwithstanding Defendant's failure to request our invocation of Rule 2, after careful review, we conclude that Defendant has not shown that appellate review is necessary "to prevent manifest injustice" or "to expedite decision in the public interest." *Radomski*, 294 N.C. App. at 112, 901 S.E.2d at 912 (cleaned up). Accordingly, we decline, in our discretion, to invoke Rule 2 to review this issue.

C. Motion to Dismiss

[3] Defendant also contends that the trial court erred by denying his motion to dismiss "because there was insufficient evidence that he had changed his address." We disagree.

1. Standard of Review

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Lamp*, 383 N.C. 562, 569, 884 S.E.2d 623, 628 (2022) (citation omitted).

"When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Reynolds*, 253 N.C. App. 359, 364, 800 S.E.2d 702, 706 (2017) (citation omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d 159 (2018). "The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State." *Id.* (citation omitted).

"The only issue before the trial court in such instances is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 364–65, 800 S.E.2d at 706 (citation omitted). "Once the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *State v. Parker*, 274 N.C. App. 464, 468, 852 S.E.2d 638, 644 (2020) (cleaned up).

2. Analysis

The jury convicted Defendant of failure to report a new address as a sex offender, in violation of N.C. Gen. Stat. § 14-208.11(a)(2). That section provides that "[a] person required by this [a]rticle to register who willfully does any of the following is guilty of a Class F felony: . . . [f]ails to notify the last registering sheriff of a change of address as required by this [a]rticle." N.C. Gen. Stat. § 14-208.11(a)(2). "The three essential elements of this offense are (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. James*, 242 N.C. App. 188, 192–93, 774 S.E.2d 871, 874 (2015) (cleaned up), *aff'd*, 368 N.C. 728, 782 S.E.2d 509 (2016).

"[A] sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary, so that law enforcement authorities and the general public know the whereabouts of sex offenders in our State." *State v. Fox*, 216 N.C. App. 153, 157, 716 S.E.2d 261, 265 (2011) (cleaned up). "Determining that a place is a person's residence suggests that certain activities of life occur at the particular location." *Id.* (citation omitted). "Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address." *Id.* at 157–58, 716 S.E.2d at 265 (citation omitted).

In the instant case, Defendant's only registered address on 21 June 2021 was that of his father's home on Monticello Road. However, deputies had been unable to locate Defendant there and mail sent to that address from the SBI was returned undelivered. Ultimately, deputies discovered Defendant at his sister's home on Kodak Drive.

Deputy Roberts testified that Defendant told him that "he had been staying there for one week" and that Defendant did not "contest not living at that residence"—that is, at his sister's home on Kodak Drive. Defendant's sister "confirm[ed] that [Defendant] had been living there" and signed a statement that he had been living there for "six to eight weeks" by that point. At trial, Defendant's sister testified to that effect and her signed statement was admitted into evidence and published to the jury.

Viewed in the light most favorable to the State, and regardless of Defendant's intent to retain a registered address at Monticello Drive or how frequently he stayed there, there was ample evidence that he resided

at another address—his sister's home—and that he did not register that address as mandated by statute. *See* N.C. Gen. Stat. § 14-208.9(a). As this Court has recognized: "[E]veryone, at all times, has *some* address for purposes of the sex offender registration statutes, even if it changes daily." *State v. McFarland*, 234 N.C. App. 274, 281, 758 S.E.2d 457, 463 (2014) (emphasis added). Indeed, "it is certainly possible for one to have two addresses in the same day." *Lamp*, 383 N.C. at 571, 884 S.E.2d at 629. Moreover, even if Defendant "was back and forth" between his father's and his sister's homes—actually residing at both places—this would not negate his obligation to register *both addresses* with the Sheriff's Office so that his whereabouts remain known.

Accordingly, we conclude that the trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

For the reasons stated above, we conclude that (1) Defendant waived any argument regarding the denial of his motion to suppress; (2) Defendant's argument regarding the alleged violation of his constitutional rights was not preserved for appellate review; and (3) the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges FLOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
CARL THOMAS SAMSON

No. COA25-317

Filed 18 February 2026

1. Appeal and Error—waiver—pro se defendant—denial of motion for competency evaluation—involuntary intoxication raised—failure to pursue issue

In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, defendant's argument that the trial court erred by denying his motion for a competency evaluation was waived on appeal. Upon inquiry by the trial court, defendant—who was representing himself—clarified that he was not arguing incompetency for standing trial but, rather, that he was entitled to an evaluation to help him prove that he was involuntarily intoxicated at the time of the crimes and thus could not form the requisite criminal intent. However, defendant failed to request access to an expert or otherwise articulate what type of evaluation would have been effective or relevant, eighteen months after the crimes were committed, at determining his prior mental capacity.

2. Discovery—criminal trial—motion to subpoena jail, prison, and medical records—abuse of discretion analysis

In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, in which defendant elected to proceed pro se, the trial court did not abuse its discretion by denying defendant's motion to subpoena jail, prison, and medical records. Although defendant sought the records to show that he had suffered addiction for a long period of time, the trial court properly determined that the records would not be relevant or material to any issue in the case and that the broad request amounted to a "fishing expedition."

3. Constitutional Law—waiver of counsel—knowingly and voluntarily made—sufficiency of colloquy

In a prosecution for felony larceny, felony breaking or entering, and being a habitual felon while on post release supervision, the trial court did not err by allowing defendant to represent himself, where the court's colloquies satisfied the requirements set forth in

N.C.G.S. § 15A-1242—including by ensuring that defendant understood and appreciated the consequences of his decision and that he was adequately informed of the range of permissible punishments—and, therefore, defendant's waiver of counsel was knowing and voluntary.

Judge FREEMAN concurring in result only.

Appeal by defendant from judgments entered 18 July 2024 by Judge Michael Adkins in Alexander County Superior Court. Heard in the Court of Appeals 14 January 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Jordan W. Cansler, for the State.

Shelly Bibb DeAdder for defendant-appellant.

WOOD, Judge.

Carl Samson ("Defendant") appeals from judgments entered following jury verdicts finding him guilty of felony larceny, felony breaking and or entering, and being a habitual felon while on post release supervision. On appeal, Defendant contends the trial court erred by: (1) denying Defendant's motion for a competency evaluation; (2) denying Defendant's motion to subpoena jail, prison and medical records; and, (3) allowing Defendant to represent himself. After careful review of the record, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

On 17 February 2023, at approximately 10:00 a.m. Defendant entered Toni Carrigan's ("Carrigan") home in the Westwood Lane neighborhood in Taylorsville, North Carolina. A neighbor witnessed the intrusion and called both the police and Carrigan. When Carrigan returned home she found someone had entered her home and items were missing.

Officer Ethan Windsor ("Officer Windsor"), who also lived in the Westwood Lane neighborhood, responded to a neighbor's call reporting that someone driving a black Cadillac was possibly breaking and entering into homes located in the Westwood Lane neighborhood. After checking on his home and his neighbors, Officer Windsor viewed his neighbor's footage of the car in question and began patrolling the neighborhood on the look-out for the vehicle.

Approximately an hour later, Officer Windsor observed a black Cadillac, traveling at a high rate of speed through the parking lot of an old school, located approximately a mile and a half from the Westwood Lane neighborhood. Officer Windsor activated his blue lights and moved to block the vehicle in the school driveway. The Cadillac almost t-boned Officer Windsor's patrol car. Officer Windsor exited his vehicle, drew his weapon and ordered Defendant out of his vehicle. Defendant was secured in handcuffs before officers assessed the vehicle. There was a strong odor of marijuana coming from the Cadillac and a television and portable heater were clearly visible in the backseat. A neighbor at the scene identified the items as those that he had seen taken from Carrigan's home.

Defendant claimed he had no recollection of ever entering Carrigan's home or of taking the property. He stated that he had limited memory after taking a pill his child's mother had given him the night before to help with a headache.

Defendant was initially arrested on 17 February 2023 for six felonies: breaking and entering; larceny; possession of burglary tools; possession of a schedule VI controlled substance; possession with intent to manufacture, sell or deliver; and maintaining a vehicle, dwelling house or place for controlled substances use. Attorney Claudia Mundy ("Mundy") was initially appointed as Defendant's counsel.

On 9 October 2023, Defendant was indicted for felony breaking and entering, felony larceny, felony possession of marijuana, possession of marijuana with intent to sell or distribute marijuana, and habitual felon status. Once Defendant was indicted for having attained the status of a habitual felon, Mundy moved to withdraw from the case as she was not included on the "major level felony list." The trial court approved the withdrawal and appointed Attorney Matthew Byerley ("Byerley") to represent Defendant.

On 22 May 2024, the district attorney's office received a letter from Defendant. Defendant stated he was "of sound/sober mind, and [could] fully understand, and comprehend [his] actions." He requested a speedy trial and to "fire his attorney." He further stated he wanted to "get into court at the earliest convenience to request this in person and open court." The district attorney's office immediately forwarded the letter to Byerley and scheduled a hearing.

On 3 June 2024, the parties appeared for a hearing before the trial court, and Byerley made a motion to withdraw. He stated his motion to withdraw was based on Defendant's request. He informed the trial court

he had been communicating with the district attorney and Defendant about possible plea agreements and Defendant was fully aware of the most recent offers available. The trial court then conducted a colloquy with Defendant. The trial court informed Defendant he faced a possible maximum sentence of 204 months of imprisonment. The trial court ensured Defendant was aware of his right to remain silent and have an attorney appointed to represent him and aware that if he chose to represent himself, he would be treated as an attorney. The trial court inquired if Defendant was impaired by any drugs to determine if he was of sound mind.

The trial court then found "[Defendant] has advised the Court that he willfully, understandingly, knowingly requested to represent himself in this matter. He further understands that he will be treated as if he is an attorney. He understands his rights to an attorney." The trial court then allowed Byerley's motion to withdraw, and allowed Defendant to proceed *pro se*. Defendant was sworn in open court to the waiver of counsel and signed the waiver form.

The trial court reviewed the final plea offer with Defendant which would require Defendant to plead to the felony breaking and entering, larceny after breaking and entering, and habitual felon status. In return, the State would dismiss the felony possession of marijuana and felony possession with the intent to sell and deliver marijuana. The matters would be consolidated to one judgment with sentencing at the discretion of the trial court from 97 to 129 months of imprisonment. Defendant rejected the plea offer stating "I overdosed three times in prison. I'm not going back without fighting. I reject it."

As the trial court was reviewing the steps taken in the proceedings, Defendant stated, "I don't [want] to waive all counsel. I want to waive appointed counsel." The trial court then asked Defendant to clarify whether he now planned to seek a private attorney. Defendant stated that he understood: (1) he was currently the attorney on record; and (2) he was waiving a court appointed attorney but was free to try to find a *pro bono* attorney. Defendant affirmed he knew if he was unable to find a *pro bono* attorney, he would be representing himself. The waiver form was amended to reflect his desire to waive appointed counsel rather than all counsel.

On 15 July 2024, the matter came on for trial. The district attorney reviewed the pre-trial history with the trial court. The trial court noted Defendant's intention to proceed *pro se* was clear from his letter, however, his previous interactions with the trial court and paperwork

in the file were ambiguous. Therefore, the trial court conducted a second colloquy with Defendant. The trial court reviewed every charge and its corresponding maximum and required minimum punishment with Defendant. Additionally, the trial court asked Defendant an extensive list of questions to determine his age, schooling level, physical and mental capacity, and understanding of his right to counsel. Defendant clearly stated he wanted to represent himself.

After Defendant's *pro se* status was determined, the trial court addressed pretrial issues with the parties. The State dismissed the charge of possession of marijuana with intent to sell and deliver and moved to join the remaining charges for a single trial. Defendant did not object. The trial court allowed the joinder.

Defendant had filed numerous motions from jail, which the trial court addressed. This included two relevant motions on appeal, one for a capacity evaluation, and another to subpoena Defendant's jail, prison and hospital records.

In regard to a capacity evaluation, Defendant filed a motion requesting an evaluation for the purpose of "determining [his] mental capacity and sanity at the time of the commission of [the] crime." The trial court explained that capacity and sanity are two different issues. The trial court attempted to clarify Defendant's request stating, "you are actually requesting [ ] that you be evaluated so that someone could determine if there was a defense that could be raised related to your mental status at the time of the commission of the offense?" Defendant responded in the affirmative. The State opposed the evaluation stating that intoxication impacting intent was the only issue being raised and that without understanding "who would evaluate him and how you go about obtaining that" they generally opposed the motion. Defendant argued the issue he was raising was not voluntary intoxication, but lifetime addiction paired with the unknowing consumption of fentanyl. The trial court stated "[t]o the extent that that is a motion for evaluation, I am going to deny it. If it were a request as an indigent, that would be a different story." The trial court went on to clarify, "I do not find that you meet the standard for evaluation. So there are other things -- again, this is where you get back to being your own lawyer and I can't help you with this, but based on what you filed, I'm denying that motion because it doesn't meet the standard to send you to Central Regional for evaluation."

In evaluating Defendant's request to subpoena Defendant's jail, prison and hospital records the trial court attempted to clarify Defendant's request stating, "Based on what I'm hearing you say up to

this point on the other things, you want those, again, to show that you have been suffering from an addiction for a long period of time; is that correct?" Defendant affirmed this reasoning. The trial court then denied his request.

The trial court also denied additional motions which Defendant does not now contest on appeal, including motions to request transcripts from trial court hearings in multiple counties from 2023 and 2016, motions for subpoenas for the district court judges from his previous hearings, the Alexander Sheriff's Office and Alexander Homeland Security, a motion to change venue, and numerous motions to dismiss.

The State presented extensive evidence including physical evidence, photographic evidence, and testimony from the victim, witnesses, a Taylorsville Police officer, an Alexander County Sheriff's officer, clerk of court staff, and department of correction staff. After deliberating for twenty-four minutes, the jury found Defendant guilty of felony larceny, felony breaking and or entering, and obtaining the status of habitual felon while on post release supervision but not guilty of possession of marijuana. Defendant was sentenced as a habitual felon at a prior record level IV to 90 to 120 months of imprisonment each for breaking and entering and felony larceny to run consecutively. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal, the trial court erred by: (1) denying Defendant's motion for a competency evaluation; (2) denying Defendant's motion to subpoena jail, prison and medical records; and (3) allowing Defendant to represent himself.

A. Competency

[1] In his written motion to the trial court Defendant stated, "On this day 7/09/2024, I Carl Samson file motion to be evaluated for determining my mental capacity, and sanity at the time of the commission of [the] crime." During the hearing on his motion, the trial court clarified whether Defendant was actually making two motions because mental capacity and sanity are two separate legal concepts. The trial court continued, "So what you are actually requesting is that you be evaluated so that someone could determine if there was a defense that could be raised related to your mental status at the time of the commission of the offense?" Defendant responded, "Right. Whether there was any intent or that I intended to do it or that I was even in the right mindset at the commission." The trial court then inquired whether Defendant had a

concern relative to his current ability to stand trial or represent himself that day. Defendant clearly stated "No, sir. I'm - - I'm of sound mind and understanding right now. I was addressing the actual time of the commission of the crime." After hearing from both Defendant and the State, the trial court denied Defendant's motion.

On appeal, Defendant argues the trial court erred by denying Defendant's motion for a *competency* evaluation although Defendant simultaneously stated his competency to stand trial was not the issue to be addressed by the trial court, nor is it the issue on appeal.

As there appears to be confusion by both Defendant and the State with the concepts of capacity and competency, we find it necessary to clarify.

Capacity is generally defined as, "[t]he mental ability to understand the nature and effect of one's acts." *Capacity*, *Black's Law Dictionary* (12th ed. 2024). It is a term applied to multiple situations under the law including but not limited to: *criminal capacity* when considering 'sanity' or the mental ability of understanding right from wrong that a person must possess to be held accountable for a crime; *diminished capacity* when considering mental conditions short of insanity such as intoxication, trauma or disease that prevents a person from having the mental state necessary to be held responsible for a crime; and even *testamentary capacity* when considering the mental ability necessary to prepare a will. *Capacity*, *Black's Law Dictionary* (12th ed. 2024) (including all related examples of capacity). As a measure of mental ability, capacity is frequently based on medical and mental health evaluations. *See State v. Applewhite*, 281 N.C. App. 66, 73, 868 S.E.2d 137, 143 (2021), *aff'd*, 386 N.C. 431, 904 S.E.2d 749 (2024); *see also State v. Whitted*, 209 N.C. App. 522, 529, 705 S.E.2d 787, 792 (2011).

Competency, in contrast, is specific to, "a criminal defendant's ability to stand trial, measured by the *capacity* to understand the charges and the proceedings, to consult meaningfully with counsel, and to assist in the defense." *Competency*, *Black's Law Dictionary* (12th ed. 2024) (emphasis added). Competency is a legal determination.

> The Due Process Clause of the Constitution of the United States shields criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to do so while they remain incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to possess the competence necessary to stand trial, a defendant must have the "capacity

> to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

State v. Hollars, 376 N.C. 432, 441–42, 852 S.E.2d 135, 141–42 (2020). A person's capacity impacts their ability to be competent. Our Supreme Court has stated, "[i]f there is substantial evidence suggesting that a defendant may lack the *capacity* to stand trial, then a sufficient inquiry into her *competency* is required . . . ." *State v. Flow*, 384 N.C. 528, 551, 886 S.E.2d 71, 88 (2023) (quoting *State v. Sides*, 376 N.C. 449, 459, 852 S.E.2d 170, 177 (2020) (emphasis added).

When considering *criminal capacity* and its impact on competency our statutes and Courts have used the two terms interchangeably. The North Carolina General Statute § 15A-1001 is titled "No proceedings when defendant mentally *incapacitated*; exception" and states,

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

N.C. Gen. Stat. § 15A-1001(a) (emphasis added). Additionally, this Court has stated, "[b]y statute, '[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.' " *State v. Whitted*, 209 N.C. App. 522, 529, 705 S.E.2d 787, 792 (2011) (quoting N.C. Gen. Stat. § 15A-1002(b)). However, Courts have referred to such a hearing as both a "competency hearing" as well as a "hearing to determine capacity." *See Flow*, 384 N.C. at 546, 886 S.E.2d at 85 ("the trial court is required to 'hold a hearing to determine the defendant's capacity to proceed.' N.C.[Gen. Stat.] § 15A-1002(a)-(b) (2021). When a competency hearing is conducted . . . ."). Additionally, courts have also referred to the evaluation as both a competency evaluation and a capacity evaluation. *See Hollar*s, 376 N.C. at 435, 852 S.E.2d at 138 ("the trial court granted the request of defense counsel for another competency evaluation of defendant"); *see also State v. Wray*, 228 N.C. App. 504, 507, 747 S.E.2d 133, 135 (2013) ("A capacity to proceed evaluation is conducted to determine . . .").

This overlap in terminology is unique to the consideration of *criminal capacity*. Competency is not synonymous with other issues

of capacity including *diminished capacity* which is a separate legal defense. "A defendant is entitled to present evidence that a diminished mental capacity not amounting to legal insanity negated his ability to form the specific intent . . . ." *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997).

In the case *sub judice*, Defendant explicitly stated during his pretrial motion, "I'm of sound mind and understanding right now. I was addressing the actual time of the commission of the crime." Additionally, he reiterates on appeal "[Defendant] did not contend that he was incompetent to stand trial. Rather, [Defendant's] sole defense was that he was involuntarily intoxicated when he entered Ms. Carrigan's home and did not have the requisite intent to commit the crimes of breaking and entering and larceny."

During trial, Defendant made attempts to request some type of evaluation to aid him in presenting a defense of diminished capacity due to involuntary intoxication. However, what type of evaluation, if any, administered eighteen months after the crime was committed could be conducted to determine his involuntary intoxication at the time of the crime was unclear.

When ruling on the issue, the trial court stated "[t]o the extent that that is a motion for evaluation, I am going to deny it. If it were a request as an indigent, that would be a different story." The trial court went on to clarify,

> I do not find that you meet the standard for evaluation. So there are other things -- again, this is where you get back to being your own lawyer and I can't help you with this, but based on what you filed, I'm denying that motion because it doesn't meet the standard to send you to Central Regional for evaluation.

On appeal, Defendant does not argue he should have received an evaluation of his competence to stand trial at Central Regional. Instead, and without any legal authority, Defendant argues he should have received some other unknown type of evaluation to aid in proving involuntary intoxication at the time of the offense.

As the trial court alluded when it stated, "If it were a request as an indigent, that would be a different story" and "I can't help you with this," there are other arguments Defendant could have presented as an indigent defendant. Under N.C. Gen. Stat. § 7A-450 an indigent person who is entitled to counsel is also entitled to "other necessary expenses of representation." N.C. Gen. Stat. § 7A-450. Under this statute our

courts have held, when defendants demonstrate a particularized need, experts or evaluations may be ordered. *See State v. Johnson*, 317 N.C. 193, 198-99, 344 S.E.2d 775, 778-79 (1986). However, Defendant failed to make an argument about what type of evaluation he expected could aid his defense when both the trial court and the State appeared confused as to how to evaluate involuntary intoxication eighteen months after the intoxicating event. Additionally, and more consistent with his story to the trial court, Defendant could have made a motion for access to an expert to testify to the effects of fentanyl on a person's mental capacity.

"[A] defendant who elects to appear *pro se* cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant." *State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E.2d 71, 72 (1974). Consequently, the trial judge cannot explain to a *pro se* defendant how best to mount a defense. *Id.* Further, this Court "will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Roache*, 358 N.C. 243, 314, 595 S.E.2d 381, 426 (2004) (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). As Defendant failed to request access to an expert and did not articulate what type of evaluation could possibly have been effective or relevant at trial, this issue is waived on appeal.

B. Subpoena

[2] Next, Defendant contends the trial court erred by denying Defendant's motion to subpoena jail, prison, and medical records. We disagree. A trial court's decision to deny a defendant's motion to compel discovery is reviewed for an abuse of discretion. *Belcher v. Averette*, 152 N.C. App. 452, 455, 568 S.E.2d 630, 633 (2002). Under abuse of discretion review, we determine "whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002). "In exercising that discretion, the trial judge should consider the relevancy and materiality of the items called for, the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.' " *State v. Stimson*, 246 N.C. App. 708, 710, 783 S.E.2d 749, 750–51 (2016) (quoting *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986)).

The trial court explained the concepts of relevancy and materiality to Defendant earlier in the hearing when reviewing Defendant's motion for transcripts, stating material must be relevant "to establish anything you did or did not do on the date of this offense." The trial court further

clarified, "It doesn't have any relevance to make any material fact more or less likely to have occurred." The trial court then discussed with Defendant the relevancy and materiality of the jail, prison and medical records at issue. The trial court asked, "[b]ased on what I'm hearing you say up to this point on the other things, you want those, again, to show that you have been suffering from an addiction for a long period of time; is that correct?" Defendant answered affirmatively. However, how long Defendant suffered from addiction was not an issue in the case. Defendant did not point to any specific records that could illuminate his level of intoxication on the relevant date in question, nor did he allege records exist that would reflect incapacity significant enough to render him incapable of forming specific intent. Without more than a general intention to prove a history of drug abuse, the trial court made the reasoned decision that subpoenas for Defendant's entire medical and penal records would be a "fishing expedition."

C. Right to Self-Representation

[3] Finally, Defendant contends the trial court erred by allowing him to represent himself. We disagree.

"This Court reviews de novo a criminal defendant's appeal regarding waiver of counsel. Under a de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. McGirt*, 298 N.C. App. 223, 228, 913 S.E.2d 476, 480, *writ allowed*, 916 S.E.2d 239 (N.C. 2025), and *review allowed*, 916 S.E.2d 279 (N.C. 2025) (cleaned up).

A defendant "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). "Before allowing a defendant to proceed pro se, the trial court must establish both that the defendant clearly and unequivocally expressed a desire to proceed without counsel, and that the defendant knowingly, intelligently, and voluntarily waived the right to counsel." *State v. Lindsey*, 271 N.C. App. 118, 126, 843 S.E.2d 322, 328 (2020). Before a defendant can waive his right to counsel, "the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. LeGrande*, 346 N.C. 718, 722, 487 S.E.2d 727, 729 (1997). "This Court has held that N.C. [Gen. Stat.] § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries." *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002). N.C. Gen. Stat. § 15A-1242 states,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only

> after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242. Defendant contends the trial court's colloquy did not satisfy the second or third prong of the statute. Regarding the second prong, Defendant argues the trial court could not adequately determine his understanding without the competency evaluation or medical records he requested. Regarding the third prong, Defendant argues the trial court failed to explain the $4,095.50 in court costs associated with his case. This is inapposite.

1. Understanding and appreciating the consequences of his decision

Prior to trial Defendant sent a letter to the district attorney's office in which he stated he was "of sound/sober mind, and [could] fully understand, and comprehend [his] actions." He requested a speedy trial and to "fire his attorney." He wanted to "get into court at the earliest convenience to request this in person and open court."

On 3 June 2024, the trial court held a hearing on the withdrawal of Defendant's counsel. Defendant engaged in a colloquy with the trial court that included a review of his maximum punishment, his rights to silence and representation, and ensured he was making the decision freely. Based on this interaction, the trial court granted defense counsel's motion to withdraw and requested Defendant sign a waiver of counsel. When reviewing the waiver, Defendant restated his position saying he did not want to proceed *pro se*, rather he wanted to fire his appointed counsel. The trial court then clarified Defendant's position.

> THE COURT: So are you going to hire an attorney?
>
> THE DEFENDANT: I plan on seeking an attorney.
>
> THE COURT: So you are going to hire your own attorney? That's the only way you can seek an attorney, is to hire an attorney.

> THE DEFENDANT: No, there is pro bono attorneys, ma'am.
>
> THE COURT: So at this point, do you have an attorney?
>
> THE DEFENDANT: No. I'm the attorney.
>
> THE COURT: All right. I'm going to have you complete a different waiver, sit.
>
> . . .
>
> THE COURT: Thank you, [Defendant], sir, what you advised the Court is at this point either you plan to represent yourself or sir, that you will plan to either hire to seek the assistance of counsel through pro bono service; is that accurate?
>
> THE DEFENDANT: Correct.
>
> THE STATE: Okay. You do understand as of July 15th if you walk in to this courtroom, sir, you are on the trial calendar that means if you do not have an attorney, you will be representing yourself. Do you understand that?
>
> THE DEFENDANT: Yes, ma'am.

When Defendant's case was called for trial, the trial court was concerned that, while his initial request was clear, the colloquy and forms from the previous hearing were more ambiguous. Therefore, the trial court engaged him in an extensive colloquy concerning his right to proceed *pro se*. The trial court clearly conducted a thorough colloquy with Defendant about his waiver that met all requirements set forth in N.C. Gen. Stat. § 15A-1242. Defendant stated clearly and repeatedly that he knowingly, voluntarily, and intelligently waived his right to counsel. *Lindsey*, 271 N.C. App. at 126, 843 S.E.2d at 328. He swore he was sober, had a high school education, and understood that he would be held to the standards of all other attorneys without help from the trial court. The trial court informed him of his right to counsel and of what would be expected from him if he acted as his own counsel. The trial court also informed Defendant of the maximum incarceration levels for all of his offenses.

As noted *supra*, Defendant clearly stated at the trial court and on appeal that his request for a competency evaluation had nothing to do with his competency to stand trial and that his medical records were requested to demonstrate a history of drug abuse. Defendant swore he was currently sober and always competent, therefore a colloquy sufficient to meet all requirements in N.C. Gen. Stat. § 15A-1242 was all

that was necessary to ensure Defendant understood and appreciated the consequences of this decision.

2. Comprehending possible punishments and court costs

Nothing in the record before us demonstrates "a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about 'the range of permissible punishments' " to support Defendant's contention that the trial court failed to meet the requirements set forth in N.C. Gen. Stat. § 15A-1242(a)(3). *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013) (quoting N.C. Gen. Stat. § 15A-1242).

The trial court informed Defendant multiple times that, based on the possibility of habitual felon status paired with his multiple felony charges, he would face a maximum possible sentence of nearly fifty years in prison. Defendant repeatedly asserted his decision to proceed *pro se* when facing the possibility of nearly fifty years in prison. It is beyond incredulity that the trial court's failure to inform him of a possible $4,095.50 in court costs would have influenced him to make a different decision when the potential risk of fifty years of prison did not. Therefore, we hold Defendant's waiver of the right to counsel was knowing and voluntary and the trial court did not err in allowing him to proceed *pro se*.

III. Conclusion

The trial court did not err in denying a competency evaluation when Defendant repeatedly stated he was not requesting an evaluation of his competency to stand trial and further failed to articulate what type of evaluation or expert could possibly have been effective or relevant at trial. Additionally, the trial court did not abuse its discretion when it made the reasoned decision that subpoenas for Defendant's entire medical and penal records would have been a "fishing expedition."

Finally, the trial court followed all the necessary requirements of N.C. Gen. Stat. § 15A-1242 and did not err in determining Defendant's waiver of the right to counsel was knowing and voluntary. Therefore, we hold Defendant received a fair trial free from error.

NO ERROR.

Judge TYSON concurs.

Judge FREEMAN concurs in result only.

STATE OF NORTH CAROLINA
v.
LUIS ALBERTO SANCHEZ, DEFENDANT

No. COA24-644

Filed 18 February 2026

1. Criminal Law—contributing to the abuse of a juvenile—definition of caretaker—sufficiency of evidence

In a prosecution for contributing to the abuse of a juvenile (N.C.G.S. § 14-316.1)—brought against defendant, an Avery County Sheriff's Department deputy and school resource officer who helped run the Police Explorers program for high school students, during which he pressured the victim, a 17-year-old female participant, to tase herself—the trial court erred in denying defendant's motion to dismiss the charge against him for insufficient evidence that defendant encouraged the victim to be in a place or condition, or to commit an act, whereby she could be adjudicated abused pursuant to Chapter 7B. Section 7B-101, which defines "abuse," applies where a "parent, guardian, custodian, or caretaker" has created or allowed a substantial risk of physical injury by other than accidental means; defendant was not a "caretaker" as defined by subsection 7B-101(3)—"[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting"—because the Police Explorers program was not conducted in a residential setting.

2. Criminal Law—willfully failing to discharge duties of office—failure to act versus active commission—sufficiency of evidence

In a prosecution for willfully failing to discharge the duties of office (N.C.G.S. § 14-230)—brought against defendant, an Avery County Sheriff's Department deputy and school resource officer who helped run the Police Explorers program for high school students, during which he pressured the victim, a 17-year-old female participant, to tase herself—the trial court erred in denying defendant's motion to dismiss the charge against him for insufficient evidence where the State contended that defendant willfully failed to carry out his duty to enforce the law against contributing to the abuse of a juvenile. The plain language of section 14-230—that defendant must be proved to have willfully omitted, neglected, or refused to discharge the duties of his office—did not encompass

defendant actively committing an unlawful act, as the evidence at trial tended to show.

Appeal by defendant from judgment entered 21 September 2023 by Judge R. Gregory Horne in Superior Court, Avery County. Heard in the Court of Appeals 10 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Joseph P. Lattimore for defendant-appellant.

STROUD, Judge.

Defendant Luis Alberto Sanchez appeals his convictions for contributing to the abuse of a juvenile and willfully failing to discharge his duties of office. He argues that the trial court erred in denying his motions to dismiss. The State's evidence showed that Defendant, a sheriff's deputy and school resource officer, encouraged a 17-year-old girl in a Police Explorers program to tase herself. Defendant acted irresponsibly, violated department standards on taser use, and endangered the juvenile. But the State failed to present evidence supporting the statutory elements of the specific criminal charges on which Defendant was indicted. We therefore vacate both convictions.

I. Background

On 24 January 2022, a grand jury in Avery County returned an indictment charging Defendant with one count of contributing to the abuse of a juvenile and one count of willfully failing to discharge his duties of office. *See* N.C. Gen. Stat. §§ 14-316.1 (2021) (Contributing to delinquency and neglect by parents and others), 14-230 (2021) (Willfully failing to discharge duties). The case was tried in September 2023.

The evidence tended to show that in June 2021, seventeen-year-old Ann[1] had just completed her junior year of high school. Since her freshman year, she had participated in the Police Explorers program—a program that let students "experience . . . an average day" of a police officer through "simulations," "traffic stops," and "ride-alongs." Defendant, an

1. We use a pseudonym to protect the identity of the minor child involved in the incident and the other student intern.

Avery County Sheriff's deputy and school resource officer, helped run the program.

On 26 June 2021, Defendant invited Ann on an afternoon ride-along beginning around 4:00 or 5:00 p.m. During the shift, they had dinner with Deputy Joshua Marshall, other officers, and an intern. What happened at dinner was disputed. Ann testified that she sat "in the booth with . . . Marshall on one side and [Defendant] on the other," and that "they would unhook their tasers and act like they were going to tase[ ]" her. Marshall told a different story. He said that there was no mention of tasers or tasing at dinner. The object used to scare Ann was "a cell phone or something off the table."

After dinner, Defendant and Ann returned to the Avery County Sheriff's Office parking lot before driving to a "building behind Mayland Community College," where the officers "used to wash their trucks." There, Ann testified, Defendant told her that "she would be tased that night and that there was nothing she could do about it." While Ann sat in a patrol truck, Marshall climbed in, grabbed her phone, and hit record. Defendant then opened the door and drew his taser near Ann's leg—but he didn't tase her. Ann testified that she was afraid.

Ann also recalled Defendant "mentioned that [he] could taser [Kyle]," the other intern. Defendant then walked to Kyle's car and tased him in the arm. Kyle "jerked his arm back and was in a state of confusion." But Defendant just "laughed it off."

The group then moved inside the building. Ann stated that Marshall and Defendant told her to tase herself. She felt nervous and scared. When she told them she felt like she might pass out, they told her to sit down. Then, Ann testified, Defendant told her if she didn't stop sweating, he would kill her. She realized the situation had become serious and felt powerless to stop it. Both Marshall and Defendant said that they would tase her if she didn't do it herself.

At some point, Ann used Marshall's taser on her own leg. She ran to the truck crying. Ann testified that Defendant told her afterward that she "was not allowed to tell anyone," that "it was [their] secret," and that she "would get in trouble" if she told. He also said they should keep it between them because it would violate the Avery County Sheriff's Office policy on taser use.

Marshall testified to a different sequence of events. In his version, Ann had repeatedly asked law enforcement officers about being tased and had "made several comments about wanting to be tased in front of several different ranking officials with the Sheriff's office." That evening,

Marshall said, Ann handed him her cell phone and asked him to record her. While holding the taser, Ann repeatedly turned it on and off, saying "I'm going to do it," before changing her mind. She did this several times. Marshall stated that the deputies moved forward to retrieve the taser, but Ann refused to give it back and said she would use it. When Ann tased herself, Marshall heard her yell and then begin giggling. Afterward, she appeared to be "just laughing and enjoying life."[2]

At trial, the State introduced the Avery County Sheriff's Office policy on taser use. The policy included guidelines on how officers should use tasers in "an official setting when . . . executing their duties of office." It addressed limitations on taser use with certain persons and cautioned against using tasers on sensitive parts of the body.

SBI Agent Maggie Holder testified about sheriff's deputies' duties, including the duty to "enforc[e] criminal laws in North Carolina." School resource officers, she added, have the specific responsibility to protect children in their schools. Agent Holder also described her interviews with Defendant. During those interviews, Defendant admitted asking Ann not to report him after she tased herself. And he confirmed that he had tased other participants in the Police Explorers program.

After the State rested its case, Defendant moved to dismiss both charges. The trial court denied the motions. Defendant renewed his motions after presenting his own evidence, and the court again denied them.

On 21 September 2023, a jury found Defendant guilty of contributing to the abuse of a juvenile under North Carolina General Statute Section 14-316.1 and willfully failing to discharge his duties of office under North Carolina General Statute Section 14-230. The trial court sentenced Defendant to forty-five days of confinement, suspended for eighteen months of supervised probation, on each count.

Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant argues that the trial court erred in denying his motions to dismiss. We agree.

This Court reviews the denial of a motion to dismiss to determine whether "substantial evidence" (1) supports "each essential element

2. Ann explained her laughter this way: "I have a nervous laugh, so when something is stressful or nervous happens, I laugh because I can't control it."

of the crime" and (2) shows "that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quoting *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015)). Substantial evidence is the "amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* We view the evidence "in the light most favorable to the State," giving it "every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* "[W]hether the State presented substantial evidence of each essential element of the offense is a question of law," which we review *de novo*. *Id.* (quoting *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018)).

A. Contributing to the Abuse of a Juvenile

[1] Section 14-316.1 makes it a Class 1 misdemeanor for any adult to "knowingly or willfully cause[ ], encourage[ ], or aid[ ] any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act *whereby the juvenile could be adjudicated . . . abused . . . as defined by [North Carolina General Statute Sections] 7B-101 and 7B-1501*." N.C. Gen. Stat. § 14-316.1 (emphasis added). Adjudicating a juvenile as "abused" is a specific legal process governed by statute. Section 14-316.1 incorporates the definition of an "abused juvenile" by reference to Section 7B-101. That section defines "abused juvenile" several ways, but the trial court instructed the jury on only one: Section 7B-101(1)(b). Under that provision, an "abused juvenile" is one whose "parent, guardian, custodian, or caretaker" "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(b) (2021).[3]

The indictment charged Defendant with "caus[ing], encourag[ing], or aid[ing]" Ann "to commit an act, being tased by an Avery County Sheriff's Officer taser, whereby [she] could be adjudicated abused."

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3. The General Assembly recently amended this provision. *See* An Act to Make Various Changes to the Laws Affecting Juvenile and Associated Services, County Social Services Boards and Departments, Regional Social Services Boards and Departments, Consolidated Human Services Boards and Agencies, and the North Carolina Department of Health and Human Services, to Expand Guardianship Assistance Program Eligibility to Youth Ten Years of Age, to Allow a Judge to Issue a Permanent No Contact Order Against a Defendant Convicted of Certain Violent Offenses, to Provide That it is Felony Child Abuse for Any Person Providing Care to or Supervision of a Child Less Than Sixteen Years of Age to Commit or Allow the Commission of a Sexual Act Upon the Child, and to Provide That Counties and Cities Require Criminal History Record Checks for Applicants Offered a Position if the Position Requires the Applicant to Work with Children in Any Capacity, S.L. 2025-16, § 1.1, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2025-2026/SL2025-16.pdf. These amendments do not affect our analysis.

Defendant claims that the State failed to prove he "encouraged [Ann] to be in a condition where she could be adjudicated abused." The State, in his view, had to show that one of four people—Ann's parent, guardian, custodian, or caretaker—created or allowed the risk to Ann, and that his conduct contributed to it. But the evidence shows no connection to any of them. Defendant acknowledges that encouraging a juvenile to tase herself "is contemptible conduct," but it doesn't violate Section 14-316.1 without proof "of the requisite impact on the relationships with which the Juvenile Code is concerned."

A conviction under Section 14-316.1 requires the State to meet "two different standards of proof." *State v. Stevens*, 228 N.C. App. 352, 356, 745 S.E.2d 64, 67 (2013). First, the State must prove "beyond a reasonable doubt" that the defendant "knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated [abused]." *Id.* Second, the State must show "by clear and convincing evidence" that the juvenile qualifies as abused under Section 7B-101. *Id.* (citing N.C. Gen. Stat. § 7B-805 (2011)). Put differently, the State had to prove Defendant "knowingly or willfully cause[d], encourage[d], or aid[ed]" Ann "to be in a place or condition, or to commit an act," N.C. Gen. Stat. § 14-316.1, whereby Ann's parent, guardian, custodian, or caretaker "create[d] or allow[ed]" a "substantial risk of physical injury" to her, N.C. Gen. Stat. § 7B-101(1)(b).

Defendant doesn't dispute that Ann faced a "substantial risk of serious physical injury . . . by other than accidental means." But the State did not present evidence of the required connection to a parent, guardian, custodian, or caretaker. Ann's parents were not present during the ride-along. No guardian or custodian was involved. And although Defendant may appear to have been acting as a "caretaker" for Ann in the colloquial sense, he was not a "caretaker" as defined by the relevant statute.

A "caretaker" is "[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a *residential setting*." N.C. Gen. Stat. § 7B-101(3) (2021) (emphasis added). Our Supreme Court has explained what that means:

> The "caretaker" statute protects children from abuse and neglect inflicted by people with significant, parental-type responsibility for the daily care of a child in the child's residential setting. Stepparents, foster parents, and adult members of the juvenile's household, for example, live with the child in the child's home. Similarly, house parents

> or cottage parents are in charge of children in nontraditional residential settings, such as dormitories or group residences, where children live for extended periods of time. . . . "[A]n adult relative entrusted with the juvenile's care" is a person who has a significant degree of parental-type responsibility for the child.

In re R.R.N., 368 N.C. 167, 170, 775 S.E.2d 656, 659 (2015) (citations omitted).

Defendant doesn't fit this definition. He did not reside with Ann, did not have parental-type responsibility for her daily care, and did not supervise her in a residential setting. He was responsible for Ann's health and welfare during a ride-along as the supervising officer for the Police Explorers program. A ride-along is not a "residential setting."

Without evidence of a parent, guardian, custodian, or caretaker who created or allowed the substantial risk of serious physical injury, the State failed to prove that Ann could be adjudicated abused under Section 7B-101(1)(b). *See Stevens*, 228 N.C. App. at 356, 745 S.E.2d at 67. And without that showing, the State cannot establish that Defendant "cause[d], encourage[d], or aid[ed]" Ann "to be in a place or condition, or to commit an act whereby [she] could be adjudicated . . . abused." N.C. Gen. Stat. § 14-316.1.

The State resists this conclusion, relying on this Court's decision in *State v. Harris*, 236 N.C. App. 388, 763 S.E.2d 302 (2014). In its view, *Harris* requires only that Defendant put Ann in a situation where she did "not receive proper care from a caretaker" or was "not provided necessary medical care." *Id.* at 394, 763 S.E.2d at 308 (quoting *Stevens*, 228 N.C. App. at 355, 745 S.E.2d at 67). Defendant's conduct did exactly that, the State says—"it placed [Ann] in a situation where she was deprived of appropriate care by a caretaker." The State implies that Defendant was a caretaker, since there's no evidence anyone else could have been. But as we have explained, Defendant was not a caretaker under Section 7B-101(3).

And *Harris* doesn't help the State for another reason. The defendant there was charged under Section 14-316.1 with contributing to "the abuse or neglect" of a juvenile. *Id.* at 389, 763 S.E.2d at 305. He was at the juvenile's grandmother's home, entered a bedroom where the juvenile was sleeping, touched her inappropriately, and tried to give her alcohol. *Id.* at 394-95, 763 S.E.2d at 308. We concluded that the defendant's conduct "placed [the juvenile] in a location in which and subject to conditions under which she could not and did not receive proper care from her caretakers." *Id.* at 395, 763 S.E.2d at 308.

That conclusion relied on Section 7B-101(15)(a)'s definition of a "neglected juvenile"—one "whose parent, guardian, custodian, or caretaker" "[d]oes not provide proper care, supervision, or discipline." N.C. Gen. Stat. § 7B-101(15)(a) (2021). Under that definition, the caretaker's neglect allows the child not to receive proper care or supervision. The defendant's conduct alone can prevent the juvenile from receiving proper care, violating Section 14-316.1.

But Section 7B-101(1)(b)'s abuse definition works differently. It requires that the juvenile's "parent, guardian, custodian, or caretaker" create or allow the "substantial risk of serious physical injury." N.C. Gen. Stat. § 7B-101(1)(b). To violate Section 14-316.1 under that definition, the parent, guardian, custodian, or caretaker must act—or allow another person to act—in a way that creates a "substantial risk of serious physical injury." Defendant could not "contribute" to an act of Ann's "parent, guardian, custodian, or caretaker" creating or allowing a "substantial risk of serious physical injury" where there is no evidence that any of these people were involved.

In short, the State presented no substantial evidence that Defendant "caused, encouraged, or aided [Ann] to commit an act or to be in a place or condition whereby [she] could be adjudicated abused" under Section 7B-101(1)(b). There is no evidence that Defendant communicated with Ann's parents before the tasing or that her parents knew or had reason to know Defendant may intentionally expose Ann to a risk of serious physical injury. We therefore vacate Defendant's Section 14-316.1 conviction.

B. Willfully Failing to Discharge Duties

[2] Section 14-230 makes it a Class 1 misdemeanor for "any . . . sheriff" to "willfully omit, neglect[,] or refuse to discharge any of the duties of his office." N.C. Gen. Stat. § 14-230(a). The trial court instructed the jury that the State had to prove Defendant "omitted, neglected, or refused to discharge a duty of his office, enforcing the criminal laws of this State, by encouraging a juvenile to use an Avery County taser on herself." Defendant argues that the evidence shows no such omission, neglect, or refusal.

The State disagrees. It contends that Defendant violated Section 14-230 by failing to enforce Section 14-316.1—the law prohibiting contributing to the abuse of a juvenile. Because his "conduct contributed to the abuse of the victim," the State concludes, "he willfully failed to carry out his duty to enforce the law." We disagree.

To convict under Section 14-230, the State must prove three elements. First, the defendant must be "an official of a state institution,

rather than a state employee." *State v. Eastman*, 113 N.C. App. 347, 350, 438 S.E.2d 460, 462 (1994). Second, the defendant must "willfully omit[,] neglect[,] or refuse[ ] to discharge the duties of his office." *Id.* And third, an "injury to the public" must occur because of that "omission, neglect[,] or refusal." *State v. Rhome*, 120 N.C. App. 278, 293-94, 462 S.E.2d 656, 667 (1995) (citing *State v. Anderson*, 196 N.C. 771, 773, 147 S.E. 305, 306 (1929)).

The State failed to present substantial evidence of the second element. We begin with Section 14-230's text. *See Fearrington v. City of Greenville*, 386 N.C. 38, 52, 900 S.E.2d 851, 865-66 (2024) ("We first look to the [statute's] plain language, as the 'actual words of the legislature are the clearest manifestation of its intent.' " (citation omitted)). "Omit," "neglect," and "refuse," as used in Section 14-230, all describe the same thing: failing to act when circumstances call for action. To "omit" means to "fail or neglect to do (something); leave undone." *Omit*, Oxford American Dictionary (3rd ed. 2010). To "neglect" means to "fail[ ] to do something." *Neglect*, Oxford American Dictionary (3rd ed. 2010). And to "refuse" means to "indicate or show that one is not willing to do something" or to "fail to perform a required action." *Refuse*, Oxford American Dictionary (3rd ed. 2010). None describes actively committing an unlawful act. Our cases applying Section 14-230 bear this out.

In *State v. Stanley*, two officers stopped a vehicle and discovered contraband, weapons, drugs, and alcohol. 60 N.C. App. 568-69, 299 S.E.2d 464, 465 (1983). One officer announced he was arresting the suspects. *Id.* at 569, 299 S.E.2d at 465. But instead, both officers took the suspects' weapons for themselves and let them go without charges. *Id.* One of the officers was convicted of bribery for taking the weapon and Section 14-230 for failing to arrest the suspects. *Id.* at 568, 299 S.E.2d at 465. The discovery of contraband, the Court said, triggered a duty to arrest—a duty the defendant "had the authority" to perform but declined to do. *Id.* at 571, 299 S.E.2d at 466. We held that the evidence supported his conviction for "willfully failing to discharge the duties of his office as a policeman." *Id.* at 568, 570-71, 299 S.E.2d at 465, 466.

Earlier Section 14-230 cases reflect the same basic scenario: external circumstances trigger a duty, and the officer declines to act. *See*, *e.g.*, *State v. Furguson*, 76 N.C. 197, 198 (1877) (affirming a conviction where the constable received a warrant directing him to arrest an individual but he willfully failed to execute it); *State v. Hord*, 264 N.C. 149, 152, 141 S.E.2d 241, 243 (1965) (upholding indictments alleging the police chief knew of ongoing prostitution at a specific address but willfully

omitted to investigate and bring the operator to prosecution). That is what "omit," "neglect," and "refuse" mean in Section 14-230.

Here, the State identifies no such external circumstances. Unlike *Stanley*, where discovering contraband created a duty to arrest, Ann faced no risk until Defendant created it. No complaint triggered a duty to investigate. No crime was reported. And no probable cause arose.

Still, the State claims that Defendant failed to enforce Section 14-316.1 by violating it. We have already determined that Defendant didn't violate Section 14-316.1. But even if he had, Section 14-230 doesn't criminalize violating laws; it criminalizes omitting, neglecting, or refusing to perform required duties. The State cannot point to any specific duty Defendant failed to perform. Encouraging a juvenile to tase herself is acting—Defendant did something, not nothing.

And the State cites no case where an officer was convicted under Section 14-230 on the theory that violating a law constitutes failing to enforce it. On that reasoning, any officer who violates a criminal statute could also be charged with willfully failing to discharge his duties simply because he committed a crime. Nothing in Section 14-230 supports that reading.

In sum, the State presented no substantial evidence that Defendant "omitted, neglected, or refused to discharge a duty of his office, enforcing the criminal laws of this State, by encouraging a juvenile to use an Avery County taser on herself." We therefore vacate Defendant's Section 14-230 conviction.

III. Conclusion

For the reasons explained above, we hold that the trial court erred in denying Defendant's motions to dismiss. We thus vacate both convictions.

VACATED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
RUSTY DEVON STRICKLAND

No. COA25-523

Filed 18 February 2026

1. Constitutional Law—effective assistance of counsel—failure to challenge joinder of multiple offenses—transactional connection

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates (approximately three months apart), defense counsel was not ineffective for failing to challenge the State's motion for joinder because the facts associated with the separate incidents had a transactional connection and, therefore, the offenses were properly consolidated pursuant to N.C.G.S. § 15A-926. The assaults on the two different dates occurred as a direct result of the victims attempting to intervene in violent domestic incidents between defendant and his wife and both assaults involved the same witnesses.

2. Constitutional Law—effective assistance of counsel—failure to file notice of defense—failure to seek instruction on self-defense or castle doctrine

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, defense counsel was not ineffective for failing to file any notice of defense under N.C.G.S. § 15A-905(c) or for failing to request jury instructions on self-defense or the castle doctrine. Counsel's performance was not deficient because defendant was not entitled to either defense: self-defense did not apply because defendant was assaulting and choking his wife in her home when another victim arrived to intervene, and the castle doctrine did not apply because defendant was not a lawful occupant of his mother-in-law's home where another of the assaults took place.

3. Constitutional Law—effective assistance of counsel—failure to call defendant to testify—tactical decision

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, defense counsel was not ineffective for failing to call defendant to testify where defendant expressly decided not to testify after the trial court conducted an extensive colloquy of defendant's rights and where defense

counsel's pretrial preparation was apparent from the provision of a witness list to the State.

4. Evidence—prior bad acts—attempted murder trial—prior marijuana use

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, there was no error in the introduction of defendant's prior marijuana use with one of the victims—as testified to by the victim when describing his previous interactions with defendant—where, although defendant lodged an objection to one statement, the evidence had previously been admitted without objection and, further, it was unclear on what basis the objection was made. Similarly, there was no merit to defendant's alternative argument that his counsel was ineffective for failing to previously object to references to his marijuana use.

5. Judgments—criminal—lack of jurisdiction to enter judgments—resentencing after notice of appeal given—judgments vacated

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where the trial court was divested of jurisdiction after defendant timely entered oral notice of appeal from judgments entered in November 2024 (in conjunction with the passage of the statutory period for giving notice of appeal), the trial court's judgments entered in June 2025 after rehearing (in response to a letter from the Department of Adult Corrections identifying concerns with defendant's sentences) were vacated for lack of jurisdiction.

6. Sentencing—prior record level—different levels used for different judgments—erroneous judgments vacated

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where defendant was erroneously sentenced as a prior record level IV rather than a prior record level III and was sentenced outside the permissible range of punishments for two of his offenses, as conceded by the State, the erroneous judgments were vacated and the matter was remanded for a new sentencing hearing.

7. Sentencing—aggravating factor—offense committed in presence of a minor—element of one consolidated offense—application to most serious offense not error

In a prosecution for attempted first-degree murder and multiple assaults that occurred on two separate dates, where the jury found

the aggravating factor that some of the offenses were committed in the presence of a minor—which was also an element in the offense of assault with a deadly weapon in the presence of a minor—there was no error in the application of the aggravating factor to the consolidated judgment that included the offense of assault with a deadly weapon in the presence of a minor, since the judgment only applied to the most serious offense in the consolidated judgment; in this case, assault by strangulation, which was properly sentenced in the aggravated range.

Appeal by defendant from judgments entered 8 November 2024 and 13 June 2025 by Judge Stephan R. Futrell in Scotland County Superior Court. Heard in the Court of Appeals 28 January 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Meghan E. Lock, for the State.

J. Hunter Murphy, for the defendant-appellant.

TYSON, Judge.

Rusty Devon Strickland ("Defendant") appeals from judgments entered on a jury's verdicts finding him guilty of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault on a female, possession of a firearm by a felon, assault by strangulation, assault with a deadly weapon in the presence of a minor, and communicating threats. Our review discerns no error at trial. We vacate and remand the 8 November 2024 judgment for resentencing and vacate the 13 June 2025 judgment.

I. Background

Defendant; his wife, Nancy Caulder; and her four children lived in a "little cottage" located behind Jeanette Herlocker's home. Herlocker is Caulder's mother. Both residences were located on Herlocker's family property.

Caulder went to Herlocker's home around 10:00 am on 12 November 2021. Caulder told Herlocker she wanted to leave Defendant. Herlocker noted Caulder seemed anxious.

Herlocker told Caulder to bring her eight-year-old child up to her house to sit with her housekeeper. Herlocker heard footsteps from her back deck. Defendant entered the residence, went straight to Caulder,

and the two began arguing. Herlocker attempted to get Defendant and Caulder to go outside. Defendant pushed Herlocker to the floor and punched her in the face. Herlocker received a black eye. While Herlocker was on the floor, Defendant pulled out a handgun and pointed it at her.

Defendant returned to his residence. Jamie Locklear, who was a handyman, arrived on the property to work on the cottage. Herlocker and Locklear observed Defendant taking firearms out of the cottage and placed them inside of a white van. Defendant drove away.

Locklear observed Herlocker's injured eye and called 911. Locklear took Caulder's four children to his home. When Caulder went to Locklear's home to pick up her children, Locklear heard Defendant's voice on Caulder's phone's speaker saying he was going to kill Locklear and his wife and chop their baby's head off.

Locklear went back to the property and cottage on 5 February 2022. Locklear noticed the front door had been kicked in. Locklear also heard a child screaming inside the cottage. Locklear entered the cottage and observed Caulder on the floor being choked by Defendant. Caulder was turning blue in the face.

Defendant saw Locklear, pulled out and pointed a handgun at Locklear, who fell backwards. Defendant fired multiple shots, and one round struck Locklear in the leg. Defendant fled from the property. Locklear drove himself to the hospital for treatment and required surgery for his gunshot wound.

Defendant was indicted for assault on a female, assault by pointing a gun, and communicating threats for the 12 November 2021 crimes. Defendant was also indicted for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, communicating threats, assault by strangulation, possession of a firearm by a felon, and two counts of assault with a deadly weapon in the presence of a minor for the 5 February 2022 crimes.

Prior to trial, the State filed a motion on 19 January 2024 to join the offenses at trial. The State asserted "the offenses are based on the same act or transaction or on a series of transactions connecting together or constituting parts of a single scheme or plan." Defendant opposed the State's motion, but withdrew his objection during jury selection. All offenses were joined for trial on 4 November 2024.

The State entered a voluntary dismissal to one count of assault with a deadly weapon in the presence of a minor and one count of

communicating threats. After the State rested, Defendant moved to dismiss all charges, offered no evidence, and did not testify.

The jury acquitted Defendant of assault by pointing a gun. Defendant was convicted of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault on a female, possession of a firearm by a felon, assault by strangulation, assault with a deadly weapon in the presence of a minor, and communicating threats.

The State presented the aggravating factor of committing the offense in the presence of a minor on the attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault by strangulation, and possession of a firearm by a felon. The jury found the existence of the aggravating factor. *See* N.C. Gen. Stat. § 15A-1340.16(d)(13a) (2023).

Prior to sentencing Defendant's counsel stipulated he was a prior record level IV offender with 10 prior record level points. Defendant's convictions for assault with a deadly weapon with intent to kill inflicting serious injury was consolidated for judgment with his conviction for attempted first degree murder, and he was sentenced in the aggravated range to an active sentence of 275 to 342 months.

Defendant's conviction for assault with a deadly weapon in the presence of a minor, assault on a female, and communicating threats were consolidated for judgment with his assault by strangulation conviction and he was sentenced in the aggravated range to an active sentence of 22 to 39 months. Defendant was sentenced to an active sentence in the aggravated range of 22 to 39 months for his possession of a firearm by a felon conviction. All sentences were to run consecutively. Defendant gave oral notice of appeal. The trial court made appellate entries on 8 November 2024. The record on appeal was filed with this Court on 2 June 2025, and the case was docketed.

The Department of Adult Corrections sent the trial court a letter identifying concerns with Defendant's sentences on 9 December 2024. The trial court issued a *Writ of Habeas Corpus Ad Prosequendum* for Defendant to return to the trial court for the correction of sentencing errors on 21 January 2025. Defendant never appeared and the trial court did not resentence Defendant. The trial court issued a subsequent *Writ of Habeas Corpus Ad Prosequendum* for Defendant to return to the trial court for correction of sentencing errors on 9 June 2025.

The trial court conducted a new sentencing hearing on 13 June 2025. Defendant's counsel stipulated he was a prior record level III offender with 8 prior record level points. Defendant's conviction for assault with

a deadly weapon with intent to kill inflicting serious injury was consolidated for judgment with his conviction for attempted first degree murder and he was sentenced in the aggravated range to an active sentence of 230 to 288 months. Defendant was sentenced for his conviction of possession of a firearm by a felon in the aggravated range to an active sentence of 19 to 32 months. Defendant's convictions for assault on a female and communicating threats were consolidated for judgment with his conviction for assault by strangulation, and he was sentenced in the aggravated range to 11 to 23 months. All sentences to run consecutively. The trial court arrested judgment on the conviction for assault with a deadly weapon in the presence of a minor. Defendant gave oral notice of appeal.

II. Jurisdiction

In addition to Defendant's prior oral notices of appeal, Defendant has filed a petition for writ of certiorari to review the judgments and sentences imposed by the trial court on 13 June 2025. "The jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given *and* the period described in (1) and (2) has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2023) (emphasis supplied). Subsection (1) provides "the period provided in the rules of appellate procedure for giving notice of appeal." N.C. Gen. Stat. § 15A-1448(a)(1) (2023). Our Rules of Appellate Procedure allow a written notice of appeal in a criminal case to be filed 14 days after entry of judgment. N.C. R. App. P. 4(a)(2). The trial court has jurisdiction until notice of appeal has been given and 14 days have elapsed.

Here, more than 14 days had passed and Defendant had entered oral notice of appeal from the 8 November 2024 judgments. The trial court had been divested of jurisdiction over this case. A judgment "is void *ab initio* . . . when it is issued by a court that does not have jurisdiction . . . [it] is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) (citations omitted). Defendant's oral notice of appeal from his 13 June 2025 hearing is valid.

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023). Defendant's petition for writ of certiorari is dismissed as moot.

III. Issues

Defendant argues he received ineffective assistance of counsel ("IAC") and the trial court prejudicially erred by allowing testimony of

other bad acts. Defendant further argues the trial court erred in sentencing in the 8 November 2024 judgments and it lacked jurisdiction to remedy the errors by resentencing him on 13 June 2025.

IV. Ineffective Assistance of Counsel

Defendant argues he received IAC at trial, by his counsel withdrawing his objection to the State's motion to join these separate offenses; not filing any notices of defenses in accordance with N.C. Gen. Stat. § 15A-905(c) (2023); or making any arguments or requesting jury instructions on self-defense or the castle doctrine; and, by not calling Defendant to testify.

A. Standard of Review

A defendant must satisfy the two-pronged test announced by the Supreme Court of the United States in *Strickland v. Washington*, in order to show IAC. 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The test in *Strickland* for a defendant to show IAC has been adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

Defendant "must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d at 693).

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

Id.

When reviewing a claim for IAC "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). "We ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Joinder

[1] Joinder of two or more offenses for trial is proper where there is a transactional connection, and when doing so would not impair the defendant's right to a fair trial. N.C. Gen. Stat. § 15A-926 (2023); *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 747-48 (2001). This Court considers: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case," when reviewing a transactional connection between the offenses. *State v. Montford*, 137 N.C. App. 495, 498-99, 529 S.E.2d 247, 250 (2000).

Both assaults on Herlocker and Locklear occurred as a direct result of violent domestic incidents between Defendant and Caulder. Both victims were attempting to intervene and protect Caulder from Defendant. Both assaults involved the same witnesses. Locklear was present at both assaults, Herlocker was present at the first assault and present in the aftermath of the second. The facts associated with both offenses have a transactional connection and were properly joined under N.C. Gen. Stat. § 15A-926 (2023).

Defendant's allegations challenging joinder of offenses for trial fail both prongs in *Strickland*. 466 U.S. at 687-88, 80 L. Ed. 2d at 693. Defendant's argument is overruled.

C. Self-Defense and Castle Doctrine

[2] Defendant argues he received IAC by his counsel's failure to file any notice of defense under N.C. Gen. Stat. § 15A-905(c) (2023) or seeking for the trial court to provide jury instructions on self-defense or the castle doctrine.

The castle doctrine applies to "[t]he lawful occupant," the record establishes Defendant was not the lawful occupant of Herlocker's home. N.C. Gen. Stat. § 14-51.2(b) (2023). Defendant is also not entitled to a self defense instruction as he was assaulting and choking Caulder, the property owner's daughter and "lawful occupant," of the "little cottage" when Locklear arrived. Defendant cannot meet the first prong of *Strickland*. 466 U.S. at 687-88, 80 L. Ed. 2d at 693. Defendant's argument is overruled.

D. Defendant Not Testifying

[3] Defendant further argues he received IAC by his counsel's failure to call for him to testify at trial. Defendant expressly decided not to testify after the trial court had conducted an extensive colloquy of his

rights. Defendant's counsel presented a witness list to the State showing pretrial preparation had occurred. Defendant did not present any evidence to preserve the right to present the final argument to the jury. Our court does not "consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *Lowery*, 318 N.C. at 68, 347 S.E.2d at 739. Defendant's IAC argument is overruled.

V. Rule 404(b) - Evidence of Other Crimes

[4] Defendant argues the trial court erred by failing to exclude unrelated evidence of Defendant smoking marijuana with Locklear.

A. Standard of Review

Our Supreme Court has held:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusions that the evidence is, or is not, within the coverage of Rule 404(b).

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

B. Analysis

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023).

The Supreme Court of North Carolina has repeatedly interpreted Rule 404(b) to be a rule of inclusion, and not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. This inclusion of Rule 404(b) testimony or evidence is constrained by the requirements of similarity and temporal proximity of the evidence to the alleged bad acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Admission of evidence under Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to

commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation omitted).

During trial, Locklear testified about Defendant purportedly using marijuana three times. The first time Locklear testified concerned an incident at a birthday party, where Defendant was:

> very irritable, and I had you know, rushed out to the car and asked him to stay and eat some burgers and maybe drink some beer. And we were going to go behind my home and smoke a little marijuana.

Defendant failed to object.

Locklear later testified about another occasion where he and Defendant were putting together bunk beds and they were "smoking a little marijuana." Later, during questioning, Locklear responded to a question about his and Defendant's interactions: "[W]e went looking for a little bit of marijuana. He proceeded to try to intimidate me, telling me he had killed somebody and buried them under a tree[.]" Defendant then objected and the trial court overruled this objection. The basis of the objection was not stated in the record. Defendant only argues the trial court failed to exclude unrelated evidence related to the marijuana and does not make any arguments about Locklear's testimony about Defendant had "killed somebody."

Our Supreme Court has held "[w]here evidence is admitted over objection and the same evidence has been previously admitted . . ., the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

Our appellate rules provide:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Defendant does not argue on appeal the admission of this testimony, concerning marijuana after his counsel's previous failure to object or move to strike amounts to plain error. *See State v. Dennison*, 359 N.C. 312, 313, 608 S.E.2d 756, 757 (2005); *State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019).

Defendant instead argues he received IAC if this Court finds the objections were not specific and did not properly preserve this issue for appellate review. While the grounds where Defendant's counsel objected could reasonably be tied to Defendant telling Locklear he had previously "killed somebody" and not to the prior marijuana use, presuming, without deciding, the objection addressed Defendant's purported marijuana use, Defendant's objection was properly overruled. Defendant's counsel's purported failure to previously object to the two instances of purported marijuana use also does not meet either prong of *Strickland* to constitute IAC. 466 U.S. at 687-88, 80 L. Ed. 2d at 693. Defendant's argument is overruled.

VI. Sentencing

[5] As noted above concerning Defendant's petition for writ of certiorari, the trial court was divested of jurisdiction when it entered the 13 June 2025 sentencing judgment. "When the record shows a lack of jurisdiction in the lower court, the appropriate action . . . [for] the appellate court is to . . . vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted). The judgments entered on 13 June 2025 are vacated. This Court will review the sentences imposed on Defendant's properly appealed 8 November 2024 judgments.

[6] Defendant argues, and the State concedes, Defendant had four prior class A1 or 1 misdemeanors and should have been sentenced on all felony judgments as a prior record level III; Defendant was improperly sentenced to 22 to 39 months, which is outside the range of sentences prescribed by N.C. Gen. Stat. § 15A-1340.17 (2023) for the Class H Felony Assault by strangulation; Defendant was improperly sentenced to 22 to 39 months for the Class G Felony possession of a firearm by a convicted felon; and Defendant improperly received an additional record level point under N.C. Gen. Stat. § 15A-1340.17(b)(6) (2023). The erroneous judgments are vacated.

A. Aggravating Factor

[7] Defendant further argues the trial court erred by failing to distinguish its application of the aggravating factor on all charges in the assault by strangulation judgment. N.C. Gen. Stat. § 15A-1340.4(a)(1) (2023) provides: "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation."

The aggravating factor was not given to the jury on the charge of assault with a deadly weapon in the presence of a minor. The charge

of assault with a deadly weapon in the presence of a minor and the aggravating factor of in the presence of a minor is the same evidence. *See* N.C. Gen. Stat. §§ 15A-1340.16(d)(13a); 14-33(D) (2023). Defendant's convictions for assault on a female and communicating threats can be consolidated for judgment with his conviction for assault by strangulation.

In *Tucker*, our Supreme Court held:

> Thus, when separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter judgment containing a sentence for the conviction at the highest class. Accordingly, the trial judge is limited to the statutory sentencing guidelines, set out at N.C.G.S. § [15A-]1340.17(c), for the class level of the most serious offense, rather than any of the lesser offenses in that same consolidated judgment. . . .
>
> Determination of the convictions to which the sentencing guidelines apply becomes important for the application of aggravating factors. While "evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation," N.C.G.S. § 15A-1340.16(d), where consolidated judgments are concerned, the analysis must go further. Any aggravating factors that are applied to the sentence will necessarily only apply to the offense in the judgment which provides the basis for the sentencing guidelines. Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment.

State v. Tucker, 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003).

Defendant's judgment only applied to his "most serious offense in that judgment," the assault by strangulation conviction, which could receive an aggravated sentence. Defendant's argument is overruled.

The trial court prejudicially erred in sentencing in the 8 November 2024 judgments. We vacate and remand to the superior court for a new sentencing hearing. Because we vacate Defendant's judgments, we do not review Defendant's sentencing phase IAC arguments, as the issue is not likely to recur on remand.

VII. Conclusion

Defendant did not receive IAC. The trial court did not err in admitting testimony of Defendant's purported use of marijuana. Defendant received a fair trial free from prejudicial errors he preserved and argued.

As the State concedes, the trial court prejudicially erred in sentencing Defendant. The judgments are vacated and remanded solely for a new sentencing hearing at correct prior record levels and as consistent herein. *It is so ordered.*

NO ERROR AT TRIAL; JUDGMENTS VACATED AND REMANDED FOR RESENTENCING.

Chief Judge DILLON and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
EMILLIO JESUS VILLARREAL

No. COA25-219

Filed 18 February 2026

Homicide—second-degree murder—aggressor doctrine—jury instruction—sufficiency of evidence

In a second-degree murder prosecution, the trial court properly instructed the jury on the aggressor doctrine where there was sufficient evidence from which the jury could infer that defendant was the aggressor in the fatal encounter, including that: defendant gave the victim his address and asked the victim to come to his house (to receive a payment owed by another guest at defendant's home); after a dispute broke out, while the victim produced a retractable, metal baton, he never raised or swung it at anyone; and, thereafter, defendant shot the victim in the back—a fact that could support an inference that the victim was trying to leave the confrontation when he was killed.

Appeal by Defendant from judgment entered 9 April 2024 by Judge Reggie E. McKnight in McDowell County Superior Court. Heard in the Court of Appeals 29 January 2026.

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

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for Defendant-Appellant.

COLLINS, Judge.

Defendant, Emillio Jesus Villarreal, appeals from a judgment entered upon a jury's guilty verdict of second-degree murder. Defendant argues that the trial court erred by instructing the jury on the aggressor doctrine. For the following reasons, we find no error.

I. Background and Procedural History

Defendant shot and killed Ethan Troutman at Defendant's residence in Marion, North Carolina, on 3 January 2022. Multiple eyewitnesses were present at the shooting. At trial, eyewitnesses called by the State and Defendant offered conflicting accounts of the events surrounding the shooting. The evidence, considered in the light most favorable to the State as the party requesting the instruction, *see State v. Hicks*, 385 N.C. 52, 61 (2023), tended to show the following:

Troutman and Bobby Landon Thomas were eating together at a restaurant in Morganton on 3 January 2022 when Troutman received a call from Dante Davidson. Davidson was at Defendant's residence in Marion with Defendant, Cierra Porter and her two young children, Angela Elliott, Taylor Garland, and Mekhi Hart.

Davidson requested Troutman's Netflix password; Troutman declined to give it to him because Davidson owed Troutman money. Aggression escalated between Troutman and Davidson over a series of subsequent phone calls, which were placed on speakerphone. Defendant eventually told Troutman to come to his residence to get the money and gave him the address.

Troutman and Thomas drove to Defendant's residence in Thomas' car. They stopped to pick up another friend, Bradley Metcalf, on the way. Troutman, Thomas, and Metcalf arrived at Defendant's residence at approximately 7:39 p.m. on 3 January 2022. Thomas parked on the street; Troutman exited the car and stepped onto the sidewalk in front of the residence.

Davidson came out of Defendant's residence and met Troutman. At first, their conversation was civil. Davidson told Troutman that he did

not have the money he owed; Troutman then asked Davidson to give him the chain Davidson was wearing. Troutman reached for the chain, and Davidson pushed his hand away.

Troutman pulled out a metal, retractable baton. Davidson backed into the front yard and twice yelled, "He has a weapon." Within seconds, Defendant stepped onto the front porch with a gun and Troutman turned to run. Defendant fired one shot at Troutman, hitting him in the back.

After being shot, Troutman got back in Thomas' vehicle, and Thomas began to drive away. Neither Thomas nor Metcalf immediately realized that Troutman had been shot. When they did, Thomas stopped the car and attempted to perform first response procedures on Troutman while Metcalf called 911. Troutman ultimately died from his wound.

After the shooting, Davidson ran to his truck and drove away from Defendant's residence. The people remaining in the residence attempted to cover up what happened by telling the police that Troutman had entered the residence. Defendant, Davidson, Hart, and Porter all admitted to lying to the police by telling them that Troutman had entered Defendant's residence when they were first questioned.

At the close of evidence, the court conducted its charge conference. Over Defendant's objection, the court agreed to give a jury instruction on the aggressor doctrine. The jury convicted Defendant of second-degree murder. The court sentenced Defendant to 254 to 317 months' imprisonment.

Defendant appealed in open court.

II. Discussion

Defendant argues that the trial court erred by instructing the jury on the aggressor doctrine because the evidence presented did not allow any inference that Defendant was the aggressor.

"A trial court's jury instructions challenged at trial are reviewed *de novo* on appeal." *State v. Lee*, 258 N.C. App. 122, 126 (2018). "Under *de novo* review, this Court considers the matter anew and is free to substitute its judgment for that of the trial court." *Id.*

"When deciding whether to include the aggressor doctrine in jury instructions, the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as an 'aggressor' at the time that he or she allegedly acted in self-defense." *Hicks*, 385 N.C. at 60-61 (citation omitted). "While all evidence is to be considered, the evidence must be considered in the light most favorable

to the State." *Id.* at 61 (citation omitted). The State must be given the benefit of every reasonable inference to be drawn from the evidence and any contradictions in the evidence are to be resolved in favor of the State." *Id.* (citation omitted).

Pursuant to N.C. Gen. Stat. § 14-51.3, " 'a person is justified in the use of deadly force and does not have a duty to retreat' if he or she is in a lawful place and 'reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another' or 'under the circumstances permitted pursuant to [N.C. Gen. Stat.] § 14-51.2.' " *Hicks*, 385 N.C. at 59 (brackets omitted) (quoting N.C. Gen. Stat. § 14-51.3(a)). Under section 14-51.2, there is a presumption that a home's "lawful occupant . . . held a reasonable fear of imminent death or serious bodily harm to himself or herself or another" when using deadly force if the victim "was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home" which the lawful occupant "knew or had reason to believe . . . was occurring or had occurred." N.C. Gen. Stat. § 14-51.2(b) (2024).

However, the defenses pursuant to N.C. Gen. Stat. §§ 14-51.3 and 14-51.2 " 'are not available to' someone who 'initially provokes the use of force against himself or herself.' " *Hicks*, 385 N.C. at 60 (brackets omitted) (quoting N.C. Gen. Stat. § 14-51.4). "This is what is commonly known as the 'aggressor doctrine.' " *Id.* "Someone may be considered the aggressor if they aggressively and willingly enter into a fight without legal excuse or provocation." *Id.* (cleaned up). "North Carolina law does not require that a defendant instigate a fight to be considered an aggressor." *Lee*, 258 N.C. App. at 126. Rather, "someone who did not instigate a fight may still be the aggressor if they continue to pursue a fight that the other person is trying to leave." *Hicks*, 385 N.C. at 60. Relevant here, a victim being shot in the back may support an inference that the victim was trying to leave a fight. *See State v. Cannon*, 341 N.C. 79, 83 (1995).

The record in this case contains evidence from which the jury could infer that Defendant was acting as the aggressor when he invited Troutman to his residence and shot him in the back. Porter, Hart, and Davidson all testified that Defendant told Troutman to come to Defendant's residence and gave him the address. Porter, Hart, and Davidson all testified that Troutman never raised or swung his baton at Davidson. And it is uncontested that Defendant shot Troutman in the back. Although various witnesses offered materially differing testimony, "the jury, as the finder of fact, was duty bound to weigh the credibility of the witnesses." *Lee*, 258 N.C. App. at 128. Cumulatively, this evidence

is sufficient to support a jury's inference that Defendant acted as the aggressor, and thus, it supports an aggressor doctrine jury instruction.

III. Conclusion

The record contained sufficient evidence to support a jury finding that Defendant acted as the aggressor Accordingly, the trial court did not err by instructing the jury on the aggressor doctrine.

NO ERROR.

Judges FLOOD and MURRY concur.

STATE OF NORTH CAROLINA
v.
DAVID BRADLEY WEBBER

No. COA25-613

Filed 18 February 2026

1. Constitutional Law—right to counsel—voluntary waiver—defendant's acts and intentions

In a prosecution resulting in guilty verdicts on multiple charges —robbery with a dangerous weapon, possession of a firearm by a felon, felony speeding to elude arrest, resisting a public officer, conspiracy to commit robbery with a dangerous weapon, and possession of a stolen firearm—where defendant went through four appointed attorneys, one retained private attorney, and a second private attorney whom defendant attempted to hire (but could not pay) before being compelled to proceed pro se (and without standby counsel at trial because every available attorney was conflicted out due to prior appointments to defendant's case), defendant did not voluntarily waive his right to counsel. Defendant never signed a waiver of all counsel, continuously sought both appointed and retained counsel, and indicated he did not want to proceed pro se at trial.

2. Constitutional Law—right to counsel—forfeiture—obstruction undermining the purpose of the right

In a prosecution resulting in guilty verdicts on multiple charges—robbery with a dangerous weapon, possession of a firearm by a felon, felony speeding to elude arrest, resisting a public officer, conspiracy to commit robbery with a dangerous weapon,

and possession of a stolen firearm—defendant's misconduct permitted the trial court to compel defendant to proceed to trial without counsel. Defendant's obstructionist actions completely undermined the purpose of the right to counsel in that: over more than three years between the first time his case was called for trial and the date his trial began, defendant fired, or conflicted out, four appointed attorneys—three on days the case was called for trial and all for uncredible reasons; and after his first private attorney was removed (for being unable to proceed), despite not having the financial ability to retain another private attorney, defendant formally waived his right to the appointment of counsel a second time and steadfastly refused to be appointed counsel by the court.

Appeal by Defendant from judgments entered 28 August 2024 by Judge James P. Hill, Jr., in Union County Superior Court. Heard in the Court of Appeals 13 January 2026.

Attorney General Jeff Jackson, by Special Deputy Attorney General Asa C. Edwards, IV, for the State-Appellee.

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

COLLINS, Judge.

Defendant David Bradley Webber appeals from judgments entered upon a jury's guilty verdicts of various crimes. Defendant argues that the trial court violated his Sixth Amendment right to counsel by finding he had forfeited counsel and waived counsel by conduct. We find no error.

I. Background

Defendant was arrested on 28 October 2018 and charged with 1) robbery with a dangerous weapon; 2) possession of a firearm by a felon; 3) felony speeding to elude arrest; 4) resisting a public officer; 5) conspiracy to commit robbery with a dangerous weapon; and 6) possession of a stolen firearm.

A. Attorney #1

The court determined Defendant to be indigent and assigned Attorney #1 as his counsel on 31 October 2018. Defendant pled not guilty, and a trial date was set on the 11 November 2019 trial calendar. During a 23 July 2019 motion hearing, the State indicated that it was

unclear whether the Federal prosecutor was going to federally charge Defendant, and the case was delayed.

The case was set for trial on the 2 August 2021 calendar. At calendar call on 2 August 2021, the State asked to have Defendant put on two-hour standby. Attorney #1 stated that he and Defendant were "having some issues" and asked the court to address Defendant about the status of his representation of Defendant. The court asked Defendant if he wished to speak.

Defendant stated, "I didn't say I had no problem with [Attorney #1]. I can bring some evidence and show the things he may be doing, transcript that he say I was an accessory to the case. I can bring that." He further complained, "All I ask [Attorney #1] what's going on with my case, that's all I ask him. The attitude, he walked away from me. You know [Attorney #1], know him for years, know he got a mouth, you know, he got an attitude problem, that's all I'm saying."

Attorney #1 explained that it was difficult to be prepared when Defendant had missed scheduled meetings where they could have discussed the case. He further explained,

> I can't communicate things of substantive nature in the courtroom on the day of court. And is that frustrating to me? Yeah, it is. It means I can't be prepared properly and I tried to get a number for [Defendant] for the telephone standby and we just -- we had issues from there, as I'm sure you can tell. There's -- and I felt like I got an undertone of [Defendant] would bring things to court that indicated I was an accessory to these things. I don't know if that's the case or not. I certainly hope not but I'm worried about the relationship and I felt like it was appropriate to bring it up to you.

The court asked Defendant if he wished for another attorney and explained to him that, if he did, it would delay his trial. Defendant asked the court, "So everything he say you going to believe? Like I say, I could bring facts." Ultimately, Defendant stated, "I want a new attorney." The court allowed Attorney #1 to withdraw, "given the disagreements and issues that they have."

When the court appointed Attorney #2 as Defendant's counsel, the following exchange occurred:

> THE DEFENDANT: If I may, for my lawyer, I can fire that lawyer too, y'all giving me a lawyer I ain't never heard of.

> THE COURT: Sir, let me explain something to you, okay. These attorneys are appointed to represent you zealously and make sure that they do everything possible for you, okay. [Attorney #1] was doing that but you reached --
>
> THE DEFENDANT: How do you know that?
>
> THE COURT: Not -- you're interrupting me. That is who is going to represent you. What I want to explain to you, that if you continue to have problems with attorneys it can reach a point where you won't have an attorney at all. I'm not saying that that's anywhere near here but it can happen. If you don't cooperate with your attorney that can happen. That's all with this matter. [Attorney #2] will be your attorney. Make sure that you see him prior to your next court date so that he can be prepared to represent you. Thank you [Defendant].

Defendant then asked for an "upgrade" to the disk containing evidence against him because some of the files on the disk didn't work: "The only thing that works videos, like chases and stuff but everything else don't work. So I'm asking for an upgrade so I can see -- in my constitutional right I've got to see that any evidence; right? Any evidence y'all, I've got to see that." The court told Defendant that Attorney #2 may be able to see the files and, if not, they could address that at court on a later date.

B. Attorney #2

A little over four months after he had been assigned to represent Defendant, Attorney #2 moved to withdraw on 13 December 2021, stating,

> I met with the [D]efendant . . . on November 1st, November 19th, and November 29th. None of the meetings have gone well. And the last meeting, you know, we tried to sit down and start going through the case, and basically he accused me of lying and left the room. So I don't know if, at this point, we can possibly try to work together to move this case on at this point in time, Your Honor.

The court asked Defendant if he would like a different attorney, and Defendant responded, "Yes, sir." Defendant said, "I have a situation with the NAACP. I'm trying to see what's up with them with their attorney. So can you give me time with that as well? If I can't get an attorney with them, I'll pay for my own attorney."

The court allowed Attorney #2's motion to withdraw and appointed Attorney #3, explaining to Defendant, "And if it turns out that you do not want a court-appointed attorney, that's going to be your business. There's nobody that's going to require you to take any particular attorney, but you don't have your pick of the ones that are off the court-appointed list, just so we're straight on this."

The court set the case for an administrative hearing on 24 January 2022. Defendant then stated to the court, "I need all my discovery from my ex-attorney. I need all of my evidence, because I don't have it." Attorney #2 explained that he would turn over his entire file to Attorney #3. Defendant proceeded to give a long explanation of why he had called Attorney #2 a liar:

> THE DEFENDANT: But can you ask [Attorney #2] who gave him my discovery, if you don't mind, sir, who gave him the discovery? That's what I need to know, if you don't mind, so it will be on record. Nobody had nothing to hide, so you can tell me who -- who gave you the wrong discovery?
>
> THE COURT: I can tell you typically the discovery comes from the DA's office.
>
> THE DEFENDANT: Right. He told me [Attorney #1] gave it to him. That was false.
>
> THE COURT: Well, that may be --
>
> THE DEFENDANT: Because hold on. The reason I say that --
>
> THE COURT: -- because he was your first attorney.
>
> THE DEFENDANT: Let me talk, sir. I'm sorry, I didn't mean to --
>
> THE COURT: You're telling me to let you talk?
>
> THE DEFENDANT: No, I didn't mean to cut you off. I didn't mean to cut you off. No disrespect. But like I was saying, when I go through the discovery he gave me, the same paperwork I gave [Attorney #1] it so happened the DA had. So why is that? That's the reason I got mad and called him a liar. He told me [Attorney #1] is the one that gave it to him. I called the assistant, said [Attorney #1] never delivered nothing to him. That's the reason I got mad. That's the reason I didn't want him on my case, but

> he beat me to the punch. Like he just said the DA gave it to him. If the DA gave it to him, why he got the paperwork that I gave to my attorney, my ex-attorney?
>
> THE COURT: All right. I'm going to leave it January 24, 2022. Good luck.

C. Attorney #3

The case came on for trial on 31 October 2022, at which time the State moved to amend two of the indictments. The court allowed the amendments over Attorney #3's objection. Attorney #3 moved for a continuance for time to prepare for trial based on the amended language of the indictments. The motion was denied. Defendant asked if he could speak. The court denied the request but allowed a moment for Defendant to speak with his attorney.

The court proceeded to read motions Attorney #3 had filed on Defendant's behalf. Attorney #3 then indicated that Defendant wanted to address the court about his counsel. The following exchange took place:

> THE COURT: . . . . If you would like to address me, I will hear you.
>
> THE DEFENDANT: All right. Thank you. I'd like to get another attorney.
>
> THE COURT: Would you like to say anything else?
>
> THE DEFENDANT: No, sir. I just want another attorney, if you don't mind.

The State noted that the case had been "pending for quite some time" and that Defendant was on his third attorney. The court denied Defendant's motion to replace his counsel and addressed the motions filed by Attorney #3 on Defendant's behalf.

Attorney #3 again indicated that Defendant wanted to address the court, and the following exchange took place:

> THE DEFENDANT: Yeah, I'm kind of confused what's going on. I haven't sat down and talked to my lawyer yet and we doing these motions and stuff. I might want some motions filed myself so like I don't understand what's going on. Like nobody want to hear my opinions or anything but y'all trying to prosecute me.
>
> THE COURT: Just a moment ago I interrupted what we were doing in Court so that your lawyer could speak to

> you, so what you just said is not accurate. Somebody does care about what you think -- hold on, don't interrupt me, I'll let you speak. I just gave you a moment to speak to your lawyer. You know what, I'm going to do it again. At this point I'm going to direct both of you to a room outside of the courtroom where you can have some privacy.

The court recessed for twenty-three minutes. During Defendant's meeting with Attorney #3, "the bailiff had to actually shut the doors in between the vestibule and the courtroom . . . because [Defendant] was screaming at [Attorney #3]." Upon returning, Attorney #3 moved to withdraw, stating, "I would cite what I believe is a conflict of interest based upon attorney-client privileged conversation that I've just had with [Defendant]. I believe that we have had a breakdown in communication and [Defendant] has asked that he be appointed new counsel." When asked if he wanted to say anything, Defendant responded,

> Yeah, I just feel like it's not in my best interest. And I ain't seen him since he been my lawyer so I ain't understand why we file these motions. If I ain't never sat down with him and go over my motion of Discovery. He knows nothing about my case, that's all I'm saying.

An extensive exchange between the court, counsel, and Defendant ensued. The State informed the court that Defendant was being represented by his third attorney and that discovery had been provided. The State asserted that Defendant had been repeatedly instructed to meet with counsel to prepare for trial but had failed to keep scheduled appointments, causing any lack of communication to be attributable to him.

Defendant disputed that characterization. He stated that Attorney #1 "was saying some corrupted things in the courtroom that he ain't supposed to say. . . . I got the other dude [Attorney #2] and our situation it was a misunderstanding on my part and they gave me him. I missed one appointment." He further stated of Attorney #3's representation, "I missed one appointment. I drive trucks so I called him and told him I couldn't make it. But other than that, you know what I'm saying, I made the appointments." He argued that Attorney #3 didn't know anything about his case because they had not met.

When the court asked Defendant if he was prepared to represent himself at trial that day, Defendant responded, "You said today? No. . . . No sir, I'm not." The court addressed Defendant as follows:

> And it appears at this point that any conflict that may exist between you and your present counsel, [Attorney #3], is artificially created by you in order to delay this trial. That's what it appears like to me. And if that is the case, then you are in a situation where you may actually forfeit the right to counsel at all and you may be sitting over there by yourself when we start picking a jury this afternoon. So that's the situation you're in now. This case can't go on indefinitely and every time you come to court there is some issue with a lawyer and the [c]ourt is expected to just keep putting the case off, keep putting the case off. That's not how this works.
>
> . . . .
>
> So the position that you're putting this [c]ourt in is do we let justice be denied because you keep coming up with artificial reasons, potentially, or possibly, I don't know, to keep putting this case off? That's not how this works. So I'm going to pause because the State wanted to be heard further, I'm going to hear from the State next.

A brief recess was taken so the clerk could search the files to give the court some context and background about what had happened between Defendant and his attorneys. The court then engaged in further, extensive discussion with Defendant and the State about the history of the case and Defendant's previous attorneys' withdrawals. At one point, the court asked Defendant if he had anything he wanted to say about his prior attorneys' withdrawals. Defendant responded,

> I don't want to place blame on nobody, man. I mean, but at the end of the day, ain't nobody perfect. I mean, so like if you do look at the file, you seen something, that don't mean they right. That why I ain't understand like what the purpose of you looking at the file when he got the motion. Like it don't mean nothing. Because at the end of the day lawyers lie too; right? Everybody lie. So that stuff don't mean nothing.

The court allowed Attorney #3's motion to withdraw. The court then engaged in further, extensive discussions with both parties as to whether Defendant should be appointed another attorney or required to represent himself at trial that day. During that discussion, the State argued as follows:

[Defendant] does not meet with his attorneys which reasonably causes them to ask for a continuance. We may place the case on the trial calendar for status so that [Defendant] comes in to try to give him an opportunity to speak with his counsel. That happened with [Attorney #1], it happened with [Attorney #2,] and it's happened with [Attorney #3]. We actually calendared the case in administrative court for an administrative setting so that [Defendant] was told by the judge in admin court you need to meet with [Attorney #3]. You need to get the ball rolling in your case. [Defendant] is, at the end of the day, an obstructionist of us being able to call his case. He has wanted a trial, and I will give him that, his case was arraigned quite quickly after hitting the administrative calendar. He stated, I want a trial. His co-Defendant's case was taken federally because his co-Defendant is the one, the State would suggest, that actually went into the cellphone store to perpetrate the robbery. [Defendant] was the getaway driver. That's the State's version of the facts, your Honor. As the Court is well aware, the Feds get to cherrypick what cases they take. They left [Defendant], they took the co-Defendant.

I can tell the Court that [Defendant] is familiar with the evidence in his case as well. Because within the last few months [Defendant] actually called the district attorney's office and tried to convince our office investigator that he had video of somebody stealing stuff from his car that was a part of this case. And when confronted by our office investigator about that, [Defendant] then backed up and hung up the phone. He is well aware of the evidence against him, your Honor. He is very much aware of how this works and he is at the point that he is obstructing the proceedings.

My recollection with [Attorney #1] is that there was a conflict between these two gentlemen about that representation. Then that happened again with [Attorney #2]. And he is, as the Court previously suggested, artificially creating a conflict. He didn't meet with [Attorney #3], we were ready to go. He's told by the [c]ourt in August you need to have your stuff together, you need to be here, you need to be ready to go for this term. It was preemptively set

> by the [c]ourt. Everything is fine and then if the [c]ourt noticed in the back while we were proceeding with some of the other matters this morning, that the bailiff had to actually shut the doors in between the vestibule and the courtroom. That's because [Defendant] was screaming at [Attorney #3].
>
> So your Honor, I understand that this hasn't risen to some of the case law where we have a [d]efendant who is spitting in the face of counsel or anything like that, but this is just a pattern of behavior where we are going to be right back here yet again. [Defendant] has been told this before, now we're going to be back here in a few months and we're going to do this again and [Defendant] says, oh, no, I'm going to work with my attorney. And then we're back here trying to call the case that's four years old because [Defendant] wants counsel of his choice, which is not his legal right if he is pursuing an indigent lawyer. He has the right to counsel that's appointed by the [c]ourt. And then when he doesn't like that counsel and makes representations that those attorneys are working for the State, he doesn't like it and then he creates a conflict and we're here doing this exact same thing, your Honor. I would suggest that this is obstructionist.

Defendant responded,

> I don't miss no -- you got to think, I'm facing years and I'm innocent, why would I miss an appointment. That don't even make sense. I got to go to trial, right. So why would I try to prolong anything? I'm innocent, I have nothing to hide, right. I'm ready to go to trial. But at the end of the day I need a lawyer though. That's my right. You can't say well he had two attorneys so I ain't going to give him counsel, that don't even make sense. You don't even know the situation.

After extensive discussion and deliberation, the court ultimately concluded that Defendant had not yet forfeited his right to counsel and appointed him another attorney, stating:

> All right. I don't want to just keep belaboring this so my decision is going to be that it appears that at least in part there has been some scheduling conflicts with past attorneys. It's not clear from my review of the file that the

> attorneys were allowed to withdraw exclusively because of the actions of [Defendant]. It appears that at least in part there has been some scheduling conflicts with past attorneys. I will note that it does appear that a conflict was created just this morning between [Defendant] and [Attorney #3] based on comments by [Defendant]. However, based upon some of the cases that I reviewed during the break, I am not convinced or persuaded that this rises to the level of severe or serious misconduct.
>
> So at this point I think it is my responsibility to make sure that the trial does proceed fairly. And in order to do that, he will need new counsel appointed and I'm going to -- just so you know, I'm going to include findings in this record such that if you don't cooperate and proceed with your next attorney to a resolution of this case, so could be the basis of another judge or even me later if I'm cycled back into the rotation here in Union County, it could be the basis for that judge to find that you have in fact forfeited all counsel and then you would be trying this case by yourself.

The court appointed Attorney #4 to represent Defendant but warned,

> And if you come back in here the next time with yet another conflict to me, I think that's going to rise to a level of serious or severe misconduct where it appears that all you're trying to do is delay this case so it's never tried. So that's where you are at this point. Do you have any questions about anything I just said?

Defendant responded, "No." At some point, the case was set for trial on 6 March 2023.

D. Attorney #4

On 28 February 2023, Attorney #4 filed a motion to continue, specifically noting "[t]hat this need for additional time to prepare is not in any way the fault of the Defendant." The court allowed the motion, and the case was set on the 30 October 2023 trial calendar.

On 24 October 2023, Attorney #4 filed another motion to continue. The case was called for trial on 30 October 2023. The State indicated to the court, "from my understanding from [Attorney #4] there is a motion to continue that [Attorney #4] filed last week, but in addition to that I believe there might be a counsel issue that needs to be addressed."

Attorney #4 explained to the court,

> So I spoke with [Defendant] this morning, he informed me that he had retained [Attorney #5] from Mecklenburg County. I just now spoke with [Attorney #5's] office, they did confirm that she was retained. They indicated that she was in Mecklenburg County first and was heading here as soon as she got done so they expected her to get here some time soon.

Defendant confirmed that he had hired Attorney #5. The court determined they needed to wait for Attorney #5 to arrive before addressing any matters in the case.

After a brief recess, the parties reconvened and Attorney #4 indicated that Attorney #5 was not coming to court because she "had had some sort of family emergency[.]" The court took a recess so it could contact Attorney #5 directly.

E. Attorney #5

The parties reconvened, and the court indicated that Attorney #5 confirmed via telephone that Defendant had paid her "some money" to represent him but that she was not able to appear in court due to "internal office issues going on over the weekend" and some personal issues. The court ordered everyone involved, including Attorney #5, to appear the following day.

The following day, Attorney #5 entered a general appearance in the case. She explained that Defendant had paid "some of" her quoted fee, but that she had not yet been retained for the case. Nonetheless, she had intended to appear because she "didn't want to leave him hanging." She apologized for not being available the previous day and for not being prepared to try the case. She added, "I didn't know it was already on the trial [calendar] and especially didn't know it was Number 1." Defendant signed a waiver of court-appointed counsel, and Attorney #4's motion to withdraw was allowed.

The court then considered whether to continue the case. The court told Defendant, "If I do grant the continuance[,] it's only going to be one continuance and then we're going to proceed with the case. Do you understand?" Defendant responded, "Yes, sir." After hearing from the State, Defendant, and Attorney #5, the court allowed the case to be continued, stating, "This will be the last continuance motion."

The case was continued to 27 November 2023. On that date, Attorney #5 did not show, and the case was continued to 5 February 2024. On 5 February 2024, Attorney #5 moved to withdraw because she had not been able to work on the case due to family issues. The court denied the motion but continued the case and set it for trial on 4 March 2024.

At a hearing on 22 April 2024, an attorney appearing on behalf of Attorney #5 renewed her motion to withdraw, explaining that Attorney #5 was facing criminal charges in Mecklenburg County. Defendant stated he had had a "horrible" experience with Attorney #5 and had filed a lawsuit against her to get the money back that he had paid her.

The court removed Attorney #5 from the case and asked Defendant what he was going to do about an attorney going forward. Defendant stated he had spoken to Attorney #6 back in February but was unable to hire him without Attorney #5 returning his money. The court stated to Defendant, "I just want to make sure, you do not want to be considered for a court appointed attorney, you're going to hire your own attorney?" Defendant responded, "Yes, ma'am. I have no choice." The following exchange took place:

> THE COURT: . . . I just want to make sure you understand. I know you have had several court appointed attorneys and you hired [Attorney #5] and now you're in the process of trying to -- of hiring [Attorney #6]. I just want to go through your charges, make sure you understand your maximums. So you have one count of felony flee to elude, that's a Class H maximum punishment 39 months, one count of resisting a public officer, Class 2 misdemeanor maximum punishment 60 days, one count of robbery with a dangerous weapon, Class D maximum punishment 204 months. One count of conspiracy to commit robbery with a dangerous weapon Class E 88 months, one count of possessing firearm by a convicted felon Class G 47 months and one count of possessing a stolen firearm Class H 39 months for a total maximum punishment of 419 months. Knowing what you're facing, you do not want me to consider you for a court appointed attorney?
>
> THE DEFENDANT: No, I got to hire -- I got to hire my own attorney. I really have no choice. My back against the wall.
>
> THE COURT: Well, you have a choice. That's what I'm asking. Do you not want me to consider you for court appointed attorney?

> THE DEFENDANT: I had them before, ma'am, and it's hard. Like, I ain't going to stay on that. No, I'm going to hire my own.

The court had Defendant sign a waiver of appointed counsel form. The court set 19 August 2024 as the trial date. The State indicated that it had communicated with Attorney #6, who said he had not been hired to represent Defendant. The court asked if it would be a good idea to put the matter on the July administrative calendar to address Defendant's counsel situation.

The following exchange took place:

> [THE STATE]: I think that's probably a good idea, your Honor. Because I will tell the [c]ourt based on this umpteenth waiver from [Defendant] now that the State intends to proceed on the August date regardless of whether or not [Defendant] has retained counsel by that date. As the Court can see, this matter was indicted February 11th of 2019 and we have gone through multiple, multiple attorneys in this matter, your Honor. I would -- that August date -- excuse me, the July admin date would be July 15th.
>
> THE COURT: Okay. All right. [Defendant], so your next Court date is July 15th. That's an admin session.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Your case -- the State's calling your case for trial August the 19th. So you need to go see [Attorney #6] and make sure he understands that, that it's already set for trial August 19th. But you need to be here July 15th to -- if there's any issues with that August date the Court can address that before then.
>
> THE DEFENDANT: Okay.
>
> THE COURT: Okay. So July 15th is admin and August 19th is your trial date. Okay. Any questions?
>
> THE DEFENDANT: No, ma'am. Thank you.

F. No Attorney

Defendant appeared by himself on 15 July 2024 without having hired an attorney. He stated he was unable to hire Attorney #6 because Attorney #5 had not returned his money. The court asked Defendant if he would like appointed counsel. Defendant responded, "So I'm just

waiting to get my money back so I can get a retained attorney. I don't feel comfortable hiring no public defenders up here . . . ." Defendant explained that he was not comfortable hiring a public defender because he had alleged that a police officer had planted evidence against him:

> The reason I got a problem with the Public Defender's Office, because my allegation what the officer did stealing the evidence, even planting evidence. Every time I tell my attorneys, they don't want to work on my case. . . . All y'all know each other in here, let's keep it real, right. Every time I tell the attorneys about what this officer did, I have evidence, even gave it to the DA, they brush me off, they didn't want to work on my case.

The court told Defendant, "I'm not going to change the court date right now. It sounds like you don't want a court appointed attorney. You still want to hire your own attorney given the circumstances." Defendant responded, "I can't have a court appointed attorney." The court warned, "Okay. So you need to make sure you get somebody retained before the 19th August trial date."

Defendant asked if he would have to represent himself if he was still unable to get his money back and hire a new attorney by the 19th. The court responded that it was unable to answer a question "contingent on circumstances." Defendant then asked what would happen if he did not have an attorney on the 19th. The court responded, "Then that will be up to the judge on the 19th. I'm not going to be here."

On 19 August 2024, Defendant appeared in court by himself without having hired an attorney. The State addressed the court:

> [Defendant] has been put on notice those last two court dates that the State intended to call this case as Number 1 today and that whether he showed up with an attorney or not we intended to move forward. So I believe we need to address the attorney issue before the State moves to do forfeiture of counsel.

The court took an hour recess to read the case file. Upon returning, the State apprised the court that, at the previous hearing, the court advised Defendant that the State intended to call this matter first for trial this session. The State then gave the court an extensive history of the case with regard to Defendant's counsel and the warnings the court had given Defendant about not showing up with an attorney.

The court then asked Defendant if he disputed anything that the State had said. Defendant responded, "Basically everything." Defendant stated that he and Attorney #1 "had no conflicts of interest" and further asserted, "I told him I would let him go but then I changed my mind but the [c]ourt ordered to let him go." He also stated, "The other three lawyers that I had, there were never no conflict of interest. The conflict of interest would be there in my file." He also alleged that Attorneys #2, #3, and #4 "never worked on my case." He said he gave Attorney #5 "all his money" and that he fired her. Defendant concluded by saying, "If you look in the file, we did a speedy trial 2018. So it's impossible that I'm playing any kind of games."

The court then listened to considerably more argument from the State and Defendant as to whether Defendant had forfeited or waived his right to counsel. The court took the matter under advisement over an extended lunch period. Upon returning, the court recited extensive findings of fact and, based on those findings, concluded that Defendant had forfeited counsel and waived counsel by conduct:

> Defendant has refused to obtain counsel after multiple opportunities to so do and after having been appointed attorneys on four separate occasions over a four year period. And that based upon Defendant's continually hiring and firing counsel, thereby significantly delaying the proceedings, to a period of some five -- approximately five and a half years.
>
> The [c]ourt concludes that the Defendant has forfeited his right to counsel, and further that after being warned that he would lose the right to counsel if he engaged in dilatory tactics by [the court] and further after being told that his case would be first on the trial list during this session starting today, August the 19th of 2024, by [the court] approximately 118 days ago and subsequently [by the court] another 34 -- and approximately 34 days ago that by conduct the [c]ourt concludes that the Defendant has not only forfeited counsel but also waived his right to counsel by conduct. All right.
>
> The [c]ourt determines that the Defendant should be required to go forward representing himself in these matters. That's over Defendant's strong objection.

The court was unable to appoint standby counsel because most every available attorney had been conflicted out due to their prior appointment to Defendant. Defendant represented himself through a day of motions and a day of jury selection. On the fourth day, Defendant failed to appear. His bond and pre-trial conditions of release were revoked, and a warrant was issued for Defendant's arrest.

On 26 August 2024, Defendant was found guilty of six crimes. Defendant was present in court for sentencing, and the court sentenced him to five consecutive sentences in the presumptive range. Defendant gave oral notice of appeal on the same day and filed a written notice of appeal on 9 September 2024.

II. Discussion

Defendant argues that the court violated his Sixth Amendment right to counsel by finding he had forfeited counsel and waived counsel by conduct.

A. Standard of Review

The standard of review for an alleged constitutional violation is de novo. *State v. Steele*, 260 N.C. App. 315, 319 (2018) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33 (2008) (quotation marks and citation omitted).

B. Right to Counsel

"The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. McNeill*, 371 N.C. 198, 217 (2018) (citation omitted). "The right to counsel in criminal proceedings is not only guaranteed but is considered to be fundamental in character." *State v. Harvin*, 382 N.C. 566, 584 (2022) (quotation marks and citation omitted). "This fundamental constitutional right may, however, be surrendered at the choice of a defendant or lost as a result of serious obstruction or misconduct of the defendant." *State v. Atwell*, 383 N.C. 437, 446 (2022) (citation omitted).

C. Voluntary Waiver of Counsel

[1] A defendant may choose to surrender the right to assistance of counsel through voluntary waiver. *Id.* at 447; *see also* N.C. Gen. Stat. § 15A-1242 (2024) ("A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel . . . .").

"Thus, for a waiver of counsel to be constitutional and comply with our state's statutory requirements, a defendant must, as an initial point, seek to proceed *pro se*." *Atwell*, 383 N.C. at 447 (emphasis omitted).

Here, it is plain that Defendant did not seek to proceed pro se. Instead, he continuously sought both appointed and retained counsel and indicated he did not want to proceed pro se. Although he signed two waivers of court-appointed counsel, he never signed a waiver of all counsel. Contrary to the State's argument, Defendant did not voluntarily waive assistance of counsel.

D. Forfeiture of Counsel

[2] Turning to the first issue raised by Defendant, whether he forfeited his right to counsel, we conclude that Defendant engaged in the level of misconduct which may permit a court to compel a criminal defendant to proceed to trial without counsel. *See id.* at 446.

"Forfeiture of the right to counsel is not an express choice to proceed pro se, but rather is a loss of the right to counsel which is imposed as a result of a defendant's 'egregious misconduct.' " *Id.* at 449 (quoting *State v. Simpkins*, 373 N.C. 530, 535 (2020)). Such misconduct may include "a criminal defendant's display of aggressive, profane, or threatening behavior." *Harvin*, 382 N.C. at 587.

> [A] forfeiture of the right to counsel can also result where a defendant remains polite and apparently cooperative if the defendant's "obstreperous actions" are so severe as to impair the vindication of the goals of according criminal defendants a right to counsel or which operate to completely prevent a trial court from proceeding in the case[.]

Atwell, 383 N.C. at 449 (citations omitted).

> If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion.

Simpkins, 373 N.C. at 538. In that case, "the defendant's obstructionist actions completely undermine the purposes of the right to counsel," and the court may find the defendant forfeited his right to counsel. *Id.*

Here, it is readily apparent that "[D]efendant's obstructionist actions completely undermine[d] the purposes of the right to counsel," *id.*, and the court correctly found and concluded that Defendant forfeited his right to counsel.

More than three years passed between the time Defendant's case was first called for trial on 2 August 2021 and the date his trial began on 19 August 2024. During that time, Defendant fired, or conflicted out, four appointed attorneys. Defendant's intent to delay his trial with his tactics is evident from the fact that he fired or conflicted out his court-appointed counsel each time his trial date became imminent–three of the four attorneys were fired or conflicted out on the day the case was called for trial. Defendant's intent to delay his trial with his tactics is further evident from his artificial and uncredible reasons for firing or conflicting out his attorneys–the attorneys were lying about various things, Defendant did not miss but one appointment, and the attorneys knew nothing about his case.

Following the appointment of four successive attorneys, Defendant formally waived his right to the appointment of counsel. Defendant thereafter privately retained Attorney #5, who was undoubtably a disaster and was swiftly removed by the court. Despite not having the financial ability to retain another attorney, however, Defendant formally waived his right to the appointment of counsel a second time and steadfastly refused to be appointed counsel by the court. He based his refusal upon frivolous allegations that his prior court-appointed attorneys were all lying in some way or another. Rather than accept a court-appointed attorney, which was repeatedly offered, Defendant appeared for trial without counsel despite repeated warnings that the case would proceed regardless of whether he had an attorney. A vast majority of the final three-year delay in Defendant's trial was caused by Defendant's tactics. "Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned." *State v. Montgomery*, 138 N.C. App. 521, 525 (2000).

These facts are similar to, or more egregious than, the facts in other cases where our courts have found that the defendant forfeited his right to counsel. *See*, *e.g.*, *State v. Rogers*, 194 N.C. App. 131 (2008) (over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior); *State v. Quick*, 179 N.C. App. 647 (2006) (the defendant waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact

any attorney, instead waiting until the day before trial); *Montgomery*, 138 N.C. App. 521 (over the course of fifteen months, the defendant was twice appointed counsel, twice released his appointed counsel and retained private counsel, and then disrupted proceedings when counsel was unable to secure additional continuances of his trial).

The facts of this case "demonstrate forfeiture of the right to counsel because [D]efendant's actions totally undermine[d] the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all." *Simpkins*, 373 N.C. at 536. Because we conclude that Defendant forfeited his right to counsel, we need not address his argument that the court erred by finding and concluding that he waived his right to counsel after being warned.

III. Conclusion

For the reasons stated above, the court did not err by finding and concluding that Defendant forfeited his right to counsel. We find no error in the court's judgment.

NO ERROR.

Judges ZACHARY and CARPENTER concur.

STEELE v. KENNA

[303 N.C. App. 166 (2026)]

MARY PAULA ZAYTOUN STEELE, PETITIONER
v.
KEVIN I. KENNA, JEFFREY A. KENNA, PATRICK E. KENNA, PETER L. KENNA, THOMAS X. KENNA, MARTHA ZAYTOUN, CLARE K. ZAYTOUN, TAYLOR M. ZAYTOUN, REEVES M. ZAYTOUN, MARY L. ZAYTOUN BERNE, HENRY S. ZAYTOUN, III, JEREMIAH R. ZAYTOUN, CHRISTIAN S. ZAYTOUN, HAYNES ZAYTOUN, BLAISE WATERS, BECKET WATERS, ALEXANDRA PENNY, ELENA PENNY, MARK FOSTER, JR., MARTHA LEE BRISSETTE, AUGUSTUS HOWARD, CHARLES N. HOWARD, KATIE ALLARE, GREGORY ALLARE, JOHN MICKELSON, ASHLEY STEELE, DANNY STEELE, BRIGID STEELE, AND HENRY S. ZAYTOUN, JR., AS GUARDIAN FOR MARGARET A. ZAYTOUN, AND RACHEL L. ZAYTOUN, RESPONDENTS

No. COA25-530

Filed 18 February 2026

1. Appeal and Error—interlocutory order—compelling discovery—substantial right—attorney-client privilege

In a declaratory judgment action to clarify the rights and obligations under a trust—which was initiated by the wife of the grantor in her capacity as the trustee of her deceased husband's trust—the trial court's order granting a motion compelling discovery from the grantor's law firm, although interlocutory, was immediately appealable as affecting a substantial right where petitioner-trustee asserted attorney-client privilege on behalf of herself and her deceased husband.

2. Discovery—attorney-client privilege—testamentary exception—application to trusts—determination of succession

In a declaratory judgment action to clarify the rights and obligations under a trust—specifically, whether the designation of "my nieces and nephews" as beneficiaries extended to the grantor's marital relatives in addition to his biological relatives—the trial court's order compelling discovery from the grantor's law firm was affirmed. Although petitioner (acting in her capacity as trustee of her deceased husband's trust) asserted attorney-client privilege on the grantor's behalf, the appellate court determined as a matter of first impression that the application of the testamentary exception to the attorney-client privilege to wills applied equally to trusts in a dispute regarding distribution. Under the exception, where the grantor's intent in his use of the phrase "my nieces and nephews" was at issue, the law assumed the grantor's implied authorization of the release of communications to aid in the proper administration of the trust assets, thereby waiving the privilege.

3. Discovery—attorney-client privilege—trust documents—personal privilege of trustee protected

In a declaratory judgment action to clarify the rights and obligations under a trust—specifically, whether the designation of "my nieces and nephews" as beneficiaries extended to the grantor's marital relatives in addition to his biological relatives—the trial court's order compelling discovery from the grantor's law firm was affirmed. Although petitioner, who initiated the action in her capacity as trustee of her deceased husband's trust, asserted that her personal attorney-client privilege would be violated by the release of documents by the law firm because she and her husband had consulted with the law firm together on their estate planning, the trial court's order expressly limited the release of only those documents related to the grantor's estate.

Appeal by petitioner from order entered 22 November 2024 by Judge Matthew T. Houston in Wake County Superior Court. Heard in the Court of Appeals 19 November 2025.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and Daughtry, Woodard, Lawrence & Starling, LLP, by Luther D. Starling, Jr., and Alexander M. Guin, for petitioner-appellant/counter-respondent.

Shumaker Loop & Kendrick, LLP, by Lynn F. Chandler and Lucas D. Garber, for respondents-appellees/counter-petitioners Katie Allare, Gregory Allare, John Mickelson, Ashley Steele, Danny Steele, and Brigid Steele.

No brief filed on behalf of respondents-appellees Kevin I. Kenna, Jeffrey A. Kenna, Patrick E. Kenna, Peter L. Kenna, Thomas X. Kenna, Martha Zaytoun, Clare K. Zaytoun, Taylor M. Zaytoun, Reeves M. Zaytoun, Mary L. Zaytoun Berne, Henry S. Zaytoun, III, Jeremiah R. Zaytoun, Christian S. Zaytoun, Haynes Zaytoun, Blaise Waters, Becket Waters, Alexandra Penny, Elena Penny, Mark Foster, Jr., Martha Lee Brissette, Augustus Howard, Charles N. Howard, and Henry S. Zaytoun, Jr., as guardian for Margaret A. Zaytoun and Rachel L. Zaytoun.

ZACHARY, Judge.

Petitioner Mary Paula Zaytoun Steele, the widow of Patrick Steele, acting in her capacity as trustee of the Patrick Steele Revocable Trust, appeals from an order granting the motion to compel filed by Counter-Petitioners Katie Allare, Gregory Allare, John Mickelson, Ashley Steele, Danny Steele, and Brigid Steele, who are the biological nieces and nephews and sister, respectively, of Patrick Steele (collectively, "Counter-Petitioners"). After careful review, we affirm the order compelling the production of documents by the law firm of Wyrick Robbins Yates & Ponton LLP ("Wyrick Robbins").

I. Background

This case arises from a dispute over who shall be included in the class described as "my nieces and nephews" and thereby entitled to a share of a $5 million distribution from the Patrick Steele Revocable Trust.

The Trust was first created in 2007 and was modified several times prior to the death of Patrick Steele ("Grantor") in 2022. In the 2007 iteration of the Trust, Grantor named as potential extended-family beneficiaries "Brigid Ann Steele; my nieces and nephews; and my wife's nieces and nephews." In 2013, Grantor amended the trust agreement, changing the potential extended-family beneficiaries to "such of Brigid Ann Steele, my nieces and my nephews as survive me." In successive amendments in 2015, 2018, and 2021, Grantor retained his sister and his nieces and nephews as potential extended-family beneficiaries. In the 2018 amendment, Grantor limited the amount that would be distributed to his sister and his nieces and nephews to no more than $5,000,000.

Attorney Matt Bullard of Wyrick Robbins drafted the 2007 Trust with the assistance of John O'Connor, an Iowa attorney with whom Grantor had previously worked. Bullard drafted the 2013 Amendment and O'Connor drafted the 2018 Amendment, although Counter-Petitioners assert that Bullard "played a significant role in drafting" it as well. Bullard drafted the 2021 Amendment.[1]

On 1 September 2023, Mary Paula Zaytoun Steele, acting in her capacity as trustee of the Trust, filed a petition for declaratory judgment seeking clarification of the "rights and obligations created under the Trust and construction of the phrase 'nieces and nephews' as used in the Trust." Specifically, she seeks a declaratory judgment that Grantor's five biological nieces and nephews and twenty-four marital nieces

1. It is unclear from the record which attorney drafted the 2015 Amendment, although it was executed in Wake County, North Carolina.

and nephews comprise the class of "my nieces and nephews" and are therefore entitled to distributions as extended-family beneficiaries of the Trust.

On 27 February 2024, Grantor's marital nieces and nephews filed an answer and motion for summary judgment consonant with the petition, asserting that the class of "my nieces and nephews" includes both Grantor's biological and marital nieces and nephews. On 26 November 2024, Counter-Petitioners filed an amended answer, affirmative defenses, and amended counter-petition[2] in which they alleged, *inter alia*, that during a meeting with his Iowa attorney, Grantor had "clearly expressed his intent to leave the Nieces and Nephews Portion to his side of the family only." Counter-Petitioners seek a declaratory judgment that they are the only beneficiaries of the extended-family portion of the Trust, to the exclusion of the marital nieces and nephews.

During discovery, Counter-Petitioners served Wyrick Robbins with a subpoena directing the firm to produce "[a]ll documents related to estate planning for [Grantor]." Wyrick Robbins objected to the subpoena on the basis of attorney-client privilege and refused to produce the requested discovery absent Mary Paula Zaytoun Steele's written consent or a court order compelling its production. On 6 September 2024, Counter-Petitioners filed a motion to compel, seeking an order "compelling Wyrick Robbins to produce and permit inspection and copying of all documents related to the estate planning for" Grantor. In support of their motion, Counter-Petitioners invoked the "testamentary exception to the attorney-client privilege."

On 22 November 2024, the trial court entered an order addressing, *inter alia*, Counter-Petitioners' motion to compel. The court granted Counter-Petitioners' motion and instructed Wyrick Robbins to produce the subpoenaed documents within 14 days of service of the order.

Mary Paula Zaytoun Steele timely filed notice of appeal from the court's order, "specifically the portion of the [o]rder granting [the] [m]otion to [c]ompel."

II. Appellate Jurisdiction

[1] "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723,

2. The original answer and counter-petition do not appear in the record. The parties stipulated that "[a]s the amended pleadings are now the operative pleadings, they are included in the Record and the originals are excluded from the Record."

725, 392 S.E.2d 735, 736 (1990). "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). Such orders are appealable, however, "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citation omitted).

"An order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right." *Sessions v. Sloane*, 248 N.C. App. 370, 380, 789 S.E.2d 844, 853 (2016). Yet when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999); *see also State v. Chemuti*, 388 N.C. 412, 417, 920 S.E.2d 810, 815 (2025) ("We have long held that orders compelling the disclosure of information allegedly subject to a statutory confidentiality protection are immediately appealable as affecting a substantial right."). For similar reasons, and although the protection arises from the common law rather than by statute, this Court has also "applied the reasoning of *Sharpe* to the common law attorney-client privilege." *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 37 (2011).

In the case at bar, Mary Paula Zaytoun Steele argues that the trial court erred by ordering Wyrick Robbins to produce documents related to Grantor's estate planning. As the record reveals, Mary Paula Zaytoun Steele objected to the production of the documents, asserting attorney-client privilege on behalf of herself and Grantor. Thus, the court's order granting Counter-Petitioners' motion to compel is immediately appealable.

III. Discussion

Mary Paula Zaytoun Steele raises two issues on appeal: whether the trial court erred (1) "by applying the 'testamentary exception' to . . . Grantor's attorney-client privilege"; and (2) "by failing to uphold and protect [Mary Paula Zaytoun Steele]'s personal attorney-client privilege."

A. Standard of Review

Whether a "party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be

reversed absent an abuse of discretion." *Maldjian v. Bloomquist*, 245 N.C. App. 222, 226, 782 S.E.2d 80, 83 (2016) (citation omitted). A trial court abuses its discretion when its "actions are manifestly unsupported by reason and so arbitrary that they could not have been the result of a reasoned decision." *Id.* at 226, 782 S.E.2d at 83–84 (cleaned up). By contrast, "the determination of privilege is a question of law." *Medlin v. N.C. Specialty Hosp., LLC*, 233 N.C. App. 327, 339, 756 S.E.2d 812, 820 (2014). "Questions of law receive de novo review." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (italics omitted).

B. Grantor's Attorney-Client Privilege

[2] As our Supreme Court has explained, "[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Dickson v. Rucho*, 366 N.C. 332, 340, 737 S.E.2d 362, 368 (2013) (citation omitted). "When the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." *In re Investigation of Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003) (cleaned up). Moreover, "the attorney-client privilege . . . survive[s] the death of the client." *Id.* at 323, 584 S.E.2d at 779.

Yet, the attorney-client privilege is not absolute. Indeed, the United States Supreme Court has long recognized certain exceptions to the privilege, including the "testamentary exception" at issue in the instant case: "[W]e are of opinion that, in a suit between devisees under a will[,] statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged." *Glover v. Patten*, 165 U.S. 394, 406, 41 L. Ed. 760, 767 (1897). Our Supreme Court has also adopted the testamentary exception, explaining that "where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of [the] deceased with his attorney." *In re Will of Kemp*, 236 N.C. 680, 684, 73 S.E.2d 906, 910 (1953) (citation omitted). The exception is grounded in the assumption that "a client impliedly authorized the release of confidential information in order that the estate might be properly and thoroughly administered." *In re Will of Johnston*, 157 N.C. App. 258, 263, 266, 578 S.E.2d 635, 640, 641 (Tyson, J., dissenting) (cleaned up) (addressing merits where majority dismissed as interlocutory and

concluding trial court erred in denying motion to compel because testamentary exception applied), *aff'd on other grounds*, 357 N.C. 569, 597 S.E.2d 670 (2003).

The parties cite no North Carolina cases—and our research yields none—that have applied the testamentary exception to the attorney-client privilege in the context of a trust, rather than a will. We conclude that the logic of the exception's application to wills applies with equal force to trusts. The exception applies when there is a "controversy . . . to determine who shall take by succession." *Kemp*, 236 N.C. at 684, 73 S.E.2d at 910 (citation omitted). This is the precise controversy presented by the present case. Here, the parties dispute Grantor's intent in his use of the phrase "my nieces and nephews," which in turn controls the distribution of a substantial amount of money from Grantor's Trust to the extended-family beneficiaries. Further, although not controlling precedent, we observe that a number of our sister States have applied the exception to trusts. *See*, *e.g.*, *Zook v. Pesce*, 91 A.3d 1114, 1120 (Md. 2014) ("[W]e reaffirm that in a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony . . . regarding communication between the decedent and . . . attorneys."). Considering this issue of first impression under North Carolina law, we now similarly conclude that the testamentary exception to the attorney-client privilege applies equally to a dispute regarding distribution under either a will or a trust.

There is no contention that the exception does not apply to trusts in general. Instead, Mary Paula Zaytoun Steele disputes the trial court's application of the testamentary privilege to *Grantor's* Trust, arguing that:

> The Zaytoun Respondents and Steele Respondents do not "set up a claim of privilege" against the other. [Mary Paula Zaytoun Steele] and . . . Grantor (through [Mary Paula Zaytoun Steele]) assert their own privileges. No third party asserts the privilege of another.
>
> . . . .
>
> The client (. . . [Mary Paula Zaytoun Steele], for herself and Grantor) has not chosen to waive the privilege. The client, not a third party, invokes the privilege. The testamentary exception therefore does not apply to . . . [Mary Paula Zaytoun Steele]'s assertion of the privilege.
>
> Our courts have never applied the testamentary exception to deprive a client of her own privilege.

The underlying purpose of the testamentary exception defeats Mary Paula Zaytoun Steele's argument. Our Supreme Court "recognizes a five-part test to determine whether [attorney-client] privilege applies to a certain communication"; the privilege applies if, *inter alia*, "the client has not waived the privilege." *Sessions*, 248 N.C. App. at 385–86, 789 S.E.2d at 856 (citation omitted). When applying the testamentary exception, we assume that the client "impliedly authorized the release of confidential information in order that the estate might be properly and thoroughly administered," thereby waiving the privilege. *Johnston*, 157 N.C. App. at 266, 578 S.E.2d at 641 (Tyson, J. dissenting) (cleaned up).

The instant case presents the quintessential situation that the testamentary exception exists to resolve. Because the issue presented is Grantor's intent in his use of the phrase "my nieces and nephews"—affecting the distribution of his property—the law assumes that Grantor "impliedly authorized the release of" his communications with, and documents prepared by, Wyrick Robbins, "in order that [his] estate might be properly and thoroughly administered." *Id.* (citation omitted).

Mary Paula Zaytoun Steele also argues that the testamentary exception applies only to the drafter of the document. She contends that O'Connor drafted the 2018 Amendment, not Bullard; however, Counter-Petitioners contend that Bullard also "played a significant role" in drafting this amendment. Therefore, both attorneys could have documents including privileged communications related to Grantor's estate planning in their possession. The trial court thus properly determined that these communications are subject to discovery in the instant action.

Accordingly, the trial court did not abuse its discretion in compelling the production of "the documents in [Wyrick Robbins's] custody, control, or possession that are responsive to the [s]ubpoena."

C. Mary Paula Zaytoun Steele's Attorney-Client Privilege

[3] Finally, Mary Paula Zaytoun Steele argues that the privileged communications that she and Grantor had with Wyrick Robbins "are inextricable," making it "impossible for Wyrick Robbins to adhere to the Order by producing and withholding the same information." She further argues that "[a]t minimum, the trial court failed to conduct an appropriate *in camera* review to determine what, if any, portion of the subpoenaed files can be produced without violating [her] privilege."

Our review of the record and transcripts reveals no argument before the trial court that Mary Paula Zaytoun Steele's personal attorney-client privilege was inextricably linked with Grantor's, other than a bare

assertion that Mary Paula Zaytoun Steele and Grantor "consulted with Wyrick Robbins together on their estate planning." Regardless, the court expressly limited Wyrick Robbins's compelled discovery, ordering the law firm to produce only those "documents . . . that are responsive to the [s]ubpoena." Notably, the trial court's order specifically "d[id] not compel the production of information unrelated to estate planning for [Grantor] or attorney-client privileged information of firm clients other than [Grantor]."

Thus, Mary Paula Zaytoun Steele's argument is overruled.

IV. Conclusion

For the foregoing reasons, we conclude that the testamentary exception to the attorney-client privilege applies to Grantor's communications with Wyrick Robbins concerning the drafting of the Trust and its amendments. The trial court therefore did not abuse its discretion by compelling Wyrick Robbins to produce documents responsive to the subpoena. In that the court carefully crafted its order to prevent the release of any privileged communications regarding other clients of the law firm, we further conclude that Mary Paula Zaytoun Steele's personal attorney-client privilege will not be violated. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges FLOOD and STADING concur.

WEAVER v. AMV HOLDINGS, LLC

[303 N.C. App. 175 (2026)]

STEPHEN C. WEAVER, PLAINTIFF
v.
AMV HOLDINGS LLC AND MVRB2, LLC, DEFENDANTS

STEPHEN C. WEAVER, PLAINTIFF
v.
MEDUSA DISTRIBUTION, LLC, DEFENDANT

No. COA25-268

Filed 18 February 2026

1. Products Liability—sealed container defense—battery for vaping device—latent, internal manufacturing defect—exercise of reasonable care

In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, plaintiff's claims (for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose) were defeated by the sealed container defense, which bars a products liability claim where "the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of" (N.C.G.S. § 99B-2(a)). The trial court's unchallenged finding of fact was that plaintiff's injuries resulted from a latent, internal manufacturing defect in the battery, and it was unreasonable to expect a distributor or seller to disassemble, closely inspect, and submit each battery to the expert testing necessary to reveal such a defect.

2. Products Liability—sealed container defense—personal jurisdiction exception—burden of proof—plaintiff's failure to forecast evidence

In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, where the sealed container defense applied to plaintiff's claims (for negligence, gross

negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose), the statutory provision that the defense "shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State" (N.C.G.S. § 99B-2(a)) constituted an exception to the defense (rather than an affirmative defense) because the provision operates when the manufacturer, who would normally be the liable party, is beyond the reach of the state's courts. Accordingly, the burden of proving the exception rested with plaintiff, who failed to forecast evidence that the courts of North Carolina did not have personal jurisdiction over the manufacturer of the exploding battery.

3. Products Liability—sealed container defense—battery for vaping device—latent, internal manufacturing defect—defense requirements met

In a products liability case, brought after plaintiff suffered serious injuries when a lithium-ion cell battery purchased at a vape store owned and operated by defendants and intended for use in his vaping device exploded in his pocket, the sealed container defense applied to plaintiff's claims (for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose) against defendants (the sellers, but not the manufacturer, of the defective battery). Plaintiff's arguments that defendants failed to meet the requirements for the defense failed because: defendants did not purchase the battery from a disreputable entity, but rather from an unknown manufacturer; defendants' employees did not "install" the battery, but only placed it in the vaping device; the employees' persuasion to purchase did not expose defendants to liability for a product defect; and the fact that the battery was counterfeit was not relevant where the defect was latent and not discoverable by defendants in the exercise of reasonable care.

Appeal by plaintiff from orders entered 18 July 2023 and 5 August 2024 by Judge Daniel A. Kuehnert in Union County Superior Court. Heard in the Court of Appeals 19 November 2025.

Dowling PLLC, by Troy D. Shelton; Wilson, Lackey, Rohr & Hall, P.C., by Destin C. Hall; and The Paynter Law Firm, PLLC, by Stuart M. Paynter and Sara Willingham, for plaintiff-appellant.

The Duggan Law Firm, PC, by Christopher M. Duggan, for defendants-appellees AMV Holdings LLC and MVRB2, LLC.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, by Michael S. Rothrock and Peter Clements, for defendant-appellee Medusa Distribution, LLC.

ZACHARY, Judge.

Plaintiff Stephen C. Weaver suffered serious injuries when a lithium-ion cell battery intended for use in his vaping device exploded in his pocket. Following an unsuccessful suit to recover his damages, Plaintiff now appeals from 1) the trial court's order granting partial summary judgment in favor of Defendants AMV Holdings LLC and MVRB2, LLC (collectively "AMV Defendants") on Plaintiff's punitive damages claim, and 2) the court's order granting summary judgment on behalf of AMV Defendants and Defendant Medusa Distribution, LLC ("Medusa") on Plaintiff's remaining claims. After careful review, we determine that Plaintiff's claims are governed by the North Carolina Products Liability Act and that Plaintiff cannot surmount Defendants' "sealed container" defense under N.C. Gen. Stat. § 99B-2(a) (2023). Accordingly, we affirm the orders of the trial court.

I. Background

On 12 April 2019, Plaintiff owned a residential floor and tile business. Plaintiff had recently begun using a "vaping" device—which vaporizes a liquid mixture of nicotine, flavoring, propylene glycol, and other additives for inhalation—as an alternative to smoking. To power the device, Plaintiff had purchased two 21700 cylindrical lithium-ion cell ("CLC") batteries and one 18650 CLC battery. As Plaintiff worked at a job site, one of the 21700 CLC batteries "experienced a 'thermal runaway' event while . . . in [Plaintiff's] pants pocket."[1] The resulting flames and chemicals severely burned Plaintiff's leg and hand, causing serious, permanent injuries.

Plaintiff filed a complaint on 22 February 2021 against AMV Holdings LLC and MadVapes Franchising, LLC. On 30 August 2021, Plaintiff filed a

1. The trial court provided a definition of "thermal runaway event" in its findings of fact: "A [CLC] battery 'thermal runaway event' has been described as an explosive event where the battery heats to extremely high temperatures, melts, burns, disintegrates, and becomes like a flame-thrower."

First Amended Complaint, which replaced MadVapes Franchising, LLC, with "MVRB2, LLC." In the First Amended Complaint, Plaintiff alleged that he had purchased the CLC batteries—including the defective battery—from MadVapes stores owned and operated by AMV Defendants in North Carolina. Plaintiff further alleged that the batteries came in "plain white boxes"; that neither the vaping device nor the batteries "came with written warnings that the batteries could spontaneously catch fire and explode"; and that no MadVapes employee warned him of the danger of a spontaneous explosion. Plaintiff raised three claims against AMV Defendants: inadequate warning or instruction under N.C. Gen. Stat. § 99B-1, *et seq.*; negligence; and breach of the implied warranty of merchantability for a particular purpose under N.C. Gen. Stat. § 25-2-315.

On 20 December 2021, AMV Defendants filed a motion for summary judgment, asserting that "all of Plaintiff's claims against . . . AMV Defendants . . . are barred by the sealed container doctrine enumerated at N.C. Gen. Stat. §[ ]99B-2(a)" of the North Carolina Products Liability Act. AMV Defendants asserted that Plaintiff had proffered no evidence to indicate that AMV Defendants could have discovered prior to sale that the battery in question had the "internal manufacturing defect" identified by Plaintiff's expert as the cause of the explosion. In response, Plaintiff filed a "Rule 56(f) motion to refuse or continue [the] motion for summary judgment" pending further discovery. Following a hearing, on 7 February 2022, the trial court entered an order, *inter alia*, denying AMV Defendants' motion for summary judgment and denying Plaintiff's motion as moot.

Plaintiff moved to further amend his complaint, which the trial court granted by order entered on 19 April 2022. In the Second Amended Complaint, filed on 27 April 2022, Plaintiff added a claim for gross negligence, alleging that AMV Defendants were "grossly negligent, careless, and reckless" by failing to warn Plaintiff "of the risk and danger of exploding" CLC batteries and by selling a battery that they knew "was inappropriate and not intended for use in vaping devices and posed an unreasonable risk of spontaneously catching fire and/or violently exploding without warning."

Additionally, on 1 April 2022, Plaintiff filed a separate complaint against Medusa, the distributor from which AMV Defendants purchased the CLC batteries. Plaintiff raised five claims: inadequate warning or instruction under N.C. Gen. Stat. § 99B-1, *et seq.*; negligence; gross negligence; breach of the implied warranty of merchantability for a particular purpose under N.C. Gen. Stat. § 25-2-315; and, in the alternative,

breach of the implied warranty of merchantability under N.C. Gen. Stat. § 25-2-314.

AMV Defendants filed their answer to the Second Amended Complaint on 27 May 2022, generally denying Plaintiff's allegations and advancing 21 affirmative defenses. As one of these defenses, AMV Defendants again contended that Plaintiff's claims were barred by the Products Liability Act.

On 1 September 2022, the Chief Justice of the North Carolina Supreme Court designated Plaintiff's suit against AMV Defendants as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts and assigned the matter to Judge Daniel A. Kuehnert. On 16 May 2023, the trial court entered an order granting Defendants' joint motion to consolidate the actions pursuant to Rule 42 pending a Rule 2.1 designation in the suit against Medusa; the suit was so designated on 19 May 2023, and the actions were consolidated.

On 14 February 2023, AMV Defendants moved for partial summary judgment as to Plaintiff's claim for punitive damages. On 18 July 2023, the trial court entered an order granting this motion. In sum, the court determined that Plaintiff had failed to forecast clear and convincing evidence—when viewed in the light most favorable to Plaintiff—of one or more of the requisite aggravating factors enumerated in N.C. Gen. Stat. § 1D-15.

Plaintiff filed a First Amended Complaint against Medusa on 7 June 2024, in which he raised two additional claims: unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, *et seq*., and punitive damages under N.C. Gen. Stat. § 1D-1, *et seq*.

On 7 June 2024, AMV Defendants filed a motion for summary judgment as to Plaintiff's remaining claims. Medusa filed an amended motion for summary judgment dated 24 June 2024. Medusa also filed an answer and affirmative defenses in response to Plaintiff's First Amended Complaint on 24 June 2024.

On 5 August 2024, the trial court entered an order, *inter alia*, granting all Defendants' motions for summary judgment. In its order, the court set forth an in-depth analysis of two issues raised in this case: Plaintiff's failure-to-warn claim and the sealed container defense invoked by Defendants. Regarding the former, the court concluded that Plaintiff's evidence "fail[ed] to show that the subject battery . . . created an unreasonably dangerous condition or posed a substantial risk of harm such as would satisfy either [N.C. Gen. Stat.] § 99B-5(a)(1) or § 99B-5(a)(2)." The

court emphasized that the explosion was caused by a "latent, internal manufacturing defect," instead of the "external short circuit risks" upon which Plaintiff's failure-to-warn claim focused.

Regarding the sealed container defense, the trial court noted that, even if Plaintiff did not receive the battery in a sealed container, his own expert testified that "the latent, internal manufacturing defect could *only* be identified through a CT scan and expert analysis. There [was] no forecasted evidence that it was reasonable for Defendants to have had CT scan equipment and experts necessary to detect this latent, internal manufacturing defect." Responding to Plaintiff's argument that the sealed container defense is inapplicable where the manufacturer is not subject to the jurisdiction of North Carolina's courts, the trial court characterized this as an "exception to"—rather than an element of—the affirmative defense and placed the burden on Plaintiff to produce evidence of lack of jurisdiction, which it found that Plaintiff had failed to meet.

Plaintiff filed timely notice of appeal from the order granting Defendants' motion for partial summary judgment on Plaintiff's punitive damages claim and from the order granting Defendants' motion for summary judgment on Plaintiff's remaining claims.

II. Discussion

Plaintiff raises three issues on appeal: whether the trial court erred in (1) dismissing his failure-to-warn claim; (2) granting summary judgment for Defendants on their sealed container defense; and (3) dismissing his remaining claims. For the following reasons, we conclude that each of Plaintiff's claims against Defendants is barred by the sealed container defense.

A. Standard of Review

It is axiomatic that "to succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Nicholson v. Amer. Safety Utility Corp.*, 124 N.C. App. 59, 63, 476 S.E.2d 672, 675 (1996) (cleaned up), *aff'd as modified*, 346 N.C. 767, 488 S.E.2d 240 (1997). "Summary judgment is appropriate only when it appears that even if the facts as claimed by the non-movant are taken as true, there can be no recovery, with the non-movant's materials being indulgently regarded and the movant's closely scrutinized." *Id.* (cleaned up). "The showing required for summary judgment may be accomplished

by proving an essential element of the opposing party's claim . . . would be barred by an affirmative defense." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

B. Products Liability Act

[1] Chapter 99B of the North Carolina General Statutes is known as the "Products Liability Act." In sum, the Products Liability Act subjects the seller or distributor of a defective product to liability for harm to persons or property resulting from the defective product.

The Products Liability Act defines the term "[p]roduct liability action" as "any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product." N.C. Gen. Stat. § 99B-1(3). "A products liability claim normally contemplates injury or damage caused by a defective product" for which "recovery is premised on either negligence or on the contract principles of warranty." *Red Hill Hosiery Mill, Inc. v. Magnetek, Inc.*, 138 N.C. App. 70, 74–75, 530 S.E.2d 321, 325, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 112 (2000).

In the present case, all of Plaintiff's claims against Defendants fall within the scope of the Products Liability Act. In his separate complaints, Plaintiff advanced claims for negligence, gross negligence, inadequate warning or instruction under the Products Liability Act, breach of the implied warranty of merchantability, and breach of the implied warranty of merchantability for a particular purpose.[2] These claims arise from "personal injury . . . caused by or resulting from the manufacture . . . of any product,"—namely, the vaping device—and as such are governed by the Products Liability Act. N.C. Gen. Stat. § 99B-1(3); *see also Red Hill*, 138 N.C. App. at 74–75, 530 S.E.2d at 325–26 (concluding that claims for breach of implied warranty of merchantability and negligence constituted products liability claims); *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520, 524, 527, 432 S.E.2d 915, 917, 919 (concluding

2. Plaintiff also alleged that Medusa engaged in unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, *et seq*. We do not address whether this claim constitutes a products liability action, in that Plaintiff's briefs are bereft of any argument concerning this claim. Consequently, we deem the claim abandoned. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

that claims for negligence, breach of implied warranty, and strict liability constituted products liability claims), *disc. review denied*, 335 N.C. 238, 439 S.E.2d 149 (1993); *Crews v. W.A. Brown & Son*, 106 N.C. App. 324, 328, 416 S.E.2d 924, 927–28 (1992) (concluding that claims for negligence, failure to provide adequate warnings, breach of express warranties, and breach of implied warranties of merchantability and fitness for a particular purpose constituted products liability claims).

C. Sealed Container Defense

The Products Liability Act prohibits holding sellers or distributors strictly liable for harm and sets forth defenses to products liability claims. N.C. Gen. Stat. §§ 99B-1.1, 99B-2. In the case at bar, the dispositive issue is whether Plaintiff's claims are defeated by the sealed container defense of the Products Liability Act. This defense bars a products liability claim where (1) "the product was acquired and sold by the seller in a sealed container" or (2) "the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of." *Id.* § 99B-2(a).

In the instant case, the parties debate at length whether Plaintiff purchased the battery in a "sealed container," with Plaintiff alleging that "when [MadVapes] received the batteries, . . . [they were] in white cardboard sleeves that could be opened. The boxes were not sealed or taped shut." Yet, the crux of the controversy before us is whether Defendants were afforded a "reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of." *Id.*

In its order, the trial court found that Plaintiff's injuries resulted from a "latent, internal manufacturing defect." Plaintiff does not contest this aspect of the order, nor does he contend that any Defendant, in the reasonable exercise of care, should have uncovered the latent defect in the CLC battery. Therefore, on the facts before us in the instant case, we conclude that it would be unreasonable to expect a distributor or seller of CLC batteries to disassemble, closely inspect, and submit each battery to expert testing as would be necessary to determine the existence of a latent manufacturing defect such as that in the battery in question.

D. Exception to Sealed Container Defense

[2] Nevertheless, Plaintiff maintains that Defendants are barred from asserting the sealed container defense because the Products Liability

Act includes the proviso that this defense "shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent." *Id.* Plaintiff argues that it was error for the trial court to conclude that "the burden of proving the exception in section 99B-2(a) . . . rested with [Plaintiff]," and moreover, even if he properly bore such burden, the sealed container defense is inapplicable in this instance because "[t]he forecast of evidence show[ed] that the courts of North Carolina do not have personal jurisdiction over the manufacturer."[3] We disagree.

It is well established that with regard to "an affirmative defense, the burden of proof lies with the defendant." *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974). Indeed, Defendants do not dispute that N.C. Gen. Stat. § 99B-2(a) constitutes an affirmative defense in part and that they bear the burden of demonstrating that they had no reasonable opportunity to inspect the CLC battery. Rather, the disagreement arises over which party bears the burden of proving that "the manufacturer . . . is not subject to the jurisdiction of the courts of this State." N.C. Gen. Stat. § 99B-2(a).

The first question before us on this issue is whether the jurisdiction clause serves as an exception to, or an element of, the affirmative defense. This Court has long held that "[t]he party seeking the benefit of the [statutory] exception bears the burden of establishing that they fit squarely within the exception." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 175 N.C. App. 309, 312, 623 S.E.2d 315, 318 (citation omitted), *aff'd*, 360 N.C. 641, 636 S.E.2d 564 (2006). Here, the party benefiting from the potential exception is Plaintiff, given that the sealed container defense would be unavailable to Defendants if the exception applied. Accordingly, Plaintiff would properly bear the burden of proving that the manufacturer of the defective battery is not subject to the jurisdiction of North Carolina's courts if we interpret this clause to be an exception to, instead of an element of, the sealed container defense.

"When interpreting a statute, we must apply the rules of statutory construction. The principal rule of statutory construction is that the legislature's intent controls. That intent may be inferred from the nature and purpose of the statute, and the consequences which would follow, respectively, from various constructions." *Id.* at 311–12, 623 S.E.2d at 318 (cleaned up).

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3. The manufacturer's insolvency is not argued by any party on appeal.

"[I]n undertaking to determine what is and what is not an affirmative defense," the answer "depends ultimately on broad considerations of policy." *Speas v. Merchants' Bank & Tr. Co. of Winston-Salem*, 188 N.C. 524, 531, 125 S.E. 398, 402 (1924) (citation omitted). The Products Liability Act is primarily based on the policy of consumer protection, which is achieved by holding manufacturers, distributors, and sellers accountable for injuries caused by defective products. The sealed container defense, on the other hand, seeks to balance the interests of the parties, in part by protecting sellers who could not reasonably be expected to know of a given product's defective nature. Notably, however, this defense does not apply where the manufacturer, who would normally be the liable party, is insolvent or beyond the jurisdiction of North Carolina's courts, N.C. Gen. Stat. § 99B-2(a), thus rendering these *exceptions* to the sealed container defense. As such, the plaintiff bears the burden of demonstrating that one of these exceptions applies to the facts at hand.

To this end, Plaintiff contends in the alternative that "[t]he forecast of evidence shows that the courts of North Carolina do not have personal jurisdiction over the manufacturer of the exploding battery." Again, we disagree.

Plaintiff's entire argument rests on a series of assumptions. First, Plaintiff asserts that because "[t]he batteries were acquired by a Chinese distributor named ECIG Fiend . . . , then sold and shipped to Medusa by the Chinese distributor in New Jersey[,] [t]he only plausible inference from the evidence is that the manufacturer is Chinese." Building on this assumption, Plaintiff then alleges that "even if that Chinese manufacturer could be identified, there is no way for a court in North Carolina to exercise jurisdiction over that manufacturer"—thereby assuming that Chinese distributors do not purchase their products from outside of China and that Chinese manufacturers do not purposely avail themselves of North Carolina markets. *See Bartlett v. Est. of Burke*, 285 N.C. App. 249, 265, 877 S.E.2d 432, 443–44 (2022) ("[T]he mere manufacture and introduction of a product into the world's stream of commerce without purposeful availment is insufficient to establish personal jurisdiction in North Carolina." (cleaned up)), *appeal dismissed and disc. review denied*, 386 N.C. 662, 905 S.E.2d 219 (2024).

Even though we are to indulgently regard Plaintiff's evidence, *see Nicholson*, 124 N.C. App. at 63, 476 S.E.2d at 675, Plaintiff is nonetheless required to "set forth specific facts showing there is an issue for trial." *Doggett v. Welborn*, 18 N.C. App. 105, 107, 196 S.E.2d 36, 37, *cert. denied*, 283 N.C. 665, 197 S.E.2d 873 (1973). Admittedly, it is not in Defendants'

interest to reveal the identity of the manufacturer of the defective battery where the manufacturer is not subject to the jurisdiction of our courts, if Defendants in fact possess this information. Nevertheless, regarding North Carolina courts' alleged lack of jurisdiction over the manufacturer, Plaintiff's evidence on this issue reduces to the bare fact that the distributor positioned above Medusa in the supply chain was Chinese. This is not sufficient to survive summary judgment.

We conclude that Plaintiff failed to show, on the issue of jurisdiction, that "there is an issue for trial," *id.*, and having properly invoked it, Defendants remain shielded from liability by the sealed container defense.

E. Additional Bars to Assertion of Sealed Container Defense

[3] Plaintiff further contends that there are "other sealed container requirements" that Defendants failed to satisfy.

First, Plaintiff maintains that Defendants did not purchase the defective battery from a "reputable manufacturer" and therefore cannot assert the sealed container defense, citing *Sutton v. Major Products Company,* 91 N.C. App. 610, 614, 372 S.E.2d 897, 900 (1988). In *Sutton*, this Court concluded that "a seller of a product made by a *reputable* manufacturer, where he acts as a mere conduit and has no knowledge or reason to know of a product's dangerous propensities, is under no affirmative duty to inspect or test for a latent defect." *Id.* (emphasis added) (cleaned up). Plaintiff alleges that no Defendant "purchased the battery from a reputable manufacturer. It's undisputed that the battery sold to [Plaintiff] was a counterfeit Samsung battery."

Plaintiff's interpretation of *Sutton* overemphasizes the term "reputable." *Sutton* did not undertake to define "reputable" and its disposition did not turn on whether the manufacturer was indeed reputable. Moreover, cases citing *Sutton* do not turn on the reputability of the manufacturer. *See Nicholson*, 124 N.C. App. at 65, 476 S.E.2d.at 676; *Crews*, 106 N.C. App. at 329, 416 S.E.2d at 928. We also note that in the instant case, it is undisputed that the manufacturer is unknown, rather than a known and disreputable entity. Accordingly, we conclude that in this respect *Sutton* does not apply to the case at hand.

Next, Plaintiff argues that Defendants cannot benefit from the sealed container defense because they "acted as more than 'mere conduits' of the battery manufacturer," citing *Crews*. In *Crews*, this Court determined that when "the seller assembles and installs the product thereby acting as more than a mere conduit, the seller has the duty to exercise reasonable care in assembling and installing the product and in

inspecting the product for latent defects." 106 N.C. App. at 329–30, 416 S.E.2d at 928 (cleaned up). Plaintiff alleges that a MadVapes employee "persuaded [him] to buy a vape device that required removable, CLC batteries, even though the batteries for such devices are known to be unsafe"; "taught [him] how to use the device"; and "selected the battery, . . . and then installed [it] in the device."

Yet, the seller assembly and installation discussed in *Crews* differ significantly from the installation of a battery in the present case. In *Crews*, the plaintiff suffered severe frostbite after a walk-in freezer door closed behind her and the interior door lock release button malfunctioned. *Id.* at 327, 416 S.E.2d at 927. The plaintiff filed suit against the defendant, whose employees "assembled and installed the various pre-assembled parts of the freezer, including the freezer door in which the manufacturer had previously installed the . . . door latch assembly." *Id.* at 330, 416 S.E.2d at 929. By contrast, the "installation" here was merely the act of placing the CLC battery in the vaping device, a task Plaintiff anticipated performing himself when the original battery was depleted. As to a MadVapes employee persuading Plaintiff to purchase the battery, it is long settled that a seller has no duty to test or inspect a product when acting as "a mere marketing conduit between producer and consumer." *Davis v. Siloo Inc.*, 47 N.C. App. 237, 247, 267 S.E.2d 354, 360, *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980). Furthermore, Plaintiff cites no cases in which our courts have concluded that mere persuasion to purchase an item exposes a seller to liability for a product defect.

Plaintiff further contends that Defendants "knew or should have known" that the battery could explode, precluding Defendants' invocation of the sealed container defense. "A non-manufacturing seller acting as a mere conduit of the product . . . ordinarily has no affirmative duty to inspect and test a product made by a reputable manufacturer. However, this rule does not stand where the seller knows or has reason to know of a product's dangerous propensity." *Nicholson*, 124 N.C. App. at 65, 476 S.E.2d at 676 (emphasis omitted) (cleaned up). At no point does Plaintiff's argument to this Court address a duty to inspect and test the battery. Instead, Plaintiff first focuses on Defendants' knowledge of battery explosions and manufacturer warnings that CLC batteries should not be used in vaping devices, then concludes that "MadVapes warned its own employees about the importance of battery safety. But it didn't warn [Plaintiff] about these things." Rather than challenge Defendants' failure to discover the latent defect, Plaintiff essentially reasserts his failure-to-warn claim. Consequently, Plaintiff's argument under *Nicholson* is overruled.

Finally, Plaintiff alleges that Defendants are prohibited from asserting the sealed container defense because "Defendants misrepresented the authenticity of the battery." Plaintiff cites *Davis*, in which this Court stated that although "the seller of a product is ordinarily not liable for his failure to discover . . . product defects which are latent," this rule does not apply in some instances, including "where the seller makes representations concerning the product." 47 N.C. App. at 247, 267 S.E.2d at 360 (citation omitted). This Court did not discuss or apply the exception in *Davis*; however, our Supreme Court applied the exception in *Jones v. Raney Chevrolet Co.*, 217 N.C. 693, 694, 9 S.E.2d 395, 396 (1940).

In *Jones*, a retail automobile "dealer represented to the owner that the automobile was equipped with good, reliable brakes when it knew, or by the exercise of due care could have known, that the automobile had defective brakes." *Id.* As a result of the defective brakes, "the automobile was wrecked resulting in injury to the plaintiff." *Id.* Our Supreme Court concluded: "A retail dealer who takes a used truck in trade and undertakes to repair and recondition it for resale . . . owes a duty to the public to use reasonable care in the making of tests for the purpose of detecting defects which would make the truck a menace." *Id.* (citation omitted). In addition, the dealer "is charged with knowledge of defects which are patent or discoverable in the exercise of ordinary care." *Id.* (citation omitted).

In Plaintiff's view, Defendants' representation was that the battery in question was an authentic Samsung battery, when in reality it was a counterfeit Samsung battery. Yet, even if true, this is not a representation that was shown to be relevant to Plaintiff's injury, as it is undisputed that the defect in the battery in question was *latent* and *not reasonably discoverable* in the exercise of ordinary care. Thus, this argument is similarly overruled.

III. Conclusion

For the foregoing reasons, we conclude that Plaintiff's claims are governed by the Products Liability Act; that Defendants are not barred from raising the sealed container defense pursuant to N.C. Gen. Stat. § 99B-2(a); and that Plaintiff cannot surmount this defense. Accordingly, we affirm the orders of the trial court.

AFFIRMED.

Judges FLOOD and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 FEBRUARY 2026)

GILL v. TIP TOWING, INC. No. 25-759	Mecklenburg (25CV007110-590)	Dismissed
IN RE A.L. No. 25-650	Pender (24JT000009-700)	Affirmed
IN RE B.C. No. 25-474	Duplin (24JA000037-300) (24JA000038-300) (25CVD000054-300) (25CVD000055-300)	Affirmed in Part, Vacated in Part, and Remanded for Additional Findings of Fact
IN RE C.H.B. No. 25-444	Yadkin (24JT000029-980)	Affirmed
IN RE D.S. No. 25-448	Durham (19JA000090-310) (19JA000093-310) (19JA000094-310) (19JA000095-310)	Affirmed in Part; Remanded in Part
IN RE DUKE ENERGY CAROLINAS, LLC No. 25-203	N.C. Utilities Commission (E-7,SUB1304)	Reversed and Remanded
IN RE DUKE ENERGY PROGRESS, LLC No. 25-310	N.C. Utilities Commission (E-2,SUB1341)	Reversed and Remanded
IN RE E.J.T. No. 25-541	Randolph (22JT000239-750)	Affirmed
IN RE F.T.S. No. 25-622	Cabarrus (23JT000160-120)	Affirmed
IN RE J.F. No. 25-151	Moore (22JA000024-620)	Affirmed in part and dismissed in part
IN RE K.T.N. No. 25-644	McDowell (22JT000111-580) (22JT000112-580) (22JT000113-580)	Affirmed
IN RE M.G.C. No. 25-427	Henderson (24JA000001-440) (23JA000005-440)	Affirmed

IN RE S.J. No. 25-370	Franklin (17JT000021-340)	Dismissed.
McKEE-WHIPPLE v. WHIPPLE No. 25-201	Wake (22CVD005293-910)	Affirmed
MIDDLE SOUND LOOKOUT v. NEW HANOVER CNTY. No. 25-503	New Hanover (22CVS003443-640)	Dismissed
STATE v. ALLISON No. 25-394	Iredell (21CR001408-480) (21CR051438-480) (21CR052133-480)	Vacated and Remanded
STATE v. BRIDDELL No. 25-750	Mecklenburg (20CR213169-590)	No Prejudicial Error
STATE v. BYRNSIDE No. 25-585	Henderson (22CR051993-440) (22CR051994-440) (23CR000182-440)	Vacated and Remanded
STATE v. HARRIS-BROOKS No. 25-583	Wilson (23CR414407-970)	Vacated and Remanded for Resentencing
STATE v. HARWELL No. 25-348	Durham (20CR054996-310)	No Error
STATE v. HODGE No. 25-139	Johnston (22CR052665-500) (23CR002897-500) (22CR000789-500)	No Error
STATE v. JAMES No. 24-888	McDowell (22CR000293-580) (22CR050679-580)	No Error
STATE v. JONES No. 25-308	Nash (22CR051071-630)	Remanded with Instructions
STATE v. KHOURI No. 25-553	Pitt (22CR052960-730)	REMANDED FOR RESENTENCING
STATE v. KLEIN No. 25-732	New Hanover (18CR053985-640)	Affirmed
STATE v. LASSITER No. 25-675	Edgecombe (22CR317603-320) (23CR000444-320)	Remanded

STATE v. MARTIN No. 25-489	Alexander (21CR051578-010) (21CR051579-010) (21CR051580-010)	No Error.
STATE v. MASSEY No. 25-346	Union (20CR000197-890) (20CR000198-890)	No Error
STATE v. METCALF No. 25-626	Wake (23CR406028-910)	No Error
STATE v. SINCLAIR No. 25-502	Cumberland (22CR051093-250)	No Error
STATE v. WILLIAMS No. 24-990	Gaston (22CR055457-350) (22CR055458-350)	No Error
STATE v. WILSON No. 25-765	Craven (22CR050911-240) (23CR000396-240)	Affirmed
WATERS v. STATE OF N.C. JUD. STANDARDS COMM'N No. 25-492	N.C. Industrial Commission (TA-31082)	Affirmed
WYER v. ALAMANCE REG'L MED. CTR. No. 25-693	Alamance (20CVS002215-000)	Affirmed

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