252 N.C. App.—No. 4 Pages 428-529

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 15, 2019

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Retired 31 December 2016. [7]Retired 24 April 2017.
[8]Appointed 1 August 2016. Term ended 31 December 2016. [9]Retired 31 December 2018. [10]Retired 31 December 2018.

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COURT OF APPEALS

CASES REPORTED

FILED 4 APRIL 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ADMINISTRATIVE LAW

Administrative Law—dismissal of social worker—back pay—An award of back pay to a social services employee who was terminated was reversed. Back pay is not a remedy for a procedural violation under Subchapter I of Title 25 of the Administrative Law Code. **Watlington v. Dep't of Soc. Servs. Rockingham Cty., 512.**

Administrative Law—dismissal of social worker—career state employee—In cases arising from administrative tribunals, questions of law receive de novo review while factual issues are reviewed under the whole record test. In a case arising from the termination of an employee of the Rockingham County Department of Social Services (RCDSS), the Court of Appeals affirmed the Administrative Law Judge's conclusion that petitioner was a career State employee subject to the State Human Resources Act, but it was noted that neither this issue nor the question of just cause were argued prior to appeal. On remand, the RCDSS was required to show that just cause existed for her termination. **Watlington v. Dep't of Soc. Servs. Rockingham Cty., 512.**

as the predicate felony on these facts; the conviction was upheld by the Court of Appeals; and, after a MAR hearing, a trial court judge vacated the conviction. Despite opinions discussing a footnote in a prior case, neither the North Carolina Supreme Court nor the Court of Appeals had ever expressly recognized an exception to the felony murder rule for discharging a weapon into occupied property. While defendant argued neither court had foreclosed the possibility of that exception, that could not be made into the conclusion that there was a reasonable probability that defendant would have prevailed on appeal if appellate counsel had made the argument. **State v. Spruiell, 486.**

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Motor Vehicles—driving while impaired—civil revocation of driver's license—sufficiency of evidence—willful refusal to submit to chemical analysis—The superior court did not err in a driving while impaired case by reversing the Department of Motor Vehicles' (DMV's) civil revocation of petitioner's driver's license. DMV failed to show the evidence supported the conclusion that petitioner willfully refused to submit to a chemical analysis. **Brackett v. Thomas, 428.**

POSSESSION OF STOLEN PROPERTY

Possession of Stolen Property—possession of stolen goods—firearms—nonexclusive possession of automobile—constructive possession—The trial court did not err by denying defendant's motions to dismiss the charges of possession of

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

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

WAYNE T. BRACKETT, JR., PETITIONER
v.
KELLY J. THOMAS, COMMISSIONER, RESPONDENT

No. COA16-912

Filed 4 April 2017

Motor Vehicles—driving while impaired—civil revocation of driver's license—sufficiency of evidence—willful refusal to submit to chemical analysis

The superior court did not err in a driving while impaired case by reversing the Department of Motor Vehicles' (DMV's) civil revocation of petitioner's driver's license. DMV failed to show the evidence supported the conclusion that petitioner willfully refused to submit to a chemical analysis.

Appeal by respondent from order entered 16 June 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 6 February 2017.

Joel N. Oakley for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for respondent-appellant.

TYSON, Judge.

I. Procedural Background

Wayne T. Brackett, Jr. ("Petitioner") filed a complaint against Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles, ("Respondent") on 19 January 2016. Petitioner alleged he was arrested and charged with driving while impaired on 13 August 2015. Petitioner further alleged "[Respondent] notified Petitioner that effective January 18, 2016, [P]etitioner's driving privileges were to be suspended and revoked based on a refusal to submit to a chemical test."

Petitioner requested an administrative hearing before the Division of Motor Vehicles ("DMV"), which was conducted on 7 January 2016. The DMV administrative hearing officer upheld the suspension of Petitioner's driving privileges. Petitioner thereafter filed a petition for a hearing in superior court, pursuant to N.C. Gen. Stat. §§ 20-16.2 and 20-25 (2015).

The superior court heard Petitioner's petition on 6 June 2016 and reversed the decision of the DMV, holding "[t]he record does not support the conclusion under N.C. Gen. Stat. § 20-16.2(d)(5)." Petitioner was later convicted of the underlying charge of impaired driving. Respondent appeals and argues the superior court erred in reversing the administrative decision of the DMV hearing officer. We affirm.

II. Statement of Jurisdiction

Jurisdiction lies in this Court as an appeal of a final judgment of a superior court entered upon review of an administrative agency pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

III. Standard of Review

On appeal from a DMV hearing, the superior court sits as an appellate court and determines "whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e) (2015). This Court reviews the superior court's decision to " '(1) determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Johnson v. Robertson*, 227 N.C. App. 281, 286-87, 742 S.E.2d 603, 607 (2013) (quoting *ACT–UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62–63, 468 S.E.2d 557, 560 (1996) (citation omitted). We apply the same standard of review required by N.C. Gen. Stat. § 20-16.2(e) for reviewing a DMV decision to revoke a petitioner's driving privileges for a willful refusal to submit to chemical analysis for an implied-consent charge. On appeal, "there is a presumption in favor of regularity and correctness in proceedings in the trial court with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195–96, 333 S.E.2d 47, 50 (1985) (citing *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *app. dism.*, 459 U.S. 1139, 74 L.Ed.2d 987 (1983)).

IV. Analysis

Respondent argues the superior court erred in reversing the DMV's decision. The Commissioner asserts the agency record contains substantial evidence to support the findings of fact, and the findings of fact

support the hearing officer's conclusion that Petitioner willfully refused to submit to chemical analysis. We disagree.

This appeal arises from a revocation proceeding under N.C. Gen. Stat. § 20-16.2, "which authorizes a civil revocation of the driver's license when a driver has willfully refused to submit to a chemical analysis." *Steinkrause v. Tatum*, 201 N.C. App. 289, 292, 689 S.E.2d 379, 381 (2009), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010). N.C. Gen. Stat. § 20–16.2 "provides for a civil hearing at which the driver can contest the revocation of her driver's license." *Id.* at 292, 689 S.E.2d at 381.

Pursuant to N.C. Gen. Stat. § 20–16.2(d), the hearing is limited to consideration of whether:

> (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
>
> (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
>
> (4) The person was notified of the person's rights as required by subsection (a); and
>
> (5) The person willfully refused to submit to a chemical analysis.

N.C. Gen. Stat. § 20-16.2(d) (2015).

Respondent argues substantial evidence in the record supports the findings of fact in the DMV's decision, which in turn supports the DMV's conclusion of law. The superior court reviewed the record and the transcript of the DMV's administrative hearing and heard arguments from both parties.

In its order reversing the DMV's decision, the superior court found "[t]he record does not support the conclusion under N.C. Gen. Stat. § 20-16.2(d)(5). Therefore, the Hearing Officer should not have found that the petitioner willfully refused to submit to a chemical analysis of his breath." The superior court's order does not set out the standard of review required by N.C. Gen. Stat. § 20-16.2(e), and does not explain

which of the agency's fact findings were unsupported. The order does not state what standard of review was used by the superior court.

However, as our Supreme Court held in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002), "an appellate court's obligation to review a superior court order for errors of law. . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Id.* (adopting the dissenting opinion in 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, Judge, dissenting)). After review of the record and transcripts, we consider the issue under the applicable statutory standard of review, without remanding the case to the superior court.

Respondent argues substantial evidence in the record supports the findings of fact, which in turn supports the DMV's conclusion of law that Petitioner willfully refused to submit to a chemical analysis. The DMV Hearing Officer made the following findings of fact in his order, which upheld the revocation of Petitioner's driver's license:

> 1. On August 13, 2015, Officer Brent Kinney, Guilford County Sheriff's Office, was stationary in the Food Lion parking lot at 7605 North NC Hwy 68 when he observed the petitioner and a female walking to the connecting parking lot of a bar, Stoke Ridge, between 9:30-9:40 [p.m.]. He noted the petitioner had a dazed appearance and was unsure on his feet.
>
> 2. Officer Brent Kinney observed the petitioner enter the driver's seat of a gold Audi, back out of the parking space, and quickly accelerate to about 26 mph in the Food Lion parking [lot].
>
> 3. Officer Brent Kinney got behind the petitioner until the petitioner stopped in the parking lot. At that point[,] Officer Brent Kinney observed both doors open and the petitioner and the female exit the vehicle.
>
> 4. Officer Brent Kinney lost sight of the vehicle when he exited the parking lot. Then he got behind the vehicle when it exited the parking lot.
>
> 5. Officer Brent Kinney observed the gold Audi cross the yellow line twice and activated his blue lights and siren.
>
> 6. The female was driving and Officer Brent Kinney determined she was not impaired.

7. Officer Brent Kinney detected a strong odor of alcohol on the petitioner, whom he saw driving in the PVA of Food Lion and observed he had slurred speech, glassy eyes and was red-faced.

8. The petitioner put a piece of candy in his mouth even after Officer Brent Kinney told him not to do so. He subsequently removed the piece of candy when asked to do so.

9. Officer Brent Kinney asked the petitioner to submit to the following tests: 1) Recite alphabet from E-U—Petitioner recited E, F, G, H, I, J, K, L, M, N, O, P[,] and stopped; and 2) Recite numbers backwards from 67-54—Petitioner recited 67, 66, 65, 4, 3, 2, 1, 59, 8, 7, 6, 5,4, 3, 2, 1.

10. Officer Brent Kinney arrested the petitioner, charging him with driving while impaired, and transported him to the Guilford County jail control for testing.

11. Officer Brent Kinney, a currently certified chemical analyst with the Guilford County Sheriff's Office, read orally and provided a copy of the implied consent rights at 10:30 [p.m.] The petitioner refused to sign the rights form and did not call an attorney or witness.

12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.

13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the gauge did not move, indicating no air was being introduced.

14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.

15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.

16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he

was refusing the test by failing to follow his instructions and marked the refusal at that time.

17. *The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.* [emphasis added].

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

The DMV Hearing Officer also made the following conclusions of law in its order:

1. [Petitioner] was charged with an implied-consent offense.

2. Officer Brent Kinney had reasonable grounds to believe that [Petitioner] had committed an implied-consent offense.

3. The implied-consent offense charged involved no death or critical injury to another person.

4. [Petitioner] was notified of his rights as required by N.C.G.S. 20-16.2(a).

5. [Petitioner] willfully refused to submit to a chemical analysis.

A. Evidence That Petitioner Was Charged With An Implied-Consent Offense

Under the first requirement of N.C. Gen. Stat. § 20–16.2(d), testimony at the administrative hearing is sufficient evidence to show Petitioner was charged with an implied-consent offense. The DMV's Finding of Fact number 10, relevant to this conclusion of law, is supported by Officer Brent Kinney's testimony that he arrested Petitioner for driving while impaired. Additionally, Petitioner concedes in his petition seeking review of the DMV's revocation of his license that he was charged with the implied-consent offense of Impaired Driving under N.C. Gen. Stat. § 20-138.1. This conclusion of law is supported by the findings and is not in dispute.

B. Evidence That A Law Enforcement Officer Had Reasonable Grounds To Believe Petitioner Had Committed An Implied–Consent Offense

"[R]easonable grounds in a civil revocation hearing means probable cause, and is to be determined based on the same criteria." *Steinkrause*, 201 N.C. App. at 293, 689 S.E.2d at 381. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 293, 689 S.E.2d at 381-82 (alteration in original). "A determination of probable cause depends on the totality of the circumstances." *Id.* at 293, 689 S.E.2d at 381.

Concerning the second requirement, Respondent identifies the DMV Hearing Officer's Findings of Facts 1 through 9 as supporting the conclusion that Officer Kinney had reasonable grounds to believe Petitioner had committed an implied-consent offense. Officer Kinney indicated in his testimony: (1) Petitioner appeared to be impaired based on his gait, glassy eyes, and dazed look; (2) Officer Kinney observed Petitioner operating his vehicle while in the shopping center parking lot (3) Petitioner admitted to Officer Kinney that he had driven his car in the shopping center parking lot; (4) Petitioner had slurred speech; (5) After Officer Kinney had pulled over the vehicle Petitioner was in, Petitioner disregarded Officer Kinney's instructions to not put candy in his mouth; (6) Petitioner "had a very strong odor of alcohol on him[;]" and (7) Petitioner failed two field sobriety tests.

Officer Kinney's testimony is competent evidence, which supports the DMV's Findings of Fact 1, 7, 8, and 9. These Findings of Fact support the DMV's conclusion that a law enforcement officer had reasonable grounds to believe Petitioner had committed an implied-consent offense. *See Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (finding that the "[f]act that a motorist ha[d] been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie [evidence] to show a violation of [the driving while impaired statute].") (quotations and citations omitted).

C. The Affidavit Contains No Allegation That The Implied-Consent Offense Charged Involved Death Or Critical Injury To Another Person

The third requirement of N.C. Gen. Stat. § 20-16.2(d) is inapplicable to the present case. No death or critical injury to another person was alleged in the affidavit. Neither party contends subsection (3) is at issue.

D. Evidence That Petitioner Was Notified Of His Rights

As to the fourth requirement, Respondent asserts Officer Kinney's testimony shows he read Petitioner his implied-consent rights, and supplied Petitioner with a copy of his implied-consent rights. Petitioner refused to sign the implied-consent rights form or indicate he wanted to call an attorney or witness. This testimony supports the DMV hearing officer's Finding of Fact number 11. Finding of Fact number 11 supports the hearing officer's conclusion of law that Petitioner was notified of his rights as required by N.C. Gen. Stat. § 20-16.2(a).

E. Evidence That Petitioner Willfully Refused To Submit To A Chemical Analysis

As to the fifth requirement, Respondent asserts testimony presented at the DMV hearing shows Petitioner willfully refused to submit to a chemical analysis. Officer Kinney testified that: (1) he instructed Petitioner on how to provide a valid sample of breath for testing; (2) Petitioner failed to follow the officer's instructions on the first Intoximeter test, as the pressure gauge on the instrument did not indicate that air was being breathed by Petitioner; (3) Officer Kinney provided Petitioner a second opportunity to provide an air sample; and (4) contrary to Officer Kinney's instructions, Petitioner finished blowing before being told to stop and then followed up with another puff of air.

Petitioner urges us to affirm the superior court's decision and asserts the admitted evidence in the record shows: (1) the results of Petitioner's second Intoximeter test registered "mouth alcohol;" (2) the operating manual and procedures for the EC/IR II Intoximeter requires that if the machine detects "mouth alcohol," then a subsequent test should be administered after a 15-minute observation period; (3) Petitioner testified that he blew as long and hard as he could into the Intoximeter; (4) Petitioner testified he told the arresting officer before being administered the Intoximeter that he suffered from asthma.

In *Steinkrause v. Tatum*, this Court concluded that where the petitioner breathed quick, short bursts of air into the breathalyzer, contrary to the chemical analyst's instructions to provide an adequate continuous breath sample, the evidence was sufficient to support a finding and conclusion that the petitioner willfully refused to submit to chemical analysis. *Steinkrause*, 201 N.C. App. at 296-97, 689 S.E.2d at 383-84. In *Steinkrause*, the petitioner complained to the arresting officer that injuries she suffered had diminished her ability to provide an adequate breath sample. *Id.*

The arresting officer testified that the petitioner looked physically capable of providing an adequate sample of breath. *Id.* Relying on *Tedder v. Hodges*, the Court held that evidence of a petitioner's failure to follow the instructions of an intoxilyzer operator provides an adequate basis for a superior court to conclude that the petitioner willfully refused chemical analysis. *Id.* at 298, 689 S.E.2d at 385 (citing *Tedder v. Hodges*, 119 N.C. App. 169, 175, 457 S.E.2d 881, 885 (1995)). Respondent argues, citing *Steinkrause* and *Tedder*, the arresting officer's testimony that Petitioner did not follow instructions provided an adequate basis for the DMV Hearing Officer's findings of fact to support the conclusion Petitioner had willfully refused to submit to chemical analysis.

The facts in both *Steinkrause* and *Tedder* are factually distinguishable from the instant case. In *Steinkrause* and *Tedder*, "petitioners agreed to submit to a test of their breath and failed to maintain sufficient pressure to provide a valid sample." *Id.* at 299, 689 S.E.2d at 385 (summarizing *Tedder v. Hodges*, 119 N.C. App. 169, 457 S.E.2d 881). In neither case did the intoxilyzer machine register "mouth alcohol" nor sufficient samples when the petitioners purported to blow.

Here, the findings of fact show and it is undisputed that when Petitioner blew a second time, the Intoximeter registered "mouth alcohol" as the result of the sample. The arresting officer asserted Petitioner failed to follow instructions by blowing insufficiently into the machine and he marked it as a willful refusal. Rather than indicating Petitioner blew insufficiently to provide a sample on his second attempt, Petitioner provided an adequate sample for the Intoximeter to read and register "mouth alcohol". The arresting officer's testimony that Petitioner blew insufficiently is directly contradicted by the Intoximeter's registering a sample with a "mouth alcohol" test result.

Respondent did not produce any evidence to demonstrate the EC/IR II Intoximeter will produce a "mouth alcohol" reading if the test subject fails to submit a sufficient sample. The undisputed evidence shows the EC/IR II Intoximeter registered "mouth alcohol" and did not indicate an inadequate sample or refusal from Petitioner's failure to blow sufficiently.

Officer Kinney's testimony asserting Petitioner willfully refused is contradicted by the machine's acceptance of Petitioner's sample. The indicated procedure to follow from this result of "mouth alcohol" is for a subsequent EC/IR II Intoximeter test to be administered after a 15-minute observation period elapses. This procedure was not followed here. The DMV Hearing Officer's conclusion that "[Petitioner] willfully

refused to submit to a chemical analysis" is not supported by the record evidence or the findings.

V. Conclusion

Respondent has not shown the record evidence supports the conclusion, "[t]he person willfully refused to submit to a chemical analysis," set forth in N.C. Gen. Stat. § 20-16.2(d) for civil revocation of Petitioner's driver's license. The superior court's order reversing the DMV's civil revocation of Petitioner's license is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

GAIL LEE HEWITT, PLAINTIFF
v.
ROBIN LEE HEWITT, INDIVIDUALLY AND AS TRUSTEE OF THE ROBIN LEE HEWITT REVOCABLE TRUST DATED AUGUST 12, 2011, DEFENDANT

No. COA16-16

Filed 4 April 2017

Fraud—constructive—land transfer between parents and child

In a case involving the transfer of real estate between parents and their child and a trial on plaintiff's claim for constructive fraud, the trial court erred by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. There was not a scintilla of evidence that, at the time of the transaction, plaintiff and defendant were in a position of trust and confidence that defendant exploited or attempted to exploit to take advantage of plaintiff.

Appeal by Defendant from judgment entered 20 July 2015 by Judge Ebern T. Watson, III, in Brunswick County Superior Court. Heard in the Court of Appeals 24 May 2016.

The Del Ré Law Firm, PLLC, by Benedict J. Del Ré, Jr., for Plaintiff-Appellee.

Shipman & Wright, LLP, by Kyle J. Nutt, for Defendant-Appellant.

INMAN, Judge.

Robin Lee Hewitt, individually and as trustee of the Robin Lee Hewitt Revocable Trust ("Defendant"), appeals a judgment resulting from a jury verdict in favor of Gail Lee Hewitt ("Plaintiff") on a claim of constructive fraud. Defendant contends the trial court erred in denying her motions for directed verdict and her motion from judgment notwithstanding the verdict (JNOV), or in the alternative, motion for a new trial. After careful review, we hold that the trial court erred in denying the motions for directed verdict and JNOV, and reverse the judgment.

I. Factual & Procedural Background

This appeal arises out of a 2010 sale of property located in Brunswick County ("the Transaction") from Plaintiff and her late husband, Douglas Hewitt ("Mr. Hewitt") (collectively, "the Hewitts"), to their daughter, Defendant. The evidence at trial, considered in the light most favorable to Plaintiff, tends to show the following:

Defendant is one of the Hewitts' three daughters. At age sixteen, Defendant left the family home. She lived in California for twenty-seven years preceding the Transaction.

In 1987, the Hewitts purchased a tract of land in Supply, North Carolina from Mr. Hewitt's mother, Mary Hewitt. The deed explicitly reserved a life estate for Mary Hewitt in the property. Following the death of Mary Hewitt, the Hewitts built a new house ("the Property") on the land in 2005.

In May 2009, the Hewitts decided to enter a home equity conversion mortgage, also known as a reverse mortgage, on the Property. Attorney Richard Green ("Green") and his closing coordinator, Rhonda Caison ("Caison"), represented the Hewitts in the closing. Green was "trusted lawyer" and "friend" of Plaintiff, whom she had known for fifteen years and felt "confident" using. The Hewitts attended counseling sessions through a federal government agency and received informational documents regarding the loan's cost and the financial implications. On 12 June 2009, the Hewitts entered into the reverse mortgage from which they received a loan for $168,000 from RBC Bank, borrowed against their equity in the Property. At the time they entered into the reverse mortgage closing, an $80,989.52 lien on the Property with Chase Home Mortgage was recorded.

In closing on the reverse mortgage, the Hewitts received the proceeds of the loan from RBC Bank, retired the debt to Chase Home Bank, placed a new deed of trust on the record, and signed a new promissory note securing the new loan. The note was payable 2 May 2086. The loan

covered the $8,446 closing costs, provided the Hewitts a loan advance of $25,880.70, and allowed them to remain in their home, without making mortgage payments, for the rest of their lives. In the event that either spouse lived away from the Property for over a year, the Property was sold, or both spouses died, the reverse mortgage would terminate and the loan would become due. The Hewitts remained responsible for paying the maintenance, insurance, and taxes on the Property.

At the time the Hewitts entered into the reverse mortgage, Defendant lived in California. She allegedly told her parents by phone that the reverse mortgage was a "big mistake." However, Plaintiff admitted that she also received "advice independent of [Defendant] on whether or not the reverse mortgage was a good deal[.]"

In May or June of 2010, in a telephone conversation from her residence in California, Defendant offered to buy the Property from her parents. Defendant stated she could buy the Property the following year, allegedly telling her parents that "[the house] will still be in the family," "you'll be okay[,]" and "[e]verything will be the same except that I'll own the house." A few months later, in September or October of 2010, Defendant called her parents and said she was prepared to purchase the Property.

Plaintiff investigated the value of the Property in anticipation of selling it to Defendant. She consulted "four or five" real estate agencies but never requested a professional appraisal. Plaintiff referred Defendant to Green to prepare the documentation for the sale of the Property.

On 4 October 2010, Defendant contacted Green's office and spoke with Caison, the closing coordinator. Later that day, Defendant confirmed her conversation with Caison by email, stating, "Let me know what steps I need to take next for the title company and for the purchasing contract for the property." Caison responded by email stating, "I will handle the title company from here and order your title policy. . . . I'll prepare the contract and forward it to you in an e-mail."

Green's office prepared all of the documentation regarding the Transaction, including, *inter alia*, the Offer to Purchase and Contract (the "Purchase Contract"), the General Warranty Deed (the "Deed"), and the settlement sheet listing all financial terms of the Transaction. The Purchase Contract listed the Property's purchase price as $126,000.

Defendant signed The Purchase Contract in California on 11 October 2010 and sent it to North Carolina. The Hewitts signed the Purchase Contract at home on 13 October 2010 and delivered it to Green's office.

Plaintiff and Defendant never expressly discussed the terms of the Purchase Contract.[1] Plaintiff admitted that no one ever misled her about the contents of the Purchase Contract. Five days later, on 18 October 2010, as a condition of a mortgage loan Defendant obtained for the purchase, the Property was appraised at $131,000.

On 10 November 2010, Plaintiff personally retrieved the Deed and other remaining transactional documents from Green's office to take home for signing, as Mr. Hewitt was unable to leave their residence. At that time, Plaintiff allegedly asked Green if they were going to be okay signing the papers, and Green said, "I can't tell you if it's a good move or a bad move . . . but I see nothing wrong." Green testified that he considered both Plaintiff and Defendant his clients.

The Hewitts signed the Deed later that day and a neighbor notarized their signatures. The Deed was recorded on 17 November 2010 in the Brunswick County Registry.

Plaintiff testified that she mistakenly believed the life estate reserved in the 1987 deed to Mary Hewitt, her mother-in-law, also granted Plaintiff a life estate in the Property. Plaintiff testified that, "I thought that basically there was something that said in writing that we had a life estate." However, neither the executed Purchase Contract nor the Deed included any mention of a life estate. Plaintiff admitted that she had the opportunity to read the documents regarding the Transaction. Defendant testified that she would not have purchased the Property with a life estate reservation. The settlement sheet summarizing the Transaction reflects that Defendant purchased the Hewitts' home for $126,000, and paid $126,472.34 to pay off the reverse mortgage.

Following the closing, Defendant paid the new mortgage, taxes, and insurance on the Property. Plaintiff changed her insurance policy to a tenant's policy and referred to Defendant as her "landlord."

Defendant moved from California to Brunswick County shortly after the closing, on the day after Thanksgiving of 2010. Defendant

1. A post-it note written in Green's handwriting affixed to an undated, unsigned draft of the Purchase Contract reads, "M and D to have life estate." Green testified that he never communicated with Defendant and was certain that Caison never told him that the Hewitts intended to reserve a life estate in the Property. He said that he could not recall the reason he wrote the note, but assumed that Plaintiff had informed him of her desire to have a life estate in the Property. He did not recall relaying that information to Caison or anyone else. Neither the unsigned draft nor the executed Purchase Contract—or any other document introduced in evidence—referred to the conveyance reserving a life estate for the grantors.

cared for her father until his death two years later on 11 February 2013. Following her father's death, Defendant no longer felt she had a purpose in Brunswick County. Just after Christmas in December 2013, Defendant expressed her desire to sell the Property and move back to California.

Plaintiff filed the complaint initiating this action on 2 June 2014 alleging fraud, fraud in the inducement, and constructive fraud. Following discovery, Defendant filed a motion for summary judgment and Plaintiff filed a cross-motion for summary judgment. On 30 April 2015, the trial court denied Plaintiff's motion, granted Defendant's motion as to the claims for fraud and fraud in the inducement, and denied Defendant's motion as to the constructive fraud claim.

The case came on for trial on 29 June 2015, Judge Ebern T. Watson, III, presiding. At the close of Plaintiff's evidence, Defendant moved for a directed verdict, which the trial court denied. Defendant renewed the motion for directed verdict at the close of all the evidence, and the trial court again denied the motion. The jury returned a verdict in favor of Plaintiff and on 20 July 2015, the trial court entered a judgment for constructive trust.

Defendant filed a motion for JNOV or, in the alternative, a new trial on 23 July 2015. On 6 August 2015, the trial court denied Defendant's motion. Defendant timely filed a notice of appeal.

II. Analysis

Defendant argues the trial court erred in denying her motions for directed verdict, JNOV or, in the alternative, motion for new trial. After careful review of the record and applicable law, we agree.

"On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted). We review the ruling *de novo*. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004) ("Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*.").

"In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant[.]" *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). The non-movant is given "the benefit

of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Id.* at 158, 381 S.E.2d at 710. "A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009) (citations and quotation marks omitted). "However, if [the] plaintiff fails to present evidence of each element of his claim for relief, the claim will not survive a directed verdict motion." *Ridenhour v. Int'l Bus. Mach. Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777 (1999) (citation omitted).

The North Carolina Supreme Court has defined the elements of a constructive fraud claim as proof of circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quotation marks, citations, and brackets omitted). This Court has defined the essential elements of constructive fraud in slightly different formulations. *See Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) ("To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit himself in the transaction."); *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (defining the elements of constructive fraud as "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured"); *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002) (defining the elements of constructive fraud as "(1) the existence of a fiduciary duty, and (2) a breach of that duty"). Although the stated elements vary, each holding requires that the defendant exploits or seeks to exploit the relationship to his or her advantage.

"A number of relationships have been held to be inherently fiduciary, including the relationships between spouses, attorney and client, trustee and beneficiary, members of a partnership and physician and patient." *King v. Bryant*, __ N.C. __, __, 795 S.E.2d 340, 349 (2017). "The very nature of [these] relationships . . . gives rise to a fiduciary relationship as a matter of law." *CommScope Credit Union v. Butler & Burke, LLP*, __ N.C. __, __, 790 S.E.2d 657, 660 (2016). However, "[a] confidential or fiduciary relation can exist under a variety of circumstances and is not

limited to those persons who also stand in some recognized legal relationship to each other[.]" *Stilwell v. Walden*, 70 N.C. App. 543, 546-47, 320 S.E.2d 329, 331 (1984). A fiduciary relationship can exist as a matter of fact in those circumstances "in which there is confidence reposed on one side, and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). The North Carolina Supreme Court recently reaffirmed this principle in *King v. Bryant*, noting that "[i]t is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other." __ N.C. at __, 795 S.E.2d at 349 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906-07).

"Generally, the existence of a [fiduciary relationship as a matter of fact] is determined by specific facts and circumstances, and is thus a question of fact for the jury." *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001). However, the trial court, and this Court on appeal, must determine as a matter of law whether the evidence is sufficient to submit the issue to the jury. *See Maxwell*, 164 N.C. App. at 323, 595 S.E.2d at 761.

Plaintiff argues that a close relationship with family members can suffice to establish a confidential or fiduciary relationship. Although a close family relationship can serve as a factor for consideration in this analysis, the relationship of parent and child does not as a matter of law create a confidential or fiduciary relationship. *See Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 416 (1952) (holding that the parent-child relationship "is a family relationship, not a fiduciary one, and such relationship does not raise a presumption of fraud or undue influence"); *see also Benfield v. Costner*, 67 N.C. App. 444, 446, 313 S.E.2d 203, 205 (1984) (holding that "[a]n allegation of a 'mere family relationship' is not particular enough to establish a confidential or fiduciary relationship").

In *Curl v. Key*, 311 N.C. 259, 261, 316 S.E.2d 272, 274 (1984), the plaintiffs, siblings ages 16, 17, 18, and 21, inherited their family home following the death of their father. The defendant was the late father's best friend, known to the plaintiffs as "Uncle Jack," who lived in the family home with the plaintiffs. *Id.* at 262-63, 316 S.E.2d at 274-75. Upon inheriting the house, the plaintiffs were threatened, harassed, and occasionally physically abused by other relatives. *Id.* at 261, 316 S.E.2d at 274. The defendant told the plaintiffs that he would keep their relatives away if they signed a "peace paper" giving him the right to kick troublemakers off the property. *Id.* at 262, 316 S.E.2d at 274. After signing the "peace paper," the plaintiffs discovered that they had actually signed a deed to

their home, and brought an action to set aside the deed. *Id.* at 260, 316 S.E.2d at 273. The North Carolina Supreme Court held that the plaintiffs had produced sufficient evidence that, at the time the plaintiffs executed the deed to the defendant, a confidential or fiduciary relationship existed between the plaintiffs and the defendant. *Id.* at 263, 316 S.E.2d at 275.

In *Willetts v. Willetts*, 254 N.C. 136, 138, 118 S.E.2d 548, 549 (1961), the plaintiff, who was in debt and unable to obtain refinancing, made an agreement with his son, the defendant, wherein (1) the father would deliver a deed conveying his real property to his son; (2) the son would obtain a loan secured by the property; (3) the son would pay off his father's debt; and (4) the son would then reconvey the real property to his father, who would assume the outstanding mortgage. *Id.* at 138, 118 S.E.2d at 549. The son acquired a loan using the real property as security, repaid his father's debt, but never conveyed the property back to his father. *Id.* at 138, 118 S.E.2d at 549. The North Carolina Supreme Court noted that the trial court found that the son had assisted his father in farming and marketing his livestock and crops, and the son was listed as "agent" for his father's tax listing. *Id.* at 139, 118 S.E.2d at 550. The Supreme Court also noted that there was no evidence that the father was mentally or physically incapable of transacting business at the time he executed the deed. *Id.* at 142, 118 S.E.2d at 552. Noting that "[t]he evidence leaves the impression that all [the] defendant did was to assist his father when called upon to do so[,]" the Court held that "[t]here is no evidence tending to show any incident or transaction either before or after the execution and delivery of the subject deed in which [the] defendant exercised or attempted to exercise a dominating influence over his father." *Id.* at 142, 118 S.E.2d at 552.

Here, the relationship between Plaintiff and Defendant is dissimilar to the confidential relationship found in *Curl* and analogous to the parent-child relationship in *Willetts*, which the Supreme Court held was insufficient to establish a confidential relationship. Unlike the defendant in *Curl*, who was living with the young plaintiffs when they signed the deed, Defendant here was living in California more than 3,000 miles away from Plaintiff, and had lived there for twenty-seven years preceding the Transaction. During the decade immediately preceding the Transaction, Defendant visited Plaintiff "somewhere between three and eight" times, *i.e.* less frequently than once a year. Defendant planned the Hewitts' fiftieth wedding anniversary party in 2005 and occasionally traveled with her parents. Plaintiff explained that her relationship with Defendant

> is one that we trusted her. We had such faith in her, because she was the most independent of our children. She never

> asked for anything. She never broke a promise. She was always the one to keep us apprized [sic] of what was going on with her life, her promotions through business, one that we never found even the slightest glimmer of there being any reason to not have anything but pride and love and affection.

Plaintiff's own account of her relationship with her daughter, while endearing, in no way indicates that Defendant exploited or attempted to exploit the relationship for her benefit. Plaintiff admitted that at the time of the Transaction, she was legally and financially independent of Defendant, and Defendant was "totally independent" of her parents. Plaintiff also admitted that the only business transaction she had with Defendant was the sale of the Property, that Defendant never had any control over Plaintiff's finances, and that Defendant did not dominate Plaintiff.

Also, Plaintiff admitted she was a "sharp" woman, a high school graduate who had worked as an office administrator in her husband's business for forty-five years. Prior to the Transaction, Plaintiff "sought other advice," and Mr. Hewitt "spoke to several of his friends[.]" Plaintiff investigated the value of the Property prior to the Transaction. Plaintiff referred Defendant to Green, an attorney whom she knew and trusted, to prepare the necessary documentation. Plaintiff and Mr. Hewitt signed the Purchase Contract, which specified the express terms of the Transaction, and, approximately one month later, signed the Deed. As in *Willetts*, Plaintiff presented no evidence that at the time of the Transaction, she was physically or mentally incapable of conducting her own business or that Defendant exercised or attempted to exercise any dominating influence over Plaintiff.

Additionally, Defendant was in California at the time that the Hewitts signed the Purchase Contract and the Deed. Defendant paid $126,000 for the Property, over 96% of the value of the professional appraisal. It was only *after* the Transaction that Defendant returned to North Carolina and began to see Plaintiff regularly, in the course of caring for Mr. Hewitt. Plaintiff failed to present any evidence that at the time she signed the Purchase Contract or at the time she signed the Deed that she was in a position to be taken advantage of or that "[D]efendant exercised or attempted to exercise a dominating influence over [her]." *Willetts*, 254 N.C. at 142, 118 S.E.2d at 552.

In sum, a careful review of the record reveals no requisite scintilla of evidence that at the time of the Transaction, Plaintiff and Defendant were in a relationship of trust and confidence that Defendant exploited

or attempted to exploit to take advantage of Plaintiff. Plaintiff's evidence, even when considered in the light most favorable to her, giving her the benefit of all reasonable inferences and resolving all conflicts in her favor, fails to satisfy the essential elements of the constructive fraud claim. We therefore hold that the trial court erred in denying Defendant's motions for directed verdict and JNOV.

Defendant also argues that the trial court erred in failing to give her requested special jury instructions. Because we hold the trial court erred in denying Defendant's motions for directed verdict and JNOV and reverse the trial court's judgment, we need not address this issue on appeal.

III. Conclusion

Because Plaintiff failed to present even a scintilla of evidence of a fiduciary relationship or a relationship of trust and confidence which Defendant exercised or attempted to exercise to her benefit, we hold that the trial court erred in denying Defendant's motions for directed verdict and JNOV. Accordingly, we reverse the trial court and remand for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN RE L.L.O.

[252 N.C. App. 447 (2017)]

IN THE MATTER OF L.L.O.

No. COA16-1098

Filed 4 April 2017

Termination of Parental Rights—grounds—failure to make findings and conclusions—repetition of neglect if returned to parents—willfully left in foster care without reasonable progress

The trial court's order terminating respondents' parental rights was vacated. The trial court failed to enter adequate findings of fact to demonstrate and conclude that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) regarding the likelihood of repetition of neglect if the child was returned to their care or that respondents willfully left the child in foster care without showing reasonable progress to correct the conditions which led to her removal.

Appeal by respondents from order entered 9 August 2016 by Judge Mike Gentry in Person County District Court. Heard in the Court of Appeals 20 March 2017.

No brief filed for Person County Department of Social Services petitioner-appellee.

Mary McCullers Reece for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

Alston & Bird, LLP, by Kendall L. Stensvad, for guardian ad litem.

TYSON, Judge.

Respondents appeal from an order terminating their parental rights to their minor child L.L.O. We vacate the district court's order and remand.

I. Background

In May 2012, L.L.O. was born at Duke University Hospital, twelve weeks premature, weighing one pound fourteen ounces. As the result of her premature birth, L.L.O. remained hospitalized for approximately six weeks. After L.L.O.'s weight increased, Respondents were allowed to

take her home. Respondents lived in Durham at the time, but moved to Roxboro about a month later. L.L.O. continued to receive medical care in Durham.

L.L.O. had an appointment at Duke Pediatrics on 4 December 2012, from where she was taken by ambulance to the hospital because she was in "respiratory distress." She was released the same day with a follow-up appointment scheduled for the next day. After L.L.O. missed that appointment, the Person County Department of Social Services ("DSS") received a report of purported medical neglect concerning L.L.O. On 6 December 2012, a DSS social worker spoke with Respondent-mother, encouraged her to reschedule the appointment for the following day, and offered to provide transportation to the appointment for Respondent-mother and L.L.O. At L.L.O.'s appointment the next day, she was determined to be in "respiratory distress." Her pulse oxygen levels were "dangerously low" and she was again transported to the hospital.

When L.L.O. was discharged from the hospital on 10 December 2012, Respondent-mother was given a prescription for prednisone for L.L.O. She was instructed to fill the prescription and give L.L.O. a dose every twelve hours for the next forty-eight hours. According to Respondent-mother, she was unable to fill the prescription that day because her pharmacy was closed by the time she and L.L.O. had returned to Roxboro. On 11 December 2012, the following day, a social worker filled the prescription for Respondent-mother and delivered it to the home. Although the social worker brought the medication to Respondents' home at 4:45 p.m. that day, L.L.O. did not receive her first dose of prednisone until the following day, 12 December 2012. That same day, a social worker transported L.L.O. and Respondent-mother to a follow-up appointment, where she was again found to be in "respiratory distress."

On 15 December 2012, a social worker transported L.L.O. and Respondent-mother to Duke Pediatrics. L.L.O. was again found to be in "respiratory distress" and was transported to the hospital by ambulance. Following L.L.O.'s discharge several hours later, Respondents were instructed to schedule a follow-up appointment, which Respondents did not do. Duke Pediatrics scheduled an appointment on L.L.O.'s behalf and notified Respondents of the 19 December appointment. Respondents did not appear with L.L.O. for the appointment.

On 19 December 2012, DSS filed a petition alleging L.L.O. was neglected, because Respondents had failed to provide her necessary medical and remedial care. DSS obtained nonsecure custody of L.L.O. the same day. On 1 April 2013, the district court adjudicated L.L.O. to be

neglected "as alleged in the Petition," and ordered Respondents to submit to drug screens, relinquish L.L.O.'s WIC vouchers to DSS and develop a case plan with DSS.

Respondents agreed and entered into case plans with DSS, which included the following goals: obtain and maintain employment and housing; participate in psychological and substance abuse evaluations and follow all recommendations; refrain from using drugs and alcohol and participate in drug testing; attend visitation with L.L.O.; and communicate respectfully with DSS, foster parents, and other staff regarding L.L.O.'s care and scheduled visits.

Following a 2 December 2013 permanency planning hearing, the trial court ordered that DSS could cease reunification efforts. At the next permanency planning hearing on 9 June 2014, the court ordered the permanent plan be changed from reunification to adoption.

On 30 September 2014, DSS filed its motion for termination of parental rights ("TPR") alleging L.L.O. was neglected as defined in N.C. Gen. Stat. § 7B-101. Without a statutory reference, the motion also alleged that "[t]wenty-one months have passed since the child was removed from the parents' custody and little likelihood exists that the parents will ever be able to resume custody of their child."

On 9 September 2015, the court entered an order limiting the time for presentation of the parties' cases to five hours total for Petitioner and the guardian ad litem and five hours total for Respondents. In its order terminating Respondent's parental rights, Judge Gentry stated he "wants the Court of Appeals to decide if he is right or wrong on that issue." Respondents do not raise this time limitation issue on appeal and it is not before us.

Petitioner's motion for TPR was heard on 5 November, 6 November, and 9 November 2015. The trial court entered an order on 9 August 2016 concluding that Respondents had neglected L.L.O. and willfully left L.L.O. in foster care or placement outside of the home for more than twelve months without showing reasonable progress in correcting the conditions that led to L.L.O.'s removal. The court concluded termination was in the juvenile's best interest and terminated Respondents' parental rights. Respondents appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2015).

III. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law.
>
> The trial court's conclusions of law are reviewable *de novo* on appeal.

In re J.S.L., 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

IV. Issues

Respondents assert the trial court erred when it concluded they had neglected their daughter, L.L.O., without making any finding or conclusion of the likelihood of repetition of neglect, if L.L.O. was returned to their care. Respondents also argue the trial court erred by concluding they willfully left L.L.O. in foster care without showing reasonable progress to correct the conditions which led to her removal.

V. Analysis

A. Neglect

A court may terminate parental rights upon a finding that the parents have neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2015). In relevant part, N.C. Gen. Stat. § 7B-101(15) (2015) defines a neglected juvenile as one "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care[.]"

Where a child has not been in the custody of the parents for a significant period of time prior to the TPR hearing, "the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). The court must consider "evidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect." *Id.* (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d. 227, 231 (1984)). The trial court concluded grounds existed for terminating the parental rights of both Respondents because both had "neglected [their] minor child, [L.L.O.]."

The trial court's order must reflect the process by which the court reasoned and adjudicated facts, based upon clear and convincing evidence, which compel the conclusion that Respondents were likely to neglect L.L.O. if she were returned to their custody. *See Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). Respondents argue the court's order lacks the requisite findings that they were likely to repeat the neglect which led to the initial adjudication, and no clear and convincing record evidence supports such finding. We agree.

In *In re E.L.E.*, __ N.C. App. __, __, 778 S.E.2d 445, 447 (2015), the child, Emma, had been adjudicated neglected and removed from the respondent's care due to domestic violence and respondent's substance abuse. The trial court's TPR order contained no finding that "there was a probability of repetition of neglect if Emma were returned to respondent." *Id.* at __, 778 S.E.2d 450. This Court held "thus, the ground of neglect is unsupported by necessary findings of fact." *Id.* at __, 778 S.E.2d at 450. The court in *In re E.L.E.* recognized that "[a]rguably, competent evidence in the record exists to support such a finding, however, the absence of this necessary finding requires reversal." *Id.* at __, 778 S.E.2d at 450-51.

While DSS has not filed an appellant brief, the Guardian ad Litem ("GAL") argues the following are findings supporting a conclusion of Respondent-father's neglect.

> 48. That during the pendency of the neglect proceeding, the Respondent father failed to gain or maintain any employment or gainful activity to enable him to provide financial assistance to the child;
>
> . . . .
>
> 50. During the course of the neglect proceeding, the Respondent father has not provided any financial support for his minor child, [L.L.O.];
>
> . . . .
>
> 57. The father was requested to attend drug screens on seven occasions;
>
> 58. On five occasions, he failed to attend the drug screens;
>
> 59. On one of his drug screens he tested positive for controlled substances through hair testings, two positive

screens through urine testing, and he had zero negative drug screens;

. . . .

64. Pursuant to such Exhibit #4, the agency also kept up with the number of visits that the parents missed, those that were rescheduled or cancelled due to DSS or other issues, and those that were removed from the parents due to their own failure to comply with visitation schedules;

65. From a review of such exhibit, and considering the testimony of the DSS Social Worker and parents, the Court finds that the parents failed to visit their child on a sufficiently regular schedule in order to maintain any bond they may have originally had with their infant child; . . . .

72. The time the father has been in jail has prevented him from bonding with his child;

. . . .

82. That [Respondents'] accommodations are not sufficient to additionally house [L.L.O.];

. . . .

95. The Court doesn't know how many times the father said he talked to his daughter. He testified I think every visit. Which that would tend to come down good for you, but there was no evidence presented about the father talking to DSS or anything else, to be sure how his case was going. Maybe if they could set some time with him to talk when mama wasn't there. Cause I know there were several times when he didn't talk or said during the visits. I think mother testified that there were at least 3 visits that did not take and I'm just talking about it during the incarceration but since cease efforts;

. . . .

101. [L.L.O.] has not had an opportunity to really bond with her father based on the testimony I heard. That she had an opportunity to begin bonding with the mother when she was born prematurely. I believe mama was there 24/7. I don't doubt that. Ma'am it's just your actions when the child needed treatment and then not getting a decent place for the child to live in it appeared that you didn't care[.]

With respect to Respondent-mother, the GAL argues that in addition to the findings numbered 64, 65 and 82, *supra*, addressing both parents, the following findings of fact support the court's conclusion of neglect by Respondent-mother.

> 47. That during the pendency of the neglect proceeding, the Respondent mother failed to gain any employment or engage in any gainful activity to enable her to provide financial assistance to the child; the Court further finds she has not worked in fifteen months;
>
> . . . .
>
> 49. During the course of the neglect proceeding, the Respondent mother has not provided any financial support for her minor child, [L.L.O.];
>
> . . . .
>
> 54. The mother was requested to attend drug screens on seven occasions;
>
> 55. On three occasions, she failed to attend the requested drug screens;
>
> 56. On one of her drug screens she tested positive for controlled substances through hair testings, on two occasions she did not provide a sufficient quantity of hair for testing, on three occasions she had positive screens through urine testing, and she had one negative drug screen through urine testing;
>
> . . . .
>
> 96. I can't swear in this one because I don't know for sure. But in almost every case in every case I can recall. Anytime I've ceased efforts I was sure to say to the parents that cease efforts just moves the ball from DSS Court to your Court. You can keep working, you can keep doing stuff to swing it back to you getting the child back, and mama hasn't done anything. I mean she's done some stuff but she hadn't done anything to amount to anything as far as I'm concerned according to her elements of testimony about getting the child into a public element (you can use that language). You hadn't done anything except you filed an application and paid money that she could have paid 8 or 9 years ago, at least it could have been paid while

> Respondent Father was working. I mean it could have been paid. No question in my mind it could've been paid and it was not[.]

None of these purported findings of fact address or mention the probability of repetition of neglect or failure to provide necessary medical or remedial treatment to L.L.O. In fact, a contradiction is that L.L.O.'s young siblings and a newborn sibling remain in the care and custody of Respondents.

The GAL argues the omission of an ultimate finding of a probability of future neglect was inadvertence and constitutes harmless error. We reject this argument. *See In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007) (holding that where the "trial court's findings do not establish grounds for termination[,] [i]ts failure to articulate those grounds is not harmless"); *see also In re E.L.E.*, __ N.C. App. at __, 778 S.E.2d at 450-51 ("absence of this necessary finding [of a probability of a repetition of neglect] requires reversal").

The present termination order contains no finding of a probability of a repetition of the neglect, which led to L.L.O.'s removal from Respondents' care. *See In re D.R.B.*, 182 N.C. App. at 738, 643 S.E.2d at 80; *In re E.L.E.*, __ N.C. App. at __, 778 S.E.2d at 450-51. Here, the record contains evidence, which could support, although not compel, a finding of neglect. "Without further fact-finding, we cannot determine whether the court's conclusions are supported by its findings." *In re D.M.O.*, __ N.C. App. __, __, 794 S.E.2d 858, 866 (2016). We vacate that portion of the order and remand.

B. N.C. Gen. Stat. § 7B-1111(a)(2)

N.C. Gen. Stat. § 7B-1111(a)(2) (2015) provides the court may terminate parental rights upon a finding that Respondents have "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."

At the outset, we note DSS' motion to terminate Respondents' parental rights failed to cite N.C. Gen. Stat. § 7B-1111 as the particular statutory basis upon which it was seeking to terminate Respondents' parental rights. Further, DSS' motion did not contain any of the terms or any combination thereof which are contained in N.C. Gen. Stat. § 7B-1111(a)(2). "While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions

or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). Without the terms, "willfully left," "reasonable progress," "conditions which led to the removal," Respondents would seem to be at a disadvantage to prepare for the TPR hearing. However, as neither Respondent raises the issue, we address whether the facts support the conclusion of lack of reasonable progress as a ground for termination. *See In re S.Z.H.*, __N.C. App. __, __, 785 S.E.2d 341, 347 (2016).

Respondents assert the district court erred when it concluded they had not made reasonable progress towards correcting the conditions that led to the removal of L.L.O. from their care. Respondents contend the trial court's findings of fact do not support its conclusion of law that grounds exist to terminate pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

To terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must perform a two-part analysis. *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396.

"A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

In this case, the trial court's findings of fact numbered 47, 54, 55, 56, 57, 58, 59 and 65, relied upon by the GAL to support a conclusion of neglect, also address Respondents' failure to achieve the goals they set with DSS in their case plans. In addition, the court found:

> 60. That in order to maintain contact with their infant child, the presiding Judge initially granted the parents unsupervised visitation on three days each week;

. . . .

67. That during the pendency of this action, the father engaged in criminal activity by selling cocaine to an undercover agent of the Person County Sheriff's Department in 2013;

68. After being convicted of selling drugs, and during the pendency of this proceeding, [Respondent-father] was also charged in 2014 with larceny . . . ;

69. Based on his criminal activity, the father was required to spend a significant amount of time in Person County Jail . . . ;

. . . .

74. At some point in time during the initial neglect proceeding, the parents lost their lease for failure to pay rent;

. . . .

76. [Respondent-father's] sister allowed [Respondents] and two of their minor children to move into her home, even though she had herself, her husband and her minor children residing in such home at that time;

. . . .

79. That since the initiation of the Termination of Parental Rights proceeding, the mother has moved from the home of [Respondent-father's] sister, and moved to an apartment rented by her sister . . . in Roxboro;

80. That this is a three room apartment, currently housing the sister and her two children, with [Respondent-mother] and her two children using one bedroom;

. . . .

82. That these accommodations are not sufficient to additionally house [L.L.O.];

83. That save and except for limited visitation, Respondent[s] ha[ve] provided no personal care for [L.L.O.] since the filing of this Motion for Termination of Parental Rights;

. . . .

> 92. . . . Respondent Mother owed a public housing bill of $259 since sometime around 2006, which went unpaid until recently. Looking at all the conditions the parents lived under, the parents had income for two (2) years, but failure to pay the $259 kept them out of public housing, which would have been free. Spending your money on whatever you spend it on, and not paying a debt in the amount of $259 which will get a roof your head is neglect to the Court. I want it to be very clear that she went from 2006 until very recently and didn't pay the $259.
>
> . . . .
>
> 94. That the child has been willfully left by the Respondent parents in foster care or placement outside the home for over 12 months and at the time of the hearing also demonstrated by clear and convincing evidence that the parents have not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. There is no question about leaving the child in foster care now and I was disappointed in this;
>
> . . . .
>
> 114. . . . [T]he only progress made towards the reunification goals by the parents has been related to visits with [L.L.O.];

However, the court also made findings of fact contradicting those stated above:

> 27. The mother . . . . is currently completing an application for public housing;
>
> . . .
>
> 29. The father has completed his GED and other courses involving Life Skills, Financial Skills, and Critical Thinking; and attended NA and AA meetings while incarcerated;
>
> . . . .
>
> 31. That the Respondent father broke his foot in April, 2013 and was unable to work;
>
> . . . .

> 36. That Respondent mother now has a valid driver's license and access to a motor vehicle for use at all times;
>
> 37. That Respondent mother has attended all hearings in this matter, and on various occasions has walked from her residence, sometimes over two (2) miles to attend such hearing;
>
> 38. That Respondent mother successfully completed a required course of Substance Abuse Comprehensive Outpatient Treatment by Freedom House Recovery Center on September 27, 2013;
>
> 39. That the Respondents' annual family income during 2012, 2013, and 2014 and to date in 2015 has been less than $20,000 in each year;
>
> 40. That the Court takes Judicial Notice that the Respondents family income in 2012, 2013, 2014 and 2015 was below the Federal Poverty Level;

In the case of *In re E.L.E.*, the evidence presented at the TPR hearing failed to suggest the respondent remained involved in any domestic violence. __ N.C. App. at __, 778 S.E.2d at 450. In its order terminating the respondent's parental rights, the trial court made no findings of fact regarding the respondent's progress toward correcting the domestic violence issues. Further the court "commended respondent on her progress in addressing her substance abuse issues." *Id.* This Court concluded such findings cannot support a conclusion that the respondent "had not made reasonable progress under the circumstances toward *correcting the conditions which led to [the child's] removal from her care*." *Id.* (emphasis supplied).

This Court requires orders to contain findings of fact which are clear and enable this Court to adequately determine if the findings support the trial court's conclusions of law. *In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581-82 (2015). Here, many of the trial court's findings could best be described as "stream of consciousness." "While stream of consciousness is a well-recognized literary style, it is not well suited to court orders." *Peltzer v. Peltzer*, 222 N.C. App. 784, 789, 732 S.E.2d 357, 361 (2012).

Inconsistent and "stream of consciousness" findings and conclusions in an order impedes this Court's ability to determine whether the trial court reconciled and adjudicated all of the evidence presented to it.

"Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the trial court's] judgment.' " *In re M.K.*, __ N.C. App. __, __, 773 S.E.2d 535, 538 (2015) (quoting *Appalachian Poster Adver. Co.*, 89 N.C. App. at 480, 366 S.E.2d at 707).

In the case of *In re D.M.O.*, __N.C.__, 794 S.E.2d 858 (2016), the respondent-mother's parental rights to her son had been terminated for abandonment. To terminate on grounds of abandonment the trial court must find the respondent "willfully" abandoned her child. *Id.* at __, 794 S.E.2d at 861. The trial court in *D.M.O.* found "respondent-mother had a history of substance abuse" and was incarcerated for periods during the determinative six months. *Id.* at __, 794 S.E.2d at 864. The court also found that, during those same months, "respondent-mother failed to exercise visitation and to attend [her son's] sports games, and failed to contact [him] during three of those months." *Id.*

However, the trial court "made no findings establishing whether respondent-mother had made any effort, had the capacity, or had the ability to acquire the capacity, to perform the conduct underlying its conclusion that respondent-mother abandoned [her son] willfully." *Id.* This Court held the trial court's findings were inadequate to support a conclusion of abandonment. Because conflicting evidence was presented at the TPR hearing, and this Court could not determine whether the court's conclusions supported its findings, this Court vacated the TPR order and remanded to the trial court for further findings and conclusions relating to the issue of willfulness. *Id.* at __, 794 S.E.2d at 865-66.

Here, the trial court found:

> 94. That the child has been willfully left by the Respondent parents in foster care or placement outside the home for over 12 months and at the time of the hearing, also demonstrated by clear and convincing evidence that the parents have not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. There is no question about leaving the child in foster care now and I was disappointed in this[.]

The court's finding numbered 94 was followed by the "stream of consciousness" and impossible to follow findings numbered 95 and 96, *supra*.

The order does not contain the necessary findings of fact to support the conclusion that Respondents willfully left L.L.O. in foster care without making reasonable progress under the circumstances to correct the conditions which led to the removal of their child.

According to Respondent-mother's trial testimony, they sought transportation assistance from DSS, but were denied help. They believed DSS was to transport them to the missed appointment, which triggered the removal of L.L.O., and when they failed to visit L.L.O. it was due to lack of transportation. Both Respondents testified they had been regularly applying for work.

While the trial court exercises discretion to credit or disbelieve Respondents' evidence, the court's current findings are inadequate to resolve the conflicting evidence. The order does not contain the required findings to support the conclusion that Respondents willfully failed to make reasonable progress towards correcting the conditions which led to the removal of their child. *See id.*

The court's conclusions that Respondents had failed to make reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile are not supported by its findings of fact. We vacate and remand that portion of the court's order. On remand, the court may take additional evidence if necessary. *In re D.R.B.*, 182 N.C. App. at 739, 643 S.E.2d at 81.

We also note the trial court violated N.C. Gen. Stat. § 7B-1109(e) and N.C. Gen Stat. § 7B-1110(a) where its TPR order was not entered until approximately nine months after the completion of the adjudicatory and disposition hearing. N.C. Gen. Stat. § 7B-1109(e) (2015) ("The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing" or "10 days of the subsequent hearing [to explain the reason for delay] required by this subsection."); N.C. Gen. Stat. § 7B-1110(a) (2015) ("Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing . . . . [or] within 10 days of the subsequent hearing [to explain reason for delay] required by this subsection.").

Since we vacate the court's order, we do not need to address Respondents' remaining arguments, asserting any shortcomings with respect to their completion of their case plans were due more to poverty than a willful failure to address the issues. *See* N.C. Gen. Stat. § 7B-1111(a)(2) ("[N]o parental rights shall be terminated for the sole

reason that the parents are unable to care for the juvenile on account of their poverty.").

VI. Conclusion

The trial court failed to enter adequate findings of fact to demonstrate and conclude that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) to terminate Respondents' parental rights. We vacate the court's order and remand. *It is so ordered.*

VACATED AND REMANDED.

Judges BRYANT and DAVIS concur.

IN THE MATTER OF T.E.N.

No. COA16-1011

Filed 4 April 2017

Termination of Parental Rights—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act

The trial court's order terminating respondent father's parental rights was vacated. The district court lacked subject matter jurisdiction under either relevant prong of the Uniform Child Custody Jurisdiction and Enforcement Act.

Appeal by respondent from order entered 29 April 2016 by Judge Randle L. Jones in Guilford County District Court. Heard in the Court of Appeals 20 March 2017.

Petitioner-appellee mother, pro se.

Robert W. Ewing for respondent-appellant father.

TYSON, Judge.

Respondent-father ("Respondent") appeals from an order terminating his parental rights to his child, T.E.N. We vacate the trial court's order for lack of jurisdiction.

I. Factual Background

In 2005, Respondent and petitioner-mother ("Petitioner") began a relationship. T.E.N. was born out of wedlock in May 2009 in Brick, New Jersey. Respondent and Petitioner lived together until July or August 2009, when Petitioner moved into a women's shelter with T.E.N.

According to trial testimony, Petitioner obtained domestic violence protective orders against Respondent during the course of their relationship. In September 2009, Petitioner obtained a restraining order prohibiting contact by Respondent. The order also provided "parenting time" or visitation for Respondent with T.E.N. These orders were neither introduced into evidence at the termination hearing nor made part of the record on appeal.

On 26 October 2011, Petitioner sought and received a Final Restraining Order, barring Respondent from her residence, place of employment, and barring Respondent from having contact with Petitioner or her friend, K.O. The order was issued from the Ocean County Superior Court, Chancery Division, Family Part ("New Jersey court"), and grants Petitioner temporary custody of T.E.N. On 12 February 2012, the New Jersey court issued an Amended Final Restraining Order, which barred Respondent from being present at T.E.N.'s daycare facility. The Amended Order provides for supervised visitation with the assistance of Respondent's mother.

At some point in 2013, Petitioner sought permission from the New Jersey court to relocate with T.E.N. to North Carolina. In July 2013, the New Jersey court granted Petitioner's request. Petitioner moved to North Carolina in August 2013. Respondent continues to reside in New Jersey.

In October 2013, Respondent sought modification of his visitation arrangement with T.E.N. before the New Jersey court. The court's order, made part of the record on appeal, indicates the court modified the visitation arrangement of a 25 July 2013 order and denied reconsideration of a 28 August 2013 court order. Pursuant to the October order, Respondent was allowed one weekend per month of unsupervised visitation with his son. The parties were ordered to alternate the transportation of T.E.N. between North Carolina and New Jersey. Petitioner was ordered to provide the transportation for the first visit. After this initial visit, Respondent did not visit his son again.

On 6 January 2015, Petitioner filed a petition to terminate Respondent's parental rights. The petition alleged as grounds to terminate that: (1) Respondent willfully abandoned the juvenile; and (2)

Petitioner had custody of the juvenile and Respondent failed without justification to pay for the care, support, and education of the juvenile as required by the custody agreement, for a period of one year or more preceding the filing of the petition. *See* N.C. Gen. Stat. § 7B-1111(a)(4),(7) (2015). Following a hearing, the trial court found the existence of willful abandonment on 29 April 2016 and entered an order terminating Respondent's parental rights. Respondent filed written notice of appeal on 12 May 2016.

II. Subject Matter Jurisdiction

In a termination of parental rights action, the trial court's subject matter jurisdiction is established by N.C. Gen Stat. § 7B-1101.

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen. Stat. § 7B-1101 (2015). "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

III. Issue

Respondent contends, *inter alia*, the trial court did not acquire subject matter jurisdiction over the termination proceeding under the

provisions of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). N.C. Gen. Stat. § 50A-201 et. seq. We agree.

IV. Standard of Review

"Whether a court has jurisdiction is a question of law reviewable de novo on appeal." *In re J.D.*, 234 N.C. App. 342, 344, 759 S.E.2d 375, 377 (2014) (citation omitted).

V. Analysis

Neither party contests the New Jersey court's initial and continued child custody determinations. Both Petitioner and Respondent referred to multiple New Jersey court orders at the hearing. Only three of the orders issued by the New Jersey court were admitted into evidence at the hearing and made part of the record on appeal.

Under the UCCJEA, once a court makes an initial child custody determination, the state in which that court is located generally has "exclusive continuing jurisdiction over the determination." N.C. Gen. Stat. § 50A-202(a) (2015). The UCCJEA provides the circumstances under which the courts of a second state are permitted to exercise jurisdiction over and modify a prior custody determination from the original state. *See* N.C. Gen. Stat. §§ 50A-202, 203, 204 (2015). "Modification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11) (2015).

Under N.C. Gen. Stat. § 50A-203, a North Carolina court may not modify an out-of-state custody determination unless two conditions are met. First, the North Carolina court must possess jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) or N.C. Gen. Stat. § 50A-201(a)(2). N.C. Gen. Stat. § 50A-203. In this case, both parties agree this first condition is satisfied, as North Carolina was "the home state of [T.E.N.] on the date of the commencement of the proceeding." N.C. Gen. Stat. § 50A-201(a)(1) (2015).

The second condition is met if one of the following occurs:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any

> person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203.

Respondent continues to reside in New Jersey. The Guilford County District Court did not gain jurisdiction over this case through N.C. Gen. Stat. § 50A-203(2), and the district court did not purport to gain jurisdiction pursuant to this subsection. The Termination Order does not list a specific statute as the basis to issue its order.

The court's finding of fact seven states, "[t]he Honorable Melanie Appleby of the New Jersey Family Court, on March 28, 2014, transferred the jurisdiction of the custody proceedings from New Jersey to North Carolina." The trial court apparently concluded it could assert subject matter jurisdiction over the case pursuant to N.C. Gen. Stat. § 50A-203(1).

Under subsection N.C. Gen. Stat. § 50A-203(1), there are two grounds under which the Guilford County District Court would gain jurisdiction. The first is if the New Jersey court had determined it no longer possessed jurisdiction under section 50A-202. The applicable portion of N.C. Gen. Stat. § 50A-202 provides that a court:

> which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> > (1) [it] determines that . . . the child, the child's parents, and any person acting as a parent [no longer] have a significant connection with [that] State and that substantial evidence is no longer available in [that] State concerning the child's care, protection, training, and personal relationships; or
> >
> > (2) [it] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in [the issuing state].

N.C. Gen. Stat. § 50A-202(a).

" '[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.' " *In re N.R.M.*, 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004) (quoting Official Comment to N.C. Gen. Stat. § 50A-202).

In *In re K.U-S.G.*, 208 N.C. App. 128, 702 S.E.2d 103 (2010), a Pennsylvania court had entered initial orders regarding the custody of two juveniles living within the state. Prior to the petitioners' and the juveniles' move to North Carolina, the Pennsylvania court had entered orders granting legal custody of the juveniles to the petitioners and allowing the respondent supervised visitation. *Id.* at 129-30, 702 S.E.2d at 104. Eventually, the petitioners filed petitions to terminate the respondent's parental rights. *Id.* at 130, 702 S.E.2d at 105. The North Carolina court purported to terminate the respondent's parental rights.

The North Carolina court stated "it had contacted 'the Court of Common Pleas, Fayette County, Juvenile Division and determined that Fayette County no longer wished to retain jurisdiction.' " *Id.* at 134, 702 S.E.2d at 107. The record in the case did not include an order from the Pennsylvania court indicating that it no longer exercised jurisdiction. This Court held the Pennsylvania court did not lose jurisdiction under N.C. Gen. Stat. § 50A-202(a)(1). *Id.*

In the present case, Petitioner testified at the termination hearing that the New Jersey court had transferred jurisdiction to North Carolina in March 2014. No such order was produced, introduced into evidence, or made a part of the record on appeal. Without an order from the New Jersey court relieving itself of jurisdiction, which all parties agree it had previously exercised, the Guilford County District Court lacked any basis to conclude it acquired subject matter jurisdiction over the case pursuant to N.C. Gen. Stat. § 50A-202. *See In re N.R.M.* at 300, 598 S.E.2d at 151 (vacating the trial court's termination order where an Arkansas court made the initial child-custody determination and "there [was] no Arkansas order in the record stating that Arkansas no longer [had] jurisdiction").

N.C. Gen. Stat. § 50A-203(1) also allows a North Carolina court to gain jurisdiction over a child-custody matter initiated in another state, if the other state determined North Carolina to be a more convenient forum under N.C. Gen. Stat. § 50A-207 (2015). Nothing in the *In re K.U.-S.G* record showed the Pennsylvania court had made the determination that North Carolina would be a more convenient forum under UCCJEA § 203(1) (N.C. Gen. Stat. § 50A-203(1)). Since the district court lacked subject matter jurisdiction under either relevant prong of the UCCJEA, this Court vacated the North Carolina court's termination order. *In re K.U.-S.G.*, 208 N.C. App. at 135, 702 S.E.2d at 108. Here, no order in the record demonstrates that the New Jersey court ever made such a convenient forum determination.

Since neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied, the Guilford County District Court erroneously determined it had acquired subject matter jurisdiction. *See id.* The order of the trial court terminating Respondent's parental rights is vacated. In light of this ruling, it is unnecessary for us to address Respondent's remaining arguments on appeal.

VI. Conclusion

The Guilford County District Court never acquired subject matter jurisdiction to enter the order appealed from. Without any jurisdictional basis, the order terminating Respondent's parental rights is vacated. *It is so ordered.*

VACATED.

Judges BRYANT and DAVIS concur.

LOIS MIDGETT KELLEY, Plaintiff
v.
THOMAS MICHAEL KELLEY, Defendant

No. COA16-425

Filed 4 April 2017

1. Appeal and Error—interlocutory orders and appeals—denial of summary judgment—substantial right

The trial court's denial of defendant's motion for summary judgment affected a substantial right and was immediately appealable under N.C.G.S. §§ 1-277 and 7A-27(d). The summary judgment order implicitly determined a material issue later courts would be bound by, even if the trial court claimed it was not determining the law of the case.

2. Divorce—separation agreement—void amendment—failure to notarize—no ratification or estoppel

The trial court erred in a divorce case by denying defendant's motion for summary judgment. The purported 2003 Amendment or modification to the 1994 separation agreement was void since it was not notarized. Further, a void contract cannot be the basis for ratification or estoppel.

KELLEY v. KELLEY

[252 N.C. App. 467 (2017)]

Appeal by defendant from order entered 5 November 2015 by Judge Gordon Miller in Forsyth County District Court. Heard in the Court of Appeals 9 January 2017.

Morrow Porter Vermitsky Fowler & Taylor PLLC, by John C. Vermitsky, for plaintiff-appellee.

Woodruff Law Firm, P.A., by Carolyn J. Woodruff and Jessica S. Bullock, for defendant-appellant.

TYSON, Judge.

Thomas Michael Kelley ("Defendant") appeals from the trial court's denial of his motion for summary judgment. We address the merits of Defendant's interlocutory appeal as affecting a substantial right. We reverse the trial court's order and remand.

I. Background

Plaintiff and Defendant were married in 1982. They entered into a Separation and Property Settlement Agreement upon their separation in 1994 ("the 1994 agreement") and divorced in 1999.

The 1994 agreement resolved issues of child support, alimony and property settlement, and waived further claims of the parties on the issues of alimony and equitable distribution. Article XXXI of the 1994 agreement is entitled "Modification and Waiver," and states, "[m]odification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement." Both parties' signatures were affixed and notarized on the 1994 agreement.

In 2003, approximately nine years after the parties separated and four years after their divorce, the parties purportedly signed a document entitled "Part 1 Provisions for Separation" ("the 2003 Amendment"). The 2003 Amendment is not notarized. Both parties were represented by counsel when the 1994 Amendment was executed, but no attorneys were involved on behalf of either party in the execution of the 2003 Amendment.

On 11 July 2014, approximately eleven years after the parties had signed the 2003 Amendment, Plaintiff filed suit against Defendant and alleged breach of the 2003 Amendment. Defendant filed a motion for partial summary judgment, and raised, *inter alia*, the invalidity of the

2003 Amendment. Plaintiff filed a cross-motion for summary judgment, which sought enforcement.

The trial court heard the parties' arguments over two days and determined genuine issues of material fact existed concerning both parties' claims. The court denied both parties' motions for summary judgment. The order specifically states the court found the 2003 Amendment was "not void as a matter of law." This was the only specific finding made by the trial court. The trial court did not certify its order as immediately appealable under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Defendant appeals.

II. Jurisdiction

[1] "Denial of summary judgment is interlocutory because it is not a judgment that 'disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). Defendant acknowledges his appeal is interlocutory, but argues the trial court's denial of his motion for summary judgment affects a substantial right and is immediately appealable under N.C. Gen. Stat. §§ 1-277 and 7A-27(d). We agree.

N.C. Gen. Stat. § 1-277 provides:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, *which affects a substantial right claimed in any action or proceeding*; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2015) (emphasis supplied); *see also* N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing for an appeal of right from an interlocutory order which "[a]ffects a substantial right").

Our Court has heard interlocutory appeals where a defendant was precluded from presenting affirmative defenses. *See Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 598-600, 574, S.E.2d 688, 690 (2002); *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (noting that an order granting a motion to strike

is interlocutory). Here, the trial court's order states: "The Court specifically finds that the contentions of Defendant that the modification to the separation agreement is void *ab initio* fail and that the Contract is not void as a matter of law." Defendant argues the order affects a substantial right, because the denial of his motion for summary judgment "strikes an entire defense." We agree.

The trial court found genuine issues of material fact exist, which precluded summary judgment for either party. If the order had stopped there, there would be no need to review this order at this time on appeal. In fact, Plaintiff's counsel noted as much when the trial court was announcing the ruling and discussing the provisions of the order to be entered:

> [PLAINTIFF'S COUNSEL]: And, Your Honor, for the Appellate Court purposes, just so everybody's aware, I'm going to prepare both -- denying both parties' motions for summary judgment because what Your Honor just ruled.
>
> THE COURT: In essence, yes.
>
> [PLAINTIFF'S COUNSEL]: And I'm going to do it the way the Court of Appeals yelled at me last time because I didn't do it and just say "Court finds there's genuine issue" -- like just that statement and then that's it.

We are unsure which case Plaintiff's counsel perceived that this Court "yelled" at him, and we doubt this Court intended to "yell." However, counsel is correct that an order denying summary judgment due to "genuine issue as to any material fact" should not include any "findings of fact." *See Winston v. Livingstone Coll., Inc.*, 210 N.C. App. 486, 487, 707 S.E.2d 768, 769 (2011) ("The order of the trial court granting summary judgment contains findings of fact. The appellate courts of this state have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment."); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

Here, however, the trial court specifically directed the denial of summary judgment order to include more, because "one issue . . . controls all the others." The trial court directed that the order include a finding and conclusion that the 2003 Amendment was "not void as a matter of law":

> THE COURT: I'll keep my comments to just the one issue that I think controls all the others. I've already commented on what I think the other pieces are and issues that may or

> not exist. But I think all I need to really rule on is whether or not this is void as a matter of law.
>
> The Court finds that the contract is not void as a matter of law and, therefore, denies the Defendant's motion. I -- I'm not going to rule in your favor, [Plaintiff], on the others. I think you were wanting me to make determinations I can't make. I guess, [Plaintiff's Counsel], you need to draft the order, make sure it's shared with [Defense Counsel] prior to being presented to me.
>
> . . . .
>
> THE COURT: Well, but I -- I want it so it's -- the issue's clear.
>
> [PLAINTIFF'S COUNSEL]: I'll say that it's not void.
>
> THE COURT: That it's -- because that's the key, I think.

The trial court was correct. Whether the 2003 Amendment is void is "the key," but by including this specific conclusion of law, although entitled a "finding" in the order, the trial court, in effect, ruled upon the primary legal issue in this case. In so doing essentially eliminated Defendant's defense to Plaintiff's claim. Because the trial court's order eliminated Defendant's defense to the purported validity of the 2003 Amendment, the order affects a substantial right and is immediately appealable. *See Faulconer*, 155 N.C. App. at 600, 574 S.E.2d at 690-91.

Faulconer involved an action to enforce the terms of a contract. *Id.* at 599, 574 S.E.2d at 690. The plaintiff-employee filed a complaint for breach of contract against his former employer, the defendant-employer, alleging he was entitled to various payments under their contract. *Id.* at 598-599, 574 S.E.2d at 690. The defendant answered and raised several affirmative defenses. The plaintiff filed a motion to strike the affirmative defenses. *Id.* at 599-600, 574 S.E.2d at 690. The trial court granted the motion to strike the defenses, and defendant appealed. *Id.* at 600, 574 S.E.2d at 690.

"[The] [d]efendant present[ed] the following question on appeal: Did the trial court err in granting plaintiff's motion to strike defendant's affirmative defenses?" *Id.* This Court determined the defendant's appeal was proper.

> Ordinarily, Rule 4(b) of the Rules of [Appellate Procedure] precludes an appeal from an order

> striking or denying a motion to strike allegations contained in pleadings. However, when a motion to strike an entire further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer.

Id. at 600, 574 S.E.2d at 690-91 (citing *Bank v. Easton*, 3 N.C. App. 414, 416, 165 S.E.2d 252, 254 (1969)) (internal quotation marks omitted).

Our current rules of procedure no longer includes demurrers. As this Court noted in *Cassels v. Ford Motor Co.*:

> When Rule 7(e) [in 1967] abolished demurrers and decreed that pleas for insufficiency shall not be used it also abolished the concept of a defective statement of a good cause of action. Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a defective statement of a good cause of action. For such complaint, as we have already noted, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint.

10 N.C. App. 51, 54-55, 178 S.E.2d 12, 14 (1970) (quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 7(c) (2015) (noting 1967 as the year the rule was added). Although demurrers are no longer part of North Carolina's procedure, *see id.*, our Court has continued to rely upon principles and reasoning contained in cases prior to 1967, and to rule at times that a trial court's order was "in substance a demurrer." *Faulconer*, 155 N.C. App. at 600, 574 S.E.2d at 691.

Here, the trial court determined, "as a matter of law" that the 2003 Amendment did not need to be acknowledged before a certifying officer or notarized in order to be a valid and enforceable contract. Defendant's defense, that the 2003 Amendment is void because the original 1994 contract required any modifications or amendments thereto to be formally notarized was, in effect, stricken by the trial court's order. The summary judgment order implicitly determined a material issue later courts will be bound by, even if the trial court claimed it was not determining the law of the case. Since the trial court's order was "in substance a demurrer[,]" *id.*, the order affects a substantial right. Defendant's appeal is properly before us. N.C. Gen. Stat. § 7A-27(b)(3); *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014)

("Immediate appeal is available from an interlocutory order that affects a substantial right.").

III. Issues

[2] Defendant argues the trial court erred by denying Defendant's motion for summary judgment where the 2003 Amendment is void *ab initio*, not enforceable, and any claim for breach of the 1994 agreement is precluded by the statute of limitations.

IV. Denial of Defendant's Motion for Summary Judgment

Defendant argues the trial court erred by denying his motion for summary judgment and asserts the 2003 Amendment was not acknowledged in the manner of equal dignity required by the 1994 agreement and under N.C. Gen. Stat. § 52-10.1. Defendant asserts this defect renders the 2003 Amendment void *ab initio*. We agree.

A. 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations, quotation marks, and brackets omitted).

B. Whether the 2003 Amendment was void *ab initio*

Both parties filed motions for summary judgment. The trial court considered the pleadings, briefs, and arguments of counsel at the hearing. In Plaintiff's amended complaint she alleged, "After their divorce, the parties executed an Amendment to said Separation and Property Settlement Agreement on May 29, 2003, a copy of which is attached hereto as Exhibit A and incorporated herein by reference[.]"

The first page of this document states as follows:

> AMENDMENT TO SETTLEMENT AGREEMENT DATED NOVEMBER 11, 1994
>
> MAY 29, 2003
>
> **EXCEPT FOR AMENDMENTS CONTAINED HEREIN, THE ORIGINAL SETTLEMENT AGREEMENT DATED 11/11/94 WILL REMAIN IN EFFECT AS WRITTEN**

Both parties signed the last page of the 2003 Amendment on a line entitled "Accepted by[.]"

The remaining pages of the 2003 Amendment include sections, which reference the other sections of the original agreement it purports to amend. The Amendment is clearly intended to change certain portions of the agreement, leaving all other original provisions intact. The first two subsections contain the headings "Article I," then "Article V," without Articles II-IV. It does not appear Articles II-IV were intended to be amended by the 2003 Amendment.

The stated characterization of this document as an "Amendment To Settlement Agreement" is important. Plaintiff argues on appeal: 1) this document is a free-standing contract between two unmarried adults; 2) the law applicable to separation agreements does not apply; and, 3) notarization was unnecessary. Plaintiff asserts the modification is just an ordinary contract, even though her amended complaint expressly describes it as "an Amendment to said Separation and Property Settlement Agreement[.]" Plaintiff contends the Amendment is "a signed, bargained-for exchange, supported by adequate consideration between two non-married, capable adults," and "only contracts between husbands and wives made during their coverture must be in writing and acknowledged before a certifying officer."

While Plaintiff argues the statutory requirements for execution of a separation agreement may not necessarily apply to modifications of that agreement, the parties also remain bound by the express terms of the original properly signed and notarized 1994 agreement. That agreement expressly provides that "[m]odification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement." By the express terms of the 1994 agreement alone, any modification to the 1994 agreement would have to be "executed with the same formality," or with equal dignity to the original agreement, including notarization.

"To be valid, a separation agreement must be in writing and acknowledged by both parties before a certifying officer. The statute further provides that a person acting in the capacity of a notary public may serve as a certifying officer." *Lawson v. Lawson*, 321 N.C. 274, 276, 362 S.E.2d 269, 271 (1987) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 52-10.1 (2015) (requiring separation agreements to be acknowledged by a certifying officer).

"In North Carolina the modification of the original separation agreement must be pursuant to the formalities and requirements of G.S. 52-10.1." *Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985). More recently, this Court has reiterated the requirements for execution of a modification of a separation agreement:

> A separation agreement must conform to the formalities and requirements of N.C. Gen. Stat. § 52-10.1. Specifically, the separation agreement must be in writing and acknowledged by both parties before a certifying officer. An attempt to orally modify a separation agreement fails to meet the formalities and requirements of G.S. 52-10.1. *Thus, a modification of a separation agreement, to be valid, must be in writing and acknowledged, in accordance with the statute.*

Jones v. Jones, 162 N.C. App. 134, 137, 590 S.E.2d 308, 310 (2004) (citations, quotation marks, and brackets omitted) (emphasis supplied).

While Plaintiff is correct that "two non-married, capable adults" can enter into most types of contracts without the statutory formalities required of a separation agreement, it is undisputed that the 2003 agreement is an "AMENDMENT" to the original 1994 agreement entitled, "SEPARATION AGREEMENT AND PROPERTY SETTLEMENT[.]" The statute treats modifications to separation agreements arising out of a marriage differently from ordinary contracts between two adults, even if those adults are divorced. *See id.*

Plaintiff argues the law requiring notarization of a modification or amendment of a separation agreement applies only "during their coverture." We find no requirement of coverture in the cases addressing modification of separation agreements, nor does Plaintiff cite or direct this Court to any such authority. Plaintiff contends that "[t]he court has explicitly held that the section relied upon by Appellant, N.C.G.S. § 52-10, 'requires acknowledgment only during coverture, the period of marriage.' *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 2d 610 (1989)." Plaintiff disregards the remaining portion of the sentence in

Howell, which provides acknowledgment is required pursuant to N.C. Gen. Stat. § 52-10 "only during coverture, the period of marriage, *it does not require acknowledgment for premarital agreements*." *Howell v. Landry*, 96 N.C. App. 516, 530, 386 S.E.2d 610, 618 (1989) (emphasis added). *Howell* plainly addressed the validity of premarital contracts prior to the bonds of marriage, not thereafter. *See id.*

Plaintiff also attempts to distinguish *Greene v. Greene*. While the marital status of the parties at the time of that case is not clearly stated, it would appear that the parties were already divorced when the alleged modification occurred. The substance of the alleged oral modification was the ex-wife had agreed to allow her ex-husband to stop paying alimony pursuant to the terms of the separation agreement as a "wedding present" upon his marriage to another woman. *See Greene*, 77 N.C. App. 821, 336 S.E.2d 430. In short, both the law and the terms of the agreement itself clearly requires any modifications must be notarized to be enforceable. *See id.* It is obvious and undisputed that the 2003 Amendment is not notarized.

We recognize it is possible the modification was signed before a certifying official who could later notarize it. We mention this possibility because Plaintiff argued it at the hearing and a dispute of material facts could potentially be raised. During the hearing, Plaintiff's counsel argued, "She's wrong about *Lawson* saying if it's invalid it never can work because there are cases that say if you sign it and the notary remembers you signing it but it's not notarized, it's valid. So the question – she testified she signed it in a lawyer's office where there's lawyers and notaries everywhere. That's a factual dispute as to whether it's even notarized."

In *Lawson*, the certificate of the certifying officer "was added some two years after the document had been signed." 321 N.C. at 275, 362 S.E.2d at 270. This Court considered the facts and determined:

> [T]he affidavit submitted by the plaintiff indicated to the trial court that plaintiff would testify that both she and defendant executed the separation agreement in the presence of Mr. Radeker after being advised that Radeker was a notary public. Mr. Radeker's testimony during his deposition tends to confirm the evidence stated in plaintiff's affidavit, while defendant's affidavit states he did not acknowledge the separation agreement. Defendant, however, does not deny that he signed the document in the presence of Radeker. The facts as stated by plaintiff and Mr. Radeker and not denied by defendant constitute

> a forecast of competent evidence which would establish acknowledgement as a matter of law.

Id. at 279, 362 S.E.2d at 272-73. In *Lawson*, no genuine issue of material fact challenged whether the husband *did* sign the document before the notary, although the certification was added to the agreement later. Summary judgment should have been granted in favor of the wife who sought to recover under the separation agreement. *Id.* at 274, 362 S.E.2d at 269.

Here, Plaintiff argued the forecast of evidence could show she signed the document in an office with a certifying official, so as in *Lawson*, the individual could simply add the certificate later:

> [PLAINTIFF'S COUNSEL]: But the jury will decide that. That's the point of factual determination. You can't find those facts as a matter of law on summary judgment. In fact, on her summary judgment you have to assume my facts are correct. You have to assume that she signed it in the office. You have to take all those things as absolutely correct and accurate unless there's no scintilla of evidence to support.
>
> THE COURT: But you want me then to just by mere conjecture assume that, well, there was a notary available and possibly you're going to be able to argue that they meant to do it but they didn't. That's not --
>
> [PLAINTIFF'S COUNSEL]: No, you don't -- you don't have to assume either way.
>
> THE COURT: That's not --
>
> [PLAINTIFF'S COUNSEL]: You just have --
>
> THE COURT: -- before the Court.
>
> [PLAINTIFF'S COUNSEL]: You just have to say that you can't decide where she signed it. You can't make that choice. A jury can.
>
> THE COURT: Let's say she signed it on the surface of the moon. What difference will it make?
>
> [PLAINTIFF'S COUNSEL]: Well, it does matter according to case law whether she signed it around or in front of a notary. That does matter. But the other thing, Your Honor,

> is, in this case and in this situation, you would actually -- it's actually reversible to make the decision for the reason [Defense Counsel] was asking you to for judicial economy. It's either void or it's not.

Contrary to counsel's argument, the standard for denial of summary judgment was not simply that the trial judge "can't decide where," or before whom, plaintiff signed the modification, since plaintiff had failed to forecast any evidence whatsoever that the parties signed in the presence of a certifying official.

Plaintiff's deposition testimony does not provide even a scintilla of evidence tending to show a notary was present when she and Defendant signed the modification, even if "signed it in a lawyer's office where there's lawyers and notaries everywhere." Plaintiff testified in her deposition about when they signed the 2003 Amendment:

> A: I think that probably what we did do was that we met at Michael's office -- we often did -- and probably signed it there.
>
> Q: You don't remember, though?
>
> A: I really don't.
>
> Q: And you agree that there's no notary page.
>
> A: I don't see a notary page. There was never a mention of a notary or the need for one.

Even taking Plaintiff's forecast of evidence in the light most favorable to her and drawing all possible favorable inferences from it, no evidence shows a notary or anyone else witnessed the signing of the 2003 Amendment. *See Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001) ("When a trial court rules on a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all inferences of fact must be drawn against the movant and in favor of the nonmovant." (citations, quotation marks, and brackets omitted)). From the transcript of discussions between the trial court and counsel, it appears the trial court also did not find a potential argument could be made that the execution of the 2003 modification had been witnessed before a "certifying officer" and could later be notarized, as in *Lawson*. *See Lawson*, 321 N.C. at 275, 362 S.E.2d at 270.

The 2003 modification is not notarized, and not a scintilla of evidence was tendered to suggest that it ever could be. The trial court erred as

a matter of law in concluding that the 2003 Amendment was "not void as a matter of law."

V. Plaintiff's Estoppel Argument

Plaintiff argues that, even if the 2003 Amendment is void, she may still recover based upon equitable theories, including estoppel and ratification, because Defendant had performed for eleven years under the terms of the 2003 Amendment with knowledge it had not been notarized. We disagree.

It is well settled that a void contract cannot be the basis for ratification or estoppel. *See Bolin v. Bolin*, 246 N.C. 666, 669, 99 S.E.2d 920, 923 (1957) ("A void contract will not work as an estoppel."); *see also Jenkins v. Gastonia Mfg. Co.*, 115 N.C. 535, 537, 20 S.E. 724, 724 (1894) ("[W]e have held that such contract, not being . . . in compliance with the statute, and being executory in its nature, was void and incapable of ratification."). Plaintiff's argument is overruled.

VI. Conclusion

A substantial right of Defendant's has been adversely affected since Defendant's main and prevailing defense was rejected "as a matter of law" by the trial court. Because the purported 2003 Amendment or modification to the 1994 separation agreement is void, we reverse the trial court's order denying summary judgment in favor of Defendant. We remand for entry of summary judgment for Defendant with regard to all of Plaintiff's claims asserted under the 2003 Amendment, and for further proceedings with regard to Plaintiff's remaining claims, if any. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
TREVON DEANDRE RICE, DEFENDANT

No. COA16-906

Filed 4 April 2017

Possession of Stolen Property—possession of stolen goods—firearms—nonexclusive possession of automobile—constructive possession

The trial court did not err by denying defendant's motions to dismiss the charges of possession of stolen goods. Although defendant did not have exclusive possession of the pertinent van, there were other incriminating circumstances showing defendant constructively possessed the stolen firearms.

Appeal by defendant from judgments entered 24 February 2016 by Judge Alma L. Hinton in Edgecombe County Superior Court. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Mary McCullers Reece for defendant-appellant.

MURPHY, Judge.

Trevon Deandre ("Defendant") appeals from his convictions for two counts of possession of stolen goods in violation of N.C.G.S. § 14-71.1 (2015). On appeal, he contends that the trial court erred by denying his motions to dismiss the charges on the ground that the State failed to offer sufficient evidence that he constructively possessed two stolen firearms that were found in a van he had rented. After careful review, we reject Defendant's arguments and conclude that he received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 26 April 2014, Ronald Bryant called the Rocky Mount Police Department to report that his home had been broken into and that various items of his personal property, including his .9 millimeter Smith & Wesson handgun ("the Smith & Wesson"), had been stolen. Eleven days

later on 7 May 2014, Christian Boswell's home in Rocky Mount was broken into and, among other items of personal property, Boswell's .380 millimeter Kel-Tec semi-automatic pistol ("the Kel-Tec") was stolen.

On the same day Boswell's home was robbed, Terry Reeves ("Reeves") was driving by Brandy Braswell's house in Rocky Mount and noticed that a van was parked in the driveway. He returned and observed that the van's rear doors were open and he saw two men walking around the house. Upon seeing Reeves, the two men ran back to the van, pulled onto Flood Store Road, and took off. Reeves was, however, able to get the van's license plate number before he lost sight of it.

Detective Jack Sewell ("Detective Sewell") with the Edgecombe County Sheriff's Office was assigned as the lead investigator on the case. Upon looking into the license plate number of the van, Detective Sewell determined that it was owned by H & J Auto Sales Company ("H & J"). Detective Sewell drove to H & J and spoke with the owner who informed him that the van in question had been rented to Shirelanda Clark ("Clark").

Detective Sewell reached out to Clark who informed him that she, in turn, had rented the van to Defendant and Dezmon Bullock ("Bullock"). She stated that Defendant had paid her $35.00 to use the van and that he was going to return it to her on 8 May 2014. Detective Sewell asked Clark to call him if Bullock or Defendant contacted her again.

On 8 May 2014, Clark reached out to Detective Sewell and told him that Defendant had called her and asked to rent the van for a few more days and that he had arranged to meet her close to the car lot shortly. Detective Sewell drove to the lot to meet with Clark and called Officer Jill Tyson ("Officer Tyson") to assist him as backup.

Defendant arrived and parked the van around the corner from the car lot and walked over to Clark while Bullock, who had accompanied Defendant, remained in the vehicle. Officer Tyson parked her patrol vehicle behind the van while Detective Sewell confronted Defendant in the parking lot.

Detective Sewell, Clark, and Defendant walked over to the van, and while they were approaching, Bullock exited the vehicle. Defendant, Clark, and Bullock all gave Detective Sewell and Officer Tyson permission to search the van. Detective Sewell and Officer Tyson began searching the vehicle and discovered, among other items, a new basketball goal still in its box which Defendant claimed ownership of, for which he said he had lost the receipt.

After claiming ownership of the basketball goal, Defendant suddenly and abruptly stated that he had an appointment and had to leave. Defendant then left the area leaving his personal property — including the basketball goal — behind.

Officer Tyson continued her consent search of the van and found Bryant's Smith & Wesson underneath the driver's seat of the vehicle. She also discovered several cameras, an alarm clock, assorted pieces of a gaming system, cigars, and a set of scales in the van. Officer Tyson then found Boswell's Kel-Tec underneath the front passenger seat.

Warrants were issued and Defendant was arrested. On 8 September 2014, Defendant was indicted on charges of breaking and entering Boswell's residence, larceny after breaking and entering, and possession of a stolen firearm. On 8 June 2015, a superseding indictment was filed in relation to these charges. On 13 October 2014, Defendant was also indicted for possession of a stolen firearm in connection with Bryant's Smith & Wesson. A superseding indictment as to this charge was also subsequently filed on 8 June 2015.

A jury trial was held before the Honorable Alma L. Hinton in Edgecombe County Superior Court on 23 February 2016 and 24 February 2016. At trial, Defendant moved at the close of the State's evidence and at the close of all of the evidence to dismiss the charges of possession of stolen goods on the ground that he did not constructively possess either of the stolen firearms. The trial court denied Defendant's motions.

The jury found Defendant guilty of both counts of felonious possession of stolen goods as to the firearms and acquitted Defendant of the felony breaking and entering and felony larceny charges. The trial court sentenced Defendant to consecutive sentences of 6 to 17 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant argues on appeal that the trial court erred in denying his motions to dismiss the possession of stolen goods charges. Specifically, he contends that the State failed to present sufficient evidence to establish that he constructively possessed either the Kel-Tec or the Smith & Wesson that were found in the van he was renting. We disagree.

> The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense

> charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Pressley, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 829, 763 S.E.2d 382 (2014). Furthermore, "[w]hen 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. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009).

It is well settled that:

> The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) which was [feloniously stolen], (3) the possessor knowing or having reasonable grounds to believe the property to have been [feloniously stolen], and (4) the possessor acting with a dishonest purpose.

State v. McQueen, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 385 (2005). "Possession of stolen goods may be either actual or constructive." *State v. Phillips*, 172 N.C. App. 143, 146, 615 S.E.2d 880, 882 (2005). Our Supreme Court has maintained that "[a] defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

Here, Defendant argues that because he did not have exclusive control over the van — given that Bullock also had the ability to control the vehicle — he cannot have constructively possessed the stolen Kel-Tec and Smith & Wesson without other incriminating circumstances. While Defendant is correct that he did not have exclusive possession of the van as he did, in fact, possess it jointly with Bullock, there were other incriminating circumstances that would allow a determination that Defendant constructively possessed the stolen firearms.

We have consistently maintained that "unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Hudson*, 206 N.C. App. 482, 489-90, 696 S.E.2d 577, 583 (citation, quotation marks, and brackets omitted), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010).

> Incriminating circumstances relevant to constructive possession include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.
>
> Evidence of conduct by the defendant indicating knowledge of [contraband] or fear of discovery is also sufficient to permit a jury to find constructive possession. Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.

State v. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008) (internal citations, quotation marks, and emphasis omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

At trial, Detective Sewell testified as follows:

> Q. So what happened after you took down their personal information?
>
> A. I asked Ms. Clark and Mr. Bullock and Mr. Rice if it was okay if I conducted a search of the inside of the van. They said, okay. We opened up the hatchback to the back of the van and located several items on the inside.
>
> Q. Do you have any recollection about what type of items they were?
>
> A. Yes, there was a basketball goal set still in a box, several cameras, an Ipod, some chisels, other items inside the van. I started questioning the subjects about the items inside the van.
>
> Q. And did Mr. Rice make any comment about any of the property inside the van?
>
> A. Mr. Rice said he had bought the basketball goal at a Walmart, but had no receipt. It was still in the box.

Q. And without saying anything that Mr. Bullock may or may not have said, did you ask him about anything inside the van as well?

A. Yes, sir, I did.

Q. What happened next?

A. Mr. Rice said he had to leave, that he had an appointment to make and he needed to leave. Well, at that time, I didn't have any evidence to charge him with a crime, no evidence of a crime so I let him go.

Q. So at that initial point, he wasn't under arrest.

A. He was not under arrest.

Q. And he did, in fact, leave.

A. He did.

Here, we are satisfied that multiple indications of incriminating circumstances were present so as to survive Defendant's motion to dismiss. The State presented evidence of (1) Defendant's nervous disposition; (2) the fact that Defendant admitted ownership of the basketball goal in proximity to the stolen firearms; (3) had control over the van in which the stolen property was found by way of his agreement with Clark to rent the van for $35.00; and (4) exhibited irrational conduct tending to indicate he was fearful that the firearms would be discovered during the course of the search — specifically his sudden and abrupt departure from the area when Detective Sewell and Officer Tyson began the search of the van for an appointment he stated he had just remembered, in the process leaving behind his personal property for which he did not return.

A rational juror could have concluded that Defendant suddenly leaving the area as soon as the search commenced amounted to a fearful apprehension on his part that Detective Sewell or Officer Tyson would ultimately locate the stolen firearms in the van which he controlled. *See Hudson*, 206 N.C. App. at 490, 696 S.E.2d at 583 ("Examples of incriminating circumstances include a defendant's nervousness or suspicious activity in the presence of law enforcement."). Furthermore, even assuming that Defendant did, in fact, suddenly remember that he had an actual *bona fide* appointment, we note that otherwise innocent explanations for suspicious and incriminating behavior do not entitle Defendant to the granting of his motion to dismiss. *See State v. Tirado*, 358 N.C. 551,

582, 599 S.E.2d 515, 536 (2004) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The jurors must decide whether the evidence satisfies them beyond a reasonable doubt that the defendant is guilty." (internal citation, quotation marks, and alteration omitted)), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). The State presented sufficient evidence that Defendant constructively possessed the stolen firearms.

Because Defendant limits his argument on appeal exclusively as to whether the State established that he constructively possessed the firearms, we need not address the remaining elements of the offense of possession of stolen goods.

Conclusion

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

NO ERROR.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
QUINTIS TRAVON SPRUIELL

No. COA16-639

Filed 4 April 2017

Constitutional Law—effective assistance of counsel—argument not made on appeal

A motion for appropriate relief (MAR) ruling overturning a conviction was reversed where defendant had been convicted of felony murder based on discharging a weapon into occupied property; the conviction was based on defendant having fired a single shot into a parked car at close range, killing the victim at whom he aimed; on direct appeal to the Court of Appeals, appellate counsel did not raise the issue of whether discharging a firearm into an occupied vehicle could serve as the predicate felony on these facts; the conviction was upheld by the Court of Appeals; and, after a MAR hearing, a trial court judge vacated the conviction. Despite opinions discussing a footnote

in a prior case, neither the North Carolina Supreme Court nor the Court of Appeals had ever expressly recognized an exception to the felony murder rule for discharging a weapon into occupied property. While defendant argued neither court had foreclosed the possibility of that exception, that could not be made into the conclusion that there was a reasonable probability that defendant would have prevailed on appeal if appellate counsel had made the argument.

Appeal by the State from order entered 2 December 2015 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 30 November 2016.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Robert C. Montgomery, for the State.

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

DAVIS, Judge.

Quintis Travon Spruiell ("Defendant") was convicted of first-degree murder under the felony murder rule after he fired a single shot into a parked car at close range, striking and killing the victim. This case presents the issue of whether Defendant received ineffective assistance of counsel on direct appeal when his appellate counsel failed to argue that it was error to instruct the jury on felony murder based upon the underlying felony of discharging a weapon into occupied property given that Defendant only fired a single shot at a single victim. The State appeals from the trial court's order granting Defendant's motion for appropriate relief ("MAR") and vacating his convictions for first-degree murder and discharging a weapon into occupied property. Because we conclude that Defendant was not prejudiced by his counsel's failure to raise this argument, we reverse.

Factual and Procedural Background

On the evening of 1 November 2005, Jose Lopez drove Ricardo Sanchez to a car wash in Sanford, North Carolina where Sanchez planned to complete a drug transaction with Defendant. When they arrived and parked Lopez's Ford Explorer, Lopez remained in the driver's seat while Sanchez sat in the rear passenger side seat with the window rolled down.

After Sanchez called Defendant over to the vehicle, Defendant and Shawn Hooker approached the Explorer from the passenger side.

Defendant and Sanchez proceeded to argue about "money and about drugs" for several seconds. Defendant then aimed a revolver at Sanchez and fired one shot through the open rear passenger side window, striking him in the stomach. Defendant was so close to Sanchez when he fired the shot that his gun "was almost touching [Sanchez's] stomach."

Lopez then started to drive away as Sanchez fired several shots at Defendant from the backseat of the moving vehicle, striking Defendant twice. Lopez drove Sanchez to a local hospital where he ultimately died from his gunshot wound.

On 14 November 2005, Defendant was indicted on charges of first-degree murder, discharging a weapon into occupied property, and possession of a firearm by a felon. At trial, defense counsel objected to instructing the jury on the theory of felony murder based upon the predicate offense of discharging a weapon into occupied property, but the objection was overruled.

The jury found Defendant guilty of first-degree murder based upon the felony murder rule and also convicted him of discharging a weapon into occupied property and possession of a firearm by a felon.[1] Defendant was sentenced to life imprisonment without parole for the murder conviction and to a consecutive sentence of 15 to 18 months imprisonment for the possession of a firearm by a felon conviction. His conviction for discharging a weapon into occupied property was arrested.

On direct appeal to this Court, Defendant's appellate counsel asserted several arguments but did not raise the issue of whether instructing the jury on felony murder based on these facts had constituted error. On 19 May 2009, this Court issued an opinion upholding Defendant's convictions. *State v. Spruiell*, 197 N.C. App. 232, 676 S.E.2d 669, 2009 WL 1383399 (2009) (unpublished), *disc. review denied*, 363 N.C. 588, 684 S.E.2d 38 (2009).

On 12 June 2012, Defendant filed an MAR in which he primarily argued that his appellate counsel had rendered ineffective assistance of counsel by failing to challenge on direct appeal the felony murder instruction. Specifically, Defendant argued in his MAR that — based on the specific facts of the underlying crime — the offense of discharging a weapon into occupied property could not legally constitute the predicate felony upon which to base his felony murder conviction. Defendant

1. Although the jury was also instructed on the offense of first-degree murder based on premeditation and deliberation, the jury left this portion of the verdict sheet blank.

filed subsequent amendments to his MAR on 13 September 2013 and 31 October 2014.

A hearing on Defendant's MAR was held before the Honorable C. Winston Gilchrist on 16 December 2013. On 2 December 2015, Judge Gilchrist issued an order (the "MAR Order") granting Defendant's motion. In the MAR Order, Judge Gilchrist made the following pertinent findings of fact:

> 14. [Defendant's appellate counsel] did not have any strategic reason for not arguing to the Court of Appeals that the facts of Defendant's case did not support submission to the jury of first degree murder in perpetration of the felony of shooting into an occupied vehicle.
>
> 15. Published precedents of the courts of North Carolina supporting reversal of Defendant's conviction for felony murder existed at the time Defendant's case was appealed, briefed and decided.
>
> 16. Reasonable counsel would have known of the precedents supporting Defendant's argument that felony murder based on discharging a weapon into an occupied vehicle was not properly submitted to the jury, or would have become aware of these authorities in the course of reasonable representation of Defendant on appeal.
>
> 17. Appellate counsel should have been aware of the need to challenge the trial court's submission of felony murder, given that the Defendant was not convicted of first degree murder on any theory except murder in perpetration of discharging a weapon into occupied property.

After setting forth a detailed legal analysis articulating his reasoning, Judge Gilchrist made the following pertinent conclusions of law:

> 4. Counsel on direct appeal should have argued that the trial court erred in submitting felony murder in perpetration of shooting into an occupied vehicle to the jury. In not so contending, appellate counsel's representation was not objectively reasonable.
>
> 5. Had Defendant's appellate counsel raised the issue of felony murder, there is a reasonable probability that Defendant's conviction for first degree murder — which was based solely on felony murder in perpetration of

> discharging a weapon into occupied property — would have been reversed on direct appeal. Counsel's performance undermines confidence in the outcome of this case. The performance of appellate counsel in fact prejudiced the defendant.
>
> 6. Defendant Spruiell has met his burden of proving the ineffective assistance of counsel. . . .[2]

Based upon these findings and conclusions, Judge Gilchrist vacated Defendant's convictions for first-degree murder and for discharging a weapon into occupied property and ordered that Defendant receive a new trial on these charges. On 12 January 2016, the State filed a petition for writ of *certiorari* seeking review of the MAR Order. We granted *certiorari* on 2 February 2016.

Analysis

In this appeal, the State argues that no legal authority exists in North Carolina that would have prohibited Defendant's felony murder conviction from being predicated on the crime of discharging a weapon into occupied property. Therefore, the State contends, the failure of Defendant's appellate counsel to raise this argument did not constitute ineffective assistance of counsel and the trial court's decision to grant his MAR was erroneous.

"Our review of a trial court's ruling on a defendant's MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 367 N.C. 284, 752 S.E.2d 479 (2013).

This Court has held that "[t]o show ineffective assistance of appellate counsel, Defendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (citation omitted), *appeal dismissed*, 360 N.C. 653, 637 S.E.2d 191 (2006). In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011)

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2. Judge Gilchrist concluded that the other grounds for relief asserted in Defendant's MAR lacked merit. That portion of his ruling is not presently before us.

(citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue." *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015) (citation, quotation marks, and ellipsis omitted).

In the present case, we need not decide the first prong of the ineffective assistance of counsel test because our analysis of the second prong is determinative of Defendant's ineffective assistance of counsel claim. *See State v. Rogers*, 355 N.C. 420, 450, 562 S.E.2d 859, 878 (2002) ("[I]f we can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." (citation and quotation marks omitted)). As explained in detail below, Defendant has failed to demonstrate a reasonable probability that he would have prevailed in his direct appeal had his appellate counsel argued that the offense of discharging a weapon into occupied property could not support Defendant's felony murder conviction.

Ordinarily, first-degree murder requires a showing that the killing was done with premeditation and deliberation. *See* N.C. Gen. Stat. § 4-17(a) (2015). However,

> [p]remeditation and deliberation are not elements of the crime of felony murder. The prosecution need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. By not requiring the State to prove the elements of murder, the legislature has, in essence, established a

> *per se* rule of accountability for deaths occurring during the commission of felonies.

State v. Bell, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Thus, pursuant to the felony murder rule set forth in N.C. Gen. Stat. § 14-17, first-degree murder includes any killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon . . . ." N.C. Gen. Stat. § 14-17(a).

The General Assembly has made it a felony to discharge a weapon into occupied property. N.C. Gen. Stat. § 14-34.1(a) (2015). A person is guilty of discharging a weapon into occupied property if "he intentionally, without legal justification or excuse, discharges a firearm into occupied property with knowledge that the property is then occupied by one or more persons or when he has reasonable grounds to believe that it is occupied." *State v. Jackson*, 189 N.C. App. 747, 752, 659 S.E.2d 73, 77 (citation, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 362 N.C. 512, 668 S.E.2d 564 (2008), *cert. denied*, 555 U.S. 1215, 173 L. Ed. 2d 662 (2009). By its express terms, the statute encompasses shots being fired into an occupied vehicle and contains no requirement that such a vehicle be in operation at the time of the offense. *See* N.C. Gen. Stat. § 14-34.1(a).[3]

In the MAR Order, the trial court concluded that, under the factual circumstances of Defendant's case, it was improper for the trial court to instruct the jury on felony murder. This ruling was based upon the proposition that for purposes of the felony murder rule the very same "assaultive act" — here, Defendant's act of firing his gun through an open car window into Sanchez's stomach — cannot constitute *both* the cause of the victim's death *and* the basis for the predicate felony.

In order to fully assess the validity of the MAR Order, it is necessary to examine in some detail several pertinent cases from our Supreme Court and this Court. In *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982), the Supreme Court considered whether the offense of discharging a weapon into occupied property could provide the basis for a felony murder conviction. In that case, the defendant was a convenience store clerk who followed a woman out of his store after she had refused to pay for a six-pack of beer. The woman climbed into a car, and as she

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3. If the vehicle is in operation at the time of the offense, however, the offense *is* raised from a Class E felony to a Class D felony. *See* N.C. Gen. Stat. § 14-34.1(b).

and the driver were pulling away, the defendant fired three shots at the car with his pistol. The first shot missed the vehicle while the "latter two shots appeared to strike the automobile[,]" with one of the bullets striking and killing the driver. *Id.* at 611, 286 S.E.2d at 70. The defendant was convicted of first-degree murder based upon the felony murder rule — the underlying felony being the offense of discharging a weapon into occupied property. *Id.* at 612, 286 S.E.2d at 71.

On appeal, the defendant argued that the Supreme Court should adopt the "merger doctrine" articulated in *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580 (1969). *Wall*, 304 N.C. at 612, 286 S.E.2d at 71. In *Ireland*, the California Supreme Court held that a "felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged."[4] *Ireland*, 70 Cal. 2d at 539, 450 P.2d at 590.

Our Supreme Court acknowledged that "[t]he felony of discharging a firearm into occupied property appears to be such an integral part of the homicide in the instant case as to bar a felony-murder conviction under the California merger doctrine." *Wall*, 304 N.C. at 612, 286 S.E.2d at 71 (internal citation omitted). However, the Supreme Court expressly declined to adopt that doctrine, explaining that on prior occasions it had "expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property. We elect to follow our own valid precedents." *Id.* at 612-13, 286 S.E.2d at 71 (internal citations omitted).

The Court further observed that the defendant's disagreement with the felony murder rule was more appropriately addressed to the General Assembly than the Judicial Branch:

> Our General Assembly remains free to abolish felony murder or, as the Courts did in California, to limit its effect to those other felonies not "included in fact within" or "forming an integral part of" the underlying felony. . . . We do not believe it is the proper role of this Court to abolish

4. It is important to distinguish the "merger doctrine" discussed in *Ireland* and throughout this opinion from the entirely separate merger rule that requires a defendant's conviction for the predicate felony to be arrested after he is convicted of felony murder. *See State v. Moore*, 339 N.C. 456, 468, 451 S.E.2d 232, 238 (1994) ("When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides no basis for an additional sentence. It merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested." (citation and alteration omitted)).

> or judicially limit a constitutionally valid statutory offense clearly defined by the legislature.

Id. at 615, 286 S.E.2d at 72. Accordingly, the defendant's felony murder conviction in *Wall* was upheld. *Id.* at 622, 286 S.E.2d at 76.

The Supreme Court reaffirmed its rejection of the California "merger doctrine" in several subsequent cases where the offense of discharging a weapon into occupied property supplied the basis for a felony murder conviction. *See State v. King*, 316 N.C. 78, 81-82, 340 S.E.2d 71, 74 (1986) ("Defendant argues that the 'merger doctrine' prohibits the application of the felony-murder rule whenever the predicate felony directly results in or is an integral element of the homicide. . . . In *State v. Wall*, we were asked to adopt the 'merger doctrine' but declined to do so . . . . The defendant has presented no argument to warrant a change in our position." (internal citation omitted)); *State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982) ("[D]efendant argues that this Court should adopt the 'merger doctrine' to bar application of the felony-murder rule to homicides committed during the perpetration of the felony of discharging a firearm into occupied property. For the reasons stated in *State v. Wall*, we decline to change the existing law." (internal citation omitted)).

In the MAR Order, the trial court recognized that *Wall* had, in fact, rejected the "merger doctrine" articulated in *Ireland*. However, the trial court placed great reliance upon a footnote — footnote three — in the Supreme Court's later decision in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), construing the footnote as providing an exception to the general rule articulated in *Wall*.

In *Jones*, the defendant crashed his vehicle into another vehicle occupied by six persons, two of whom died as a result. *Id.* at 161, 538 S.E.2d at 921. Pursuant to the felony murder rule, the defendant was convicted of the murders of the two deceased victims based upon the predicate felony of assault with a deadly weapon inflicting serious injury that he perpetrated against the other occupants of the vehicle. *Id.* at 165, 538 S.E.2d at 923.

On appeal to the Supreme Court from a divided panel of this Court upholding his convictions, the defendant argued that the trial court had improperly permitted his first-degree murder conviction to be predicated upon an underlying felony that could be established through a showing of criminal negligence rather than actual intent.[5] The Supreme

5. Assault with a deadly weapon inflicting serious injury may be established through a showing of criminal negligence rather than actual intent. *See id.* at 164-65, 538 S.E.2d

Court agreed with this argument and overturned the defendant's felony murder convictions. *Id.* at 163, 538 S.E.2d at 922.

While the holding in *Jones* is not directly relevant to the present case, the Court stated the following in a footnote:

> Although this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, *the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule.* Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

Id. at 170 n.3, 538 S.E.2d at 926 n.3 (internal citation omitted and emphasis added).

The MAR Order also discussed *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), which referenced the above-quoted footnote from *Jones*. In *Carroll*, the defendant struck the victim in the head with a machete and then proceeded to strangle her to death. The jury found the defendant guilty of felony murder based upon the underlying felony of assault with a deadly weapon inflicting serious bodily injury, which occurred when the defendant struck the victim with the machete. *Id.* at 534, 573 S.E.2d at 905.

On appeal to the Supreme Court, the defendant argued that the trial court had erred by instructing the jury on felony murder based upon the predicate felony of assault with a deadly weapon inflicting serious bodily injury, contending that footnote three in *Jones* stood for the proposition that "where a felonious assault culminates in or is an integral part of the homicide, the assault necessarily merges with the homicide and cannot constitute the underlying felony for a felony murder conviction." *Id.* at 535, 573 S.E.2d at 906. The defendant then asserted that

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at 922-23 ("[A] driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of [assault with a deadly weapon inflicting serious injury] provided there is either an actual intent to inflict injury or *culpable or criminal negligence* from which such intent may be implied." (emphasis added)).

"he engaged in one continuous assault on the victim that culminated in her death because [his] initial act of striking the victim with a machete cannot exist separately and independently from the acts causing [the victim's] death." *Id.* The Supreme Court rejected this reasoning, stating as follows:

> Defendant has misconstrued the language of *State v. Jones*. *Jones* precluded the use of assault as the underlying felony for a felony murder conviction only when there is a single assault victim who *dies as a result of the injuries incurred during the assault*. The victim in defendant's case, however, did not die as a result of the assault with the machete. The blow to her head was not fatal. Rather, the cause of death was strangulation. As such, the assault was a separate offense from the murder. Accordingly, the trial court did not err in submitting a felony murder instruction to the jury because the felonious assault did not merge into the homicide.

Id. (internal citation omitted).

Accordingly, *Jones* and *Carroll* stand for the limited proposition that a single assault on one victim that leads to that person's death cannot serve as the underlying felony for purposes of the felony murder rule.[6] In the MAR Order, however, the trial court construed *Jones* and *Carroll* as standing for the far broader proposition that no offense — regardless of whether the offense is classified as an assault or as some other crime — can serve as the basis for a felony murder conviction where the crime results from a "single assaultive act" against one victim. In other words, the trial court reasoned that the term " 'assault' seems to mean *any single act of assaultive conduct*, regardless of the felonious label attached to it." (Emphasis added.) The trial court then explained that this logic fully applied to the act of discharging a weapon into occupied property because "the offense of discharging a weapon into occupied property, like assault, is an offense against the person, and not against property." (Citation and quotation marks omitted.) For this reason, the trial court concluded, "discharging a weapon into occupied property by firing a single shot directly at the decedent cannot support a conviction for felony murder."

The trial court provided additional support for its ruling by citing to a footnote from this Court's decision in *Jackson*. The defendant in

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6. In its briefs to this Court, the State does not dispute this interpretation of *Jones* and *Carroll*.

Jackson was inside a vehicle at an intersection when he fired his weapon multiple times into a nearby vehicle containing two passengers, striking both of them and killing one. *Jackson*, 189 N.C. App. at 749, 659 S.E.2d at 75. The defendant was convicted of felony murder, attempted first-degree murder, and discharging a weapon into occupied property. The felony murder conviction was predicated upon the offense of discharging a weapon into occupied property. *Id.*

On appeal, we upheld the defendant's convictions and declined to apply the "merger doctrine."

> Under the merger doctrine, not adopted in North Carolina but adopted by some states, " 'a . . . felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.' " *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 71 (1982) (quoting *People v. Ireland*, 70 Cal. 2d 522, 539, 450 P.2d 580 (1969)). "[Our Supreme] Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Id.* As we are bound by our Supreme Court's decision in *Wall*, defendant's arguments regarding the merger doctrine are rejected.

Id. at 752, 659 S.E.2d at 77 (footnote omitted).

In a footnote, however, we stated the following:

> Defendant cites our Supreme Court's opinion in *State v. Jones*, 353 N.C. 159, 170, n. 3, 538 S.E.2d 917, 926, n. 3 (2000), which stated that although the merger doctrine has been disavowed, "cases involving a single assault victim who dies of his injuries have never been similarly constrained[,]" as authority to overturn defendant's conviction in this case. The rule announced in *Jones*, however, only applies where there is a single assault victim. *State v. Carroll*, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002). There being multiple assault victims in this case, defendant's argument on this point is without merit.

Id. at 752 n.3, 659 S.E.2d at 77 n.3.

While this footnote in *Jackson* appears to embrace the reasoning of footnote three in *Jones*, Defendant reads it far too broadly. The *Jackson*

footnote cannot be construed as a definitive ruling by this Court that the felony murder rule does not apply to instances in which a defendant discharges a weapon into occupied property containing only one person. To the contrary, the footnote was simply a summary rejection of a particular argument offered by the defendant on the facts of that case. This Court was not squarely faced in *Jackson* with the question currently before us — that is, whether the felony murder rule may be applied based upon the predicate felony of discharging a weapon into occupied property where there was a single shot fired at a single victim.[7]

We find more instructive our recent decision in *State v. Juarez*, __ N.C. App. __, 777 S.E.2d 325, (2015), *rev'd on other grounds*, __ N.C. __, 794 S.E.2d 293 (2016). In *Juarez*, the defendant fired one bullet into a car occupied by only the victim, shattering a window and striking and killing the victim. The defendant was convicted of felony murder based upon the underlying felony of discharging a weapon into an occupied vehicle in operation pursuant to N.C. Gen. Stat. § 14-34.1(b). *Id.* at __, 777 S.E.2d at 328.

On appeal, the defendant contended that — based on footnote three in *Jones* — a single assaultive act could not support a felony murder conviction even where the underlying felony was discharging a weapon into occupied property rather than assault. Citing *Wall*, we rejected this argument, holding that "[o]ur precedent clearly states that discharging a firearm into occupied property is a felony involving a deadly weapon, and as such supports a charge of first-degree murder based upon the felony murder theory." *Id.* at __, 777 S.E.2d at 330. Moreover, we explained that the offense of discharging a weapon into occupied property contained elements not present in assault crimes and thus did not fall within the "merger doctrine" for assault crimes as discussed in footnote three in *Jones*.

Thus, unlike in *Jackson*, this Court in *Juarez* expressly considered — and rejected — a defendant's argument that the "merger doctrine" precluded a felony murder conviction based upon the underlying felony of discharging a weapon into occupied property even where there was only one act and one victim. Defendant seeks to distinguish *Juarez* on the ground that it involved a vehicle in operation rather than one that was stationary (as in the present case). However, as the State notes, there was no indication in *Juarez* that anyone other than the actual

7. Indeed, the footnote in *Jackson* contains no analysis at all as to why footnote three in *Jones* (which dealt solely with the predicate felony of assault) should be extended to the legally distinct predicate felony of discharging a weapon into occupied property.

victim was in any danger as a result of the defendant's actions, and our analysis did not focus on the potential for harm to third parties arising from the defendant's conduct.

Our recent decision in *State v. Frazier*, __ N.C. App. __, 790 S.E.2d 312, *disc. review denied*, __ N.C. __, 794 S.E.2d 330 (2016), is also instructive. In *Frazier*, the defendant used his hand to repeatedly strike an infant, resulting in the baby's death. An expert witness testified that the infant died from blunt force trauma from three separate applications of force. Defendant was convicted of felony murder based upon felony child abuse. *Id.* at __, 790 S.E.2d at 316.

On appeal, the defendant argued that the offense of felony child abuse could not support a felony murder conviction because "the felony murder merger doctrine prevents conviction of first-degree murder when there is only one victim and one assault." *Id.* at __, 790 S.E.2d at 320. We refused to adopt this argument, holding that

> [f]elonious child abuse does not merge with first-degree murder because the crime of felonious child abuse requires proof of specific elements which are not required to prove first-degree murder[.] . . . The crime of felonious child abuse is among those offenses that address specific types of assaultive behavior that have special attributes distinguishing the offense from other assaults that result in death. Therefore, our courts have declined to apply the "merger doctrine" in cases where the underlying felony (here, child abuse) was not an offense included within the murder.

Id. (internal citation omitted).

In the present case, the offense underlying Defendant's felony murder conviction likewise included attributes distinguishing it from other acts that result in death in that the State was required to prove that Defendant fired his gun into an occupied vehicle. Defendant seeks to distinguish *Frazier* based upon the fact that the defendant in that case struck the victim multiple times whereas there was only one "assaultive" act in the present case. That reasoning is unavailing, however, given that our holding in *Frazier* was not premised on the number of blows inflicted by the defendant.

* * *

Taking into account all of the relevant statutory authority and caselaw discussed above, it is clear that neither the Supreme Court nor this

Court has ever expressly recognized an exception to the felony murder rule for the offense of discharging a weapon into occupied property. At most, North Carolina courts have recognized a very limited "merger doctrine" that precludes use of the felony murder rule in situations where the defendant has committed one *assault* crime against one victim and the State seeks to use that assault as the predicate felony for a felony murder conviction.

In his brief, Defendant acknowledges the absence of North Carolina caselaw clearly supporting his position, noting that "[w]hile no case has yet held that discharging a weapon into occupied property merges with felony murder, neither this Court nor our Supreme Court have *foreclosed* the possibility." (Emphasis added.) However, this latter observation — even if true — cannot be bootstrapped into a conclusion that a reasonable probability exists Defendant would have prevailed on direct appeal had his counsel made this argument. To the contrary, a ruling in Defendant's favor on this issue in his direct appeal would have constituted a departure from North Carolina's existing jurisprudence.

Accordingly, Defendant has failed to satisfy the prejudice element of his ineffective assistance of counsel claim. We therefore reverse the trial court's MAR Order.

Conclusion

For the reasons stated above, we reverse the trial court's 2 December 2015 order granting Defendant's MAR.

REVERSED.

Judges STROUD and HUNTER, JR. concur.

STATE v. WRIGHT

[252 N.C. App. 501 (2017)]

STATE OF NORTH CAROLINA
v.
REGIS LEE WRIGHT

No. COA16-1017

Filed 4 April 2017

1. Robbery—armed—common law robbery as lesser-included offense—weapon held but not pointed—no instruction

The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where defendant held a gun in his hands while robbing two convenience stores. Although defendant argued that this case fell within the mere possession line of cases, entitling him to the common law robbery instruction, the cases cited by defendant involved cases in which the defendant had a weapon but it wasn't seen by the victim or bystanders.

2. Robbery—armed—convenience store clerk not frightened—common law robbery as lesser-included offense—instruction not given

The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where the witness testified that she was not scared. The North Carolina Supreme Court has previously rejected similar arguments.

3. Constitutional Law—effective assistance of counsel—instruction not requested—motion to dismiss not made—uncontradicted evidence of crime

Defendant did not receive ineffective assistance of counsel in an armed robbery prosecution where his trial counsel did not request an instruction on common law robbery or make a specific motion to dismiss the charge of armed robbery. It would have been futile to request the instruction or move for the dismissal of the armed robbery charge because the State presented uncontradicted evidence of each element of armed robbery.

Appeal by defendant from judgments entered 14 April 2016 by Judge Daniel A. Kuehnert in Cleveland County Superior Court. Heard in the Court of Appeals 20 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

The primary issue in this appeal is whether a defendant charged with armed robbery is entitled to a jury instruction on the lesser-included offense of common law robbery where there is no evidence that the gun held by the defendant was actually pointed at the victim or that the victim actually feared for her life upon observing the gun. Regis Lee Wright ("Defendant") was convicted of armed robbery based on evidence showing that he entered three convenience stores with a gun in his hand and stole money in the presence of the stores' clerks. Because the State introduced uncontradicted evidence satisfying each element of armed robbery, we hold that no instruction on common law robbery was required.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: Defendant was charged with four counts of robbery with a dangerous weapon stemming from robberies occurring at four convenience stores in Shelby, North Carolina. The facts regarding each robbery are summarized below:

I. The Kangaroo Express Robbery

In the morning hours of June 29, 2014, Betty Buehner was working as a clerk at the Kangaroo Express at the intersection of Interstate 74 and Beaver Dam Church Road. At approximately 5:00 a.m., Defendant entered the store wearing a bandana and toboggan over his face and head so that only his eyes were visible. Buehner was cleaning the bathrooms in the back of the store and did not hear Defendant enter.

Buehner testified as follows:

> Well, the door opened and somebody nudged me and said, go to your register. I thought he wanted gas or something. I said, okay, I will be there in just a minute. He said, this is [sic] robbery. And he said, I don't want to hurt you, just go to the register. I looked at him and said, you're kidding. He said, no. I said, I will not. If you want it, go get it yourself. I got to get this trash out. So he went to the register and I was still getting my trash out. I got the trash out of that [sic] while he was up there trying to get into the register.

As Defendant walked back to the register, Buehner observed a gun in Defendant's right hand. Buehner also testified that at some point during the incident Defendant told her he had a gun.

Upon approaching the cash register, Defendant tried unsuccessfully to open it. Buehner then told him: "[Y]oung man you better hurry because there are going to be people coming in." Shortly thereafter, Buehner heard Defendant leave the store. After he left, Buehner realized Defendant had taken a "box of pennies" that had been sitting near the register. She also testified that it was possible that he took a "roll" of quarters. At that point, Buehner called the police.

During her testimony, Buehner stated that during her encounter with Defendant she was "never scared" and that Defendant did not actually point the gun at her. When asked on re-cross-examination if Defendant had threatened her, she stated: "Well, he threatened me at first, but I don't think he meant it."

II. Mike's Food Store Robbery

On the morning of July 6, 2014, Mary Brock was working the cash register at Mike's Food Store on Earl Road. At approximately 11:30 a.m., Defendant "c[a]me in[to] the store with a gun." He was wearing a black ski mask and hospital gloves. Brock testified that she "automatically put [her] hands up because as soon as he c[a]me in the door, you could see the gun." Defendant approached the register and told Brock to "give [him] the money." Brock removed the cash register drawer and put it on the counter. Defendant told her that he also wanted the money in the "lottery drawer" and ordered her to "hurry up." Brock was unable to remove the drawer so she started "grabbing the money and throwing it up on the counter for him." She told Defendant: "[D]on't hurt me, I got kids." Defendant took all of the money from the counter and left. When asked during cross-examination whether Defendant had actually pointed the gun at her, she responded that he had not done so.

Christopher Surratt was buying lottery tickets at Mike's Food Store at the time of the robbery. Surratt testified that Defendant "came in and had the gun in his hand." Upon seeing Defendant enter the store with the gun, he backed away from the counter. Surratt testified that he could tell Brock was terrified during this incident.

III. The Fastop Robbery

On the morning of June 29, 2014, James Stegall was working as a clerk at a Fastop on East Dixon Boulevard. At approximately 5:30 a.m., Defendant entered the store with his face and head covered and

approached the counter where Stegall was working. Defendant "laid across the counter with a gun in his hand and said give it up." Stegall took a step back and put his hands up. He noticed the gun was a "grayish color" and testified that Defendant pointed the gun at him "a couple of times." Stegall then "walked to the [cash] register, pushed the button, opened the drawer, and stepped back." Defendant reached across the counter, removed the money from the register, and left the store. Stegall then proceeded to call the police.

IV. The One Stop Food Store Robbery

During the early morning hours of July 23, 2014, Quanisha Logan and Theodore Davis were working as cashiers at the One Stop Food Store on the corner of White and Fallston Roads. At approximately 2:00 a.m., Defendant entered the store with his face and head covered and a black gun in his right hand. He told Logan and Davis to "put all the money in the bag." Both of them opened their registers and handed Defendant the money inside. Defendant left the store with over $150.

* * *

Defendant was subsequently arrested and indicted on four counts of robbery with a dangerous weapon. Beginning on 11 April 2016, a jury trial was held before the Honorable Daniel A. Kuehnert in Cleveland County Superior Court. The State presented testimony from Buehner, Stegall, Brock, Surratt, Logan, and Davis as well as from several law enforcement officers who had investigated the robberies.

At the close of the State's evidence, the following exchange occurred:

> [DEFENDANT'S COUNSEL]: I'm not going to make an argument. I would just make the standard motion to dismiss at the end of State's evidence.
>
> . . . .
>
> THE COURT: You're probably pushing it in this direction in your questioning, Mr. Gilbert, and [sic] raised a question in my mind. The fact that -- it sounded like the evidence, at least on a few occasions, the defendant didn't point the gun directly at individuals, that he may not have held a gun to somebody's head and said, give me the money or anything like that. There were statements that people were threatened or felt threatened. Some of the law that -- I decided to do a little bit of research while you were asking those questions. The mere fact that the gun

> was shown and was present and the circumstances of the situation -- as I looked at the little bit of law, it looks like it meets the threshold, to meet all the elements necessary for an armed robbery. So I'm sort of anticipating that that might be an issue and I just will let you know that had you emphasized that or argued about it, and I knew you were headed in that direction, that I have looked at and you probably knew this before. . . . That's probably the one weakness that you look at say, [sic] where's the threat?
>
> [DEFENDANT'S COUNSEL]: My practice is not to belabor an issue unless it needs to be belabored. And in this case I can't really argue with any passion that the case ought to be dismissed. . . . I think there is a scintilla.

The trial court then denied Defendant's motion to dismiss. The court proceeded to instruct the jury solely on the offense of armed robbery. The jury returned a verdict finding Defendant guilty with regard to the robberies at the Kangaroo Express, Mike's Food Store, and the Fastop. The jury found Defendant not guilty as to the robbery at the One Stop Food Store.

The trial court sentenced Defendant to a term of 68 to 94 months imprisonment for the Fastop robbery along with a consecutive term of 68 to 94 months for the Mike's Food Store robbery and a concurrent term of 68 to 94 months for the Kangaroo Express robbery. Defendant gave oral notice of appeal.[1]

Analysis

On appeal, Defendant argues that (1) the trial court committed plain error in failing to instruct the jury on the lesser-included offense of common law robbery; and (2) he was deprived of effective assistance of counsel as a result of his trial counsel's failure to request an instruction on common law robbery and to move for dismissal of the charge stemming from the Kangaroo Express robbery based specifically upon the insufficiency of the evidence. We address each argument in turn.

I. Instruction on Common Law Robbery

[1] In his first argument, Defendant contends that with regard to the Kangaroo Express and Mike's Food Store robberies, the State failed to

1. Defendant's appeal relates solely to his convictions stemming from the robberies at the Kangaroo Express and Mike's Food Store.

establish that Defendant's use of a dangerous weapon actually threatened or endangered the life of the victims. Because such evidence is essential to the offense of armed robbery, Defendant argues, the lack of proof offered by the State on this issue required the trial court to instruct the jury on the lesser-included offense of common law robbery.

Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). Our Supreme Court has held that "even when the 'plain error' rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, and brackets omitted).

> It is well settled that a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Covington, __ N.C. App. __, __, 788 S.E.2d 671, 675 (2016) (citation omitted).

Our prior caselaw makes clear that "[t]he trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation, quotation marks, and ellipses omitted). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation and quotation marks omitted).

"The elements of armed robbery are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened."[2] *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and quotation marks omitted). The elements of common law robbery are "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

Defendant's argument essentially has two components. First, he contends that the State failed to present substantial evidence of the third element of armed robbery — whether the victim's life was endangered or threatened — with respect to either the Kangaroo Express robbery or the Mike's Food Store robbery because no evidence was presented that Defendant actually pointed his gun at Buehner or Brock. Second, he points to the lack of evidence during the Kangaroo Express robbery showing that Buehner genuinely feared for her life in light of her testimony that she was "never scared." As discussed below, we reject both of these contentions.

A. Pointing of the Gun

It is well established that a defendant's mere possession of a weapon — without more — during the course of a robbery is insufficient to support a finding that the victim's life was endangered or threatened. *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981); *see also State v. Whisenant*, __ N.C. App. __, __, 791 S.E.2d 122, 125 ("The State must present evidence that the defendant endangered or threatened the life of the victim by possession of the weapon, aside from the mere

2. Defendant makes no argument in this appeal that the gun he was holding during the robberies was not, in fact, a real gun. Nor does he contend that the gun was inoperable or unloaded.

fact of the weapon's presence." (citation, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 793 S.E.2d 702 (2016).

In the present case, Defendant argues that because the State did not present evidence that Defendant actually pointed his gun at Buehner or Brock, this case falls within the "mere possession" line of cases, thereby entitling him to an instruction on common law robbery. However, the cases Defendant cites in support of this argument all involved circumstances where a perpetrator possessed a weapon but neither the victim nor bystanders actually saw the weapon during the course of the robbery. *See, e.g.*, *Gibbons*, 303 N.C. at 490, 279 S.E.2d at 578 (although perpetrators acknowledged in their testimony that they possessed shotgun during robbery, no evidence was presented that victim ever saw gun); *State v. Evans*, 279 N.C. 447, 455, 183 S.E.2d 540, 545-46 (1971) (victim's life was not endangered or threatened where co-conspirator left restaurant with shotgun that victim never saw and defendant subsequently made threats to victim during time period when shotgun was not present); *State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 661 (1996) (victim's purse was taken while she was asleep and thus "she could not have known of the presence of the [defendant's] knife and could not have been induced by it to part with her purse").

However, our appellate courts have held that in cases where the State's evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the course of the robbery, the third element of armed robbery is satisfied. *See, e.g.*, *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (defendant endangered or threatened victim's life where officer saw defendant holding knife immediately after stealing wallet even though victim had not seen knife prior to robbery), *appeal dismissed and disc. review denied*, 361 N.C. 570, 650 S.E.2d 815 (2007); *State v. Melvin*, 53 N.C. App. 421, 433, 281 S.E.2d 97, 105 (1981) (defendant endangered or threatened victim's life where he held gun during robbery and demanded money), *cert. denied*, 305 N.C. 762, 292 S.E.2d 578 (1982).

We find particularly instructive our opinion in *Melvin*. In that case, the State presented evidence that the defendant entered a store, told the victim that "he wanted the money that [she] had in the store[,]" and placed a gun on the counter with his hand over it. *Id.* at 433, 281 S.E.2d at 105. On appeal, the defendant argued that the State's evidence "did not reveal that at any time during the commission of the robbery defendant ever actually threatened the victim with harm nor did the evidence reveal that he endangered the victim by the use or threatened use of a firearm." *Id.* at 432, 281 S.E.2d at 104. However, this Court ruled that

"[t]he evidence shows that defendant robbed [the victim] while holding a pistol in his hand. We think this is ample proof of this element of the crime." *Id.* at 433, 281 S.E.2d at 105. Thus, we held that "[t]here was sufficient evidence of each of the elements of armed robbery and that defendant was the perpetrator of the armed robbery to justify the trial court's denial of his motion to dismiss." *Id.*

Here, as in *Melvin*, the uncontradicted evidence presented at trial showed that Defendant held a gun in his hand while robbing both the Kangaroo Express and Mike's Food Store. Buehner testified that during the Kangaroo Express robbery, she observed Defendant holding a gun in his right hand before he attempted to open the cash register. Similarly, Surratt testified that Defendant entered Mike's Food Store with a gun in his hand. Defendant has failed to cite any case involving similar facts in which North Carolina's appellate courts have held either that the third element of armed robbery was not satisfied or that the failure to give an accompanying instruction on the lesser-included offense of common law robbery constituted error.

B. Victim's Fear for Her Life

[2] With regard to the Kangaroo Express robbery, Defendant contends that because Buehner continued cleaning after he told her that he was robbing the store and testified that she was not scared during the incident, her life was not endangered or threatened by Defendant's possession of the gun. However, our Supreme Court has previously rejected similar arguments.

In *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978), the defendant argued on appeal that the trial court had erred by denying his motion for nonsuit on the charge of armed robbery. He contended that the State failed to prove the victim's life was endangered or threatened because the victim did not show that she was "in fear for her life at the time she surrendered her [property] . . . ." *Id.* at 62, 243 S.E.2d at 372. The Supreme Court rejected this contention, holding that "there was a threatened use of a dangerous weapon which endangered or threatened the life of the victim." *Id.* at 63, 243 S.E.2d at 373 (emphasis omitted). In its opinion, the Court made clear that "the State did not have to prove such fear to overcome defendant's motion for nonsuit." *Id.*

In *Hill*, the defendant was convicted of armed robbery where the evidence established that he brandished a knife and caused the victim to sustain injury as a result of his actions during the course of the robbery. The defendant argued on appeal that the evidence failed to show that he endangered or threatened the victim's life because the victim's

testimony did "not indicate that he was afraid of or felt threatened by the robber." *Hill*, 365 N.C. at 279, 715 S.E.2d at 845. Our Supreme Court held that the elements of armed robbery were satisfied and reiterated its prior holding in *Joyner* that the third element of armed robbery does not depend on "whether the victim was scared or in fear of his life." *Id.* (citation, quotation marks, and emphasis omitted). Thus, the Court concluded, the evidence was sufficient to establish that the victim's life was "endangered or threatened by the robber's possession, use or threatened use of a dangerous weapon, namely a knife." *Id.* (citation and quotation marks omitted).

* * *

For these reasons, we are satisfied that the State presented uncontradicted evidence establishing the elements of armed robbery for both the Kangaroo Express and Mike's Food Store robberies. Accordingly, Defendant has failed to show that the trial court erred by not instructing the jury on common law robbery. *See Covington*, __ N.C. App. at __, 788 S.E.2d at 677 ("[W]e hold that the trial court did not err at all—much less commit plain error—by failing to instruct the jury on the lesser-included offense . . . .").

II. Ineffective Assistance of Counsel

[3] Defendant's final argument is that he received ineffective assistance of counsel because of his trial counsel's failure to (1) request an instruction on the lesser-included offense of common law robbery with regard to the charges arising from the Kangaroo Express and Mike's Food Store robberies; and (2) make a specific motion to dismiss the charge of armed robbery as to the Kangaroo Express robbery. We disagree.

> In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Edgar, __ N.C. App. __, __, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted). "In considering ineffective

assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Turner*, 237 N.C. App. 388, 396, 765 S.E.2d 77, 84 (2014) (citation and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015).

Here, as shown above, Defendant was not entitled to a jury instruction on common law robbery as to either of these two charges because the State presented uncontradicted evidence of each element of the offense of armed robbery. Thus, it would have been futile for his trial counsel to request such an instruction or to move for the dismissal of the armed robbery charge relating to the Kangaroo Express robbery on a theory of insufficiency of the evidence. Accordingly, Defendant cannot establish a valid ineffective assistance of counsel claim. *See Covington*, __ N.C. App. at __, 788 S.E.2d at 678 (holding that defendant was not deprived of effective assistance of counsel based on his attorney's failure to request jury instruction on lesser-included offense).

Conclusion

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

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

GLORIA R. WATLINGTON, PETITIONER
v.
DEPARTMENT OF SOCIAL SERVICES ROCKINGHAM COUNTY, RESPONDENT

No. COA16-1038

Filed 4 April 2017

1. Administrative Law—dismissal of social worker—state or local rules

In a case arising from the termination of an employee of the Rockingham County Department of Social Services (RCDSS), the Administrative Law Judge's findings supported its conclusion that petitioner was subject to the State Human Resources Act (SHRA). The findings demonstrated that the Rockingham County Board of Commissioners passed resolutions leaving the employees of its consolidated human services subject to SHRA, except where the Rockingham County Personal Policy (RCPP) had been recognized by the State as "substantially equivalent" to the SHRA or that RCDSS was only required to follow the provisions on the RCPP in order to terminate petitioner.

2. Administrative Law—dismissal of social worker—career state employee

In cases arising from administrative tribunals, questions of law receive de novo review while factual issues are reviewed under the whole record test. In a case arising from the termination of an employee of the Rockingham County Department of Social Services (RCDSS), the Court of Appeals affirmed the Administrative Law Judge's conclusion that petitioner was a career State employee subject to the State Human Resources Act, but it was noted that neither this issue nor the question of just cause were argued prior to appeal. On remand, the RCDSS was required to show that just cause existed for her termination.

3. Administrative Law—termination—state employees—local employees—Administrative Code—applicable provisions

Title 25 of the N.C. Administrative Code, the State Human Resources Act, and case law were reviewed to provide clarity on remand of a case involving the termination of a social services employee. Subchapter J of Title 25 applied to State employees and Subchapter I applied to local government employees.

4. Administrative Law—dismissal of social worker—local employee

In a case involving the termination of a Rockingham County Social Services employee, Subchapter I of Title 25 of the Administrative Law Code was held to apply, and the Administrative Law Judge's conclusions that Subchapter J applied were reversed. The terminated employee's position fit the definition of an employee of a local department of social services.

5. Administrative Law—dismissal of social worker—just cause analysis

A case involving the termination of a social services employee was remanded where the Administrative Law Judge's (ALJ) opinion did not address two of the prongs of the test for just cause in *Warren v. N.C. Department of Crime Control and Public Safety*, 221 N.C. App. 376. Nothing in the final decision indicated that petitioner's conduct as found by the ALJ amounted to unacceptable personal conduct and there was no conclusion of law asserting that there was substantial just cause for any disciplinary action.

6. Administrative Law—dismissal of social worker—back pay

An award of back pay to a social services employee who was terminated was reversed. Back pay is not a remedy for a procedural violation under Subchapter I of Title 25 of the Administrative Law Code.

Appeal by respondent from final decision entered 5 July 2016 by Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 8 March 2017.

Mark Hayes for petitioner-appellee-cross-appellant.

Rockingham County Attorney's Office, by Emily Sloop, for respondent-appellant-cross-appellee.

TYSON, Judge.

Rockingham County Department of Social Services ("RCDSS") appeals and Gloria Watlington ("Watlington") cross-appeals from a final decision affirming Watlington's termination and ordering RCDSS to provide back pay salary to Watlington due to a procedural violation. We affirm in part, reverse in part, and remand.

I. Factual Background

RCDSS hired Watlington as a Community Social Services Technician on 9 January 2012. Her primary responsibilities included providing transportation to families and children served by RCDSS, supervising case visits between parents and children in RCDSS' custody, and providing case visit reports to RCDSS social workers.

When Watlington was hired, RCDSS provided her with a copy of Rockingham County's Personnel Policy ("RCPP"). Watlington also attended an orientation for new employees. The personnel policy and orientation described appropriate employee behavior, including RCDSS' policies on unacceptable personal conduct and the acceptance of gifts and favors.

On 15 April 2013, the Rockingham County Board of Commissioners passed a resolution to establish a consolidated human services agency, which consolidated its departments of public health and social services. The resolution, along with a subsequent resolution passed on 3 August 2013, clarified employees of the consolidated human services agency remained subject to the North Carolina Human Resources Act ("SHRA") in most circumstances. The resolutions provided that for those areas of policy and procedures where the RCPP had been recognized by the State as substantially equivalent to the SHRA, the employees are governed exclusively by the RCPP. RCDSS presented no evidence demonstrating the State had recognized the RCPP as substantially equivalent.

In December 2015, Watlington supervised a RCDSS custody visit between P.H. and her daughter. P.H. testified she wanted to do something nice for Watlington, because Watlington "had been real nice in letting us have extra time on our visits and been encouraging that we would be able to be reunited." P.H. purchased an inexpensive jewelry set, which Watlington accepted.

When Watlington's supervisor informed Watlington the gift violated RCDSS' policy, she immediately surrendered the jewelry set to RCDSS. Watlington's supervisor notified Debbie McGuire, the Director of RCDSS, of the occurrence. On 9 December 2015, Watlington was placed on administrative leave with pay, pending investigation and review of allegations made against her regarding violation of the RCPP's provision prohibiting the acceptance of gifts.

During the investigation, additional allegations came forth regarding Watlington's personal conduct. These allegations included she had: accepted food and beverages from RCDSS clientele on more than one

occasion; used Social Security Income ("SSI") money belonging to a child in RCDSS custody to purchase food for herself; accepted a cash loan of sixty dollars from a foster parent; and removed a bassinet stored at RCDSS without permission and gave it to another foster family.

On 11 December 2015, RCDSS provided Watlington a written notice of a pre-dismissal conference to be held that afternoon to discuss a recommendation for her dismissal, due to "unacceptable personal conduct." The notice listed the specific reasons for the recommendation of dismissal. Watlington, her supervisor, and McGuire attended the meeting and discussed the documented allegations.

On 14 December 2015, Watlington received a written notice of dismissal from employment. The notice again included the specific reasons for Watlington's dismissal and informed her of her right to appeal to the County Manager, Lance Metzler. Watlington appealed.

Metzler upheld Watlington's termination and notified her by letter on 15 December 2015. The letter did not inform Watlington of the specific reasons why Metzler was upholding her termination or that his letter was public record. Watlington appealed her termination to the North Carolina Office of Administrative Hearings and Review ("OAH") by filing a Petition for a Contested Case Hearing on 11 January 2016.

The case was heard before the administrative law judge ("the ALJ") on 23 May 2016. After the hearing and reviewing the parties' briefs and proposed orders, the ALJ entered his final decision and made the following findings of fact:

> 13. While employed by Respondent, Petitioner engaged in the following conduct: (1) accepted a loan in the amount of sixty dollars ($ 60.00) offered by a foster parent between two (2) and three (3) years prior to her termination by Respondent; (2) used approximately six dollars ($ 6.00) of a minor child's money to purchase food for herself while transporting the minor child across the state at the request of her supervisor, which Petitioner repaid to Respondent within one (1) week; (3) consumed leftover food purchased by a foster parent for herself and a minor child when offered by the foster parent; (4) gifted a bassinet to a foster family being served by Respondent from an area where Respondent keeps both donations and property assigned to particular families under its supervision, and upon being notified of a problem, retrieved said bassinet and returned it to Respondent; (5) accepted a slice

of cake or cupcakes offered by a foster family at a minor child's birthday party; and (6) accepted a wrapped pair of earrings from a foster parent on behalf of her child, which were immediately returned upon an issue being raised by Respondent.

14. Prior to Petitioner's voluntary disclosure of item number six (6) above to a co-worker, Respondent had taken no formal disciplinary action against Petitioner, despite being aware of at least two (2) of the same aforementioned allegations.

15. Prior to Respondent's initiation of an investigation into Petitioner's conduct, no witness called to testify by Respondent had reported items (1), (3), or (5) of the aforementioned conduct as concerning to them, violating the RCPP; or asked Respondent to initiate formal discipline against Petitioner based on such conduct despite being fully aware of them.

16. Respondent offered no evidence that any of the aforementioned conduct by Petitioner: (1) negatively impacted her job performance; (2) influenced her job performance, recommendations, or reporting; (3) diminished the reputation of Respondent in the community; or (4) led to tangible financial, legal, or regulatory consequences for Respondent.

. . .

18. On or about August 5, 2013, the Rockingham County Board of Commissioners passed an amending and clarifying resolution stating that "[e]mployees of the Consolidated Human Services Agency remain subject to the State Personnel Act. In those areas where the Rockingham County Personnel Policy has been recognized by the state as 'substantially equivalent,' the employees will be governed by the provisions of the [RCPP]."

19. Respondent offered no evidence demonstrating that it is exempt from the provisions of the State Human Resources Act ("SHRA"), codified at N.C.G.S. § 126-1 *et seq*, as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 *et seq*, or that its disciplinary or grievance procedures have been

recognized by the State Human Resources Commission as substantially equivalent.

The ALJ also made the following conclusions of law:

1. Petitioner is subject to the protections of the SHRA.

2. Due to the language of the two (2) resolutions passed by the Rockingham County Board of Commissioners and the absence of an exemption by the State Human Resources Commission respecting its disciplinary or grievance procedures, Respondent's conduct as to disciplinary or grievance procedures is controlled by Title 25, Subchapter J, of the North Carolina Administrative Code.

3. In cases in which a state employee is disciplined for "unacceptable personal conduct" that does not involve criminal conduct, the North Carolina Court of Appeals interpreted the North Carolina Supreme Court's decision in *Carroll* as adopting a "commensurate discipline" approach. *See Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 726 S.E.2d 920, 924 (N.C. App. 2012). According to *Warren*, "the proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken."

4. Respondent failed to comply with the procedural requirements for dismissing Petitioner from employment for unacceptable personal conduct by not providing specific written reasons and written details in the Final Agency Decision.

5. 25 NCAC 0lB .0432(b) provides, "[f]ailure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as the Commission determines, in its discretion, to be appropriate under all the circumstances."

> 6. The December 15, 2015 letter written by Rockingham County Manager Lance L. Metzler constitutes the Final Agency Decision for the purposes of this action.
>
> 7. Based on the language of the Final Agency Decision and pursuant to 25 NCAC 1J.0613(4)(h), Respondent lacked procedural just cause to terminate Petitioner.

The ALJ's final decision affirmed Watlington's termination, but ordered RCDSS to pay Watlington back pay due to a procedural violation. RCDSS appeals. Watlington cross-appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2015).

III. Issues

The appeal and cross-appeal request this Court to address whether the ALJ erred by: (1) holding Watlington was a career State employee subject to the provisions of the SHRA and not the local RCPP; (2) holding Title 25, Subchapter J of the North Carolina Administrative Code governs the case; (3) affirming Watlington's termination; and (4) awarding back pay to Watlington for an alleged procedural violation.

IV. Standard of Review

N.C. Gen. Stat. § 150B-51 (2015) governs the scope and standard of this Court's review of an administrative agency's final decision. *Harris v. N.C. Dep't of Pub. Safety*, No. COA16-341, __ N.C. App. __, __, __ S.E.2d __, __ (filed Mar. 7, 2017); *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 702, 635 S.E.2d 442, 446 (2006). The standard of review is dictated by the substantive nature of each assignment of error. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

N.C. Gen. Stat. § 150B-51(b) provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;

> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95 (citation and quotation marks omitted).

The court engages in *de novo* review where the error asserted is pursuant to § 150B-51(b)(1), (2), (3), or (4). N.C. Gen. Stat. § 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 446 (brackets, citation, and quotations marks omitted).

On the other hand, where the error asserted is pursuant to N.C. Gen. Stat. § 150B-51(b)(5) & (6), the reviewing court applies the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c). Under the whole record test,

> [The court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (citations and quotation marks omitted).

V. Career Employee Status and Applicability of the SHRA

[1] RCDSS argues the findings of fact do not support the ALJ's conclusion that Watlington is subject to the provisions of the SHRA. RCDSS argues the ALJ failed to make any findings to demonstrate Watlington

was a "career State employee," such that "just cause" was required to support her termination. *See* N.C. Gen. Stat. § 126-35(a) (2015).

The SHRA applies to all non-exempt State employees and certain local government employees, including those who work for local social services departments. N.C. Gen. Stat. § 126-5 (2015). The General Assembly has delegated local governments the statutory authority to create a consolidated human services agency pursuant to N.C. Gen. Stat. § 153A-77(b) (2015). These local employees are not subject to the SHRA, unless the local government chooses to keep them subject to the provisions of the SHRA upon consolidation. N.C. Gen. Stat. § 126-5.

A career State employee is defined as a State employee or a local government employee subject to the SHRA who:

> (1) Is in a permanent position with a permanent appointment, and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.

N.C. Gen. Stat. § 126-1.1 (2015). Career State employees may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a); *see* 25 NCAC 01I.2301 (2016); 25 NCAC 01J.0604 (2016).

The final decision's findings of fact show RCDSS hired Watlington as a Community Social Services Technician on 9 January 2012. Her employment was terminated on 15 December 2015. The findings also demonstrate the Rockingham County Board of Commissioners passed resolutions leaving the employees of the consolidated human services agency subject to the SHRA, except where the RCPP had been recognized by the State as "substantially equivalent." RCDSS failed to present any evidence showing the State had recognized the RCPP as "substantially equivalent" or that RCDSS was only required to follow the provisions on the RCPP in order to terminate Watlington. These findings support the ALJ's conclusion that Watlington, as an employee of RCDSS, was subject to the SHRA.

[2] Presuming *arguendo*, the findings were insufficient to support the ALJ's conclusion that Watlington was subject to the SHRA, we note RCDSS never argued this issue before the ALJ. Rather, RCDSS' proposed order and brief in support of its order stated Watlington was "subject

to the provisions of [the SHRA]." We also acknowledge the ALJ's order does not include any findings of fact showing Watlington was a career State employee. However, this issue was also not contested in the hearing before the ALJ. RCDSS' brief and proposed order explicitly state that Watlington "was a career State employee."

This Court has repeatedly held " 'the law does not permit parties to swap horses between courts in order to get a better mount,' meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). RCDSS never contested the application of the SHRA to Watlington nor Watlington's status as a career State employee prior to its arguments on appeal. We affirm the ALJ's conclusion that Watlington was a career State employee subject to the SHRA. As such, RCDSS must show just cause exists for her termination.

VI. Applicable Section of the North Carolina Administrative Code

[3] The ALJ concluded Title 25, Subchapter J of the North Carolina Administrative Code ("Subchapter J") governs this case. RCDSS argues Title 25, Subchapter I ("Subchapter I") controls, because Watlington was considered a local government employee. To provide clarity for the ALJ on remand, we address when these respective subchapters of the North Carolina Administrative Code apply.

A. Review of Title 25, Subchapters I and J

Title 25 of the North Carolina Administrative Code was promulgated pursuant to the SHRA, which established:

> a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry. It is also the intent of this Chapter that this system of personnel administration shall apply to local employees paid entirely or in part from federal funds, except to the extent that local governing boards are authorized by this Chapter to establish local rules, local pay plans, and local personnel systems.

N.C. Gen. Stat. § 126-1 (2015). The State Human Resources Commission establishes the procedures and rules governing many aspects of this personnel system. N.C. Gen. Stat. § 126-4 (2015).

Title 25 contains the rules adopted by the Commission and includes distinct subchapters on various personnel topics. Relevant to this appeal, Subchapter J, "Employee Relations," contains a section "Disciplinary Action: Suspension and Dismissal," which provides the procedures and rules regarding just cause and dismissals for unacceptable personal conduct. 25 NCAC 01J.0603-.0618 (2016)

Subchapter I, "Service to Local Governments," provides the procedures and rules specific to the personnel system developed for local government employees, including subsections on recruitment and selection, classification, and compensation. *See* 25 NCAC 01I.1800, .1900, and .2100 (2016). Subchapter I includes a separate subsection on "Disciplinary Action: Suspension, Dismissal and Appeals," which includes rules regarding just cause and dismissal for unacceptable personal conduct. 25 NCAC 01I.2301 and .2304 (2016). These rules vary slightly from the rules and procedures stated under Subchapter J. *See* 25 NCAC 01J.0603-.0618.

Subchapter I begins with the "Applicability" section:

> [The SHRA] provides for the establishment of a system of personnel administration applicable to certain local employees paid entirely or in part from federal funds. Local governing boards are authorized by G.S. 126 to establish personnel systems which will fully comply with the applicable federal standards and then may remove such employees from the state system to their own system.

25 NCAC 01I.1701 (2016).

In this case, the parties assert different interpretations of 25 NCAC 01I.1701. RCDSS argues in its brief this provision of Subchapter I is "merely implementing N.C. Gen. Stat. § 126-1, which allows local governing boards to establish local personnel systems *if* they so choose." RCDSS asserts Subchapter J applies to State employees and Subchapter I applies to local government employees, unless the local government removes those employees to its own separate system not governed by either Subchapter I or J. On the other hand, Watlington argues 25 NCAC 01I.1701 gives local governments the authority to remove certain employees from the State system, Subchapter J, to the local government system under Subchapter I.

We agree with RCDSS. As 25 NCAC 01I.1701 notes, the SHRA provided the State Human Resources Commission with the authority to establish a personnel system for certain local government employees.

The rules for that system are contained within Subchapter I. The second sentence in 25 NCAC 01I.1701 simply recognizes the ability of a local government to remove its employees to its own, separate system, if and when certain requirements are met.

Based upon our review of the case law, the SHRA, and the entirety of Title 25, we find Subchapter J applies to State employees and Subchapter I applies to local government employees. *See*, *e.g.*, *Blackburn v. Dep't of Pub. Safety*, __ N.C. App. __, 784 S.E.2d 509, 522 (2016) (applying Subchapter J to a former State employee of the Department of Public Safety); *Ramsey v. N.C. Div. of Motor Vehicles*, 184 N.C. App. 713, 718-19, 647 S.E.2d 125, 128-29 (2007) (applying Subchapter J to a former State employee of the Division of Motor Vehicles); *Steeves v. Scotland Cnty. Bd. of Health*, 152 N.C. App. 400, 406-07, 567 S.E.2d 817, 821-22 (2002) (applying Subchapter I to a former Scotland County Health Director, a career State employee under the SHRA, who was dismissed for "unacceptable personal conduct"); *Fuqua v. Rockingham Cnty. Bd. of Social Servs.*, 125 N.C. App. 66, 71, 479 S.E.2d 273, 276 (1997) (applying Subchapter I to a former director of the Rockingham County Department of Social Services, who was dismissed based on "unacceptable personal conduct").

B. Applicability to this Case

[4] Finding of Fact 19 of the ALJ's final decision states:

> 19. Respondent offered no evidence demonstrating that it is exempt from the provisions of the State Human Resources Act ("SHRA"), *codified at N.C.G.S. § 126-1 et seq*, *as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 et seq*, or that its disciplinary or grievance procedures have been recognized by the State Human Resources Commission as substantially equivalent. (emphasis supplied).

The ALJ further stated in Conclusion of Law 2 that due to the resolutions passed by the Rockingham County Board of Commissions, and in absence of an exemption, "Respondent's conduct as to disciplinary or grievance procedures is controlled by [Subchapter J]."

Both Finding 19's assertion "as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 *et seq*" and Conclusion of Law 2 are reviewed *de novo* on appeal. *See Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 131, 560 S.E.2d 374, 380-81 (2002) ("We will review conclusions of law *de novo* on appeal regardless of their label.").

We hold Subchapter I is applicable in this case, and reverse the ALJ's conclusions that Subchapter J applies. 25 NCAC 01A.0103(6) (2016) provides the definition of local government employees as "those employees of local social services departments, public health departments, mental health centers and local offices of civil preparedness which receive federal grant-in-aid funds." The evidence and the ALJ's findings of fact demonstrate Watlington's position fits this definition as an employee of a local department of social services, RCDSS. As such, Subchapter I, and not Subchapter J, governs both the substantive just cause determination, the analysis of whether any procedural violations occurred in this case, and the remedies available.

VII. Just Cause Analysis

[5] N.C. Gen. Stat. § 150B-34 (2015) provides that "[i]n each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law." The ALJ's duties are further clarified by 26 NCAC 3.0127 (2016) stating the ALJ's final decision "shall fully dispose of all issues required to resolve the case" and is required to contain "findings of fact" and "conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations."

As a career State employee subject to the SHRA, Watlington's employment may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a). In this case, the ALJ articulated the correct three-part *Warren* test applicable to terminations alleging unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren v. N.C. Dep't of Crime Control and Pub. Safety, 221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925 (2012); *see Harris*, __ N.C. App. at __, __ S.E.2d at __.

Just cause must be determined based "upon an examination of the facts and circumstances of each individual case. Inevitably, this inquiry

requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Harris*, __ N.C. App. at __, __ S.E.2d at __ (citation and quotation marks omitted).

This Court has noted:

> In an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness.

Id. at __, __ S.E.2d at __ (brackets, citations, and quotation marks omitted).

Here, the ALJ's final decision addressed the first prong of the *Warren* test in Finding of Fact 13. The ALJ found Watlington had engaged in the conduct as RCDSS alleged. This finding of fact is not disputed by either party and is binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

However, the ALJ failed to make any findings of fact or conclusions of law applying the second and third prongs of the *Warren* test to the facts of this case. *See Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. Nothing in the final decision indicates Watlington's conduct as found by the ALJ amounted to unacceptable personal conduct. Furthermore, as both the RCDSS and Watlington acknowledge in their briefs, no conclusion of law asserts RCDSS had substantive just cause for any disciplinary action against Watlington. Rather, under the last section of the order labeled "Final Decision," the ALJ simply states "Petitioner's termination is affirmed." This statement does not constitute an acceptable conclusion of law that RCDSS terminated Watlington based upon just cause. *See id.*

Pursuant to N.C. Gen. Stat. § 150B-51, we remand the case to the ALJ to make proper findings of fact and conclusions of law regarding: (1) whether Watlington's conduct constituted unacceptable personal conduct, and (2) "whether that misconduct amounted to just cause for the disciplinary action taken." *Id.*; *see Harris*, __ N.C. App. at __, __ S.E.2d at __. In making such determinations on remand, the ALJ is bound by the definitions and procedural requirements of Subchapter I.

VIII. Award of Back Pay

[6] Back pay is not provided as a remedy for a procedural violation under Subchapter I. Both parties agree 25 NCAC 01B.0432(b) expired in 2014 and no provision has been promulgated in its place. Furthermore, we note N.C. Gen. Stat. § 150B-33(11), which is cited by the ALJ in support of the award of back pay, does not provide the ALJ with independent authority to award back pay. N.C. Gen. Stat. § 150B-33(11) allows the ALJ to award attorney's fees or witnesses' fees under certain circumstances, one of which is when the ALJ awards back pay as provided in the General Statutes and North Carolina Administrative Code. Because we find that Subchapter I, and not Subchapter J, governs this case, we reverse the ALJ's award for back pay.

Upon remand, the ALJ should determine whether a procedural violation occurred under Subchapter I. If the ALJ determines a procedural violation occurred, the ALJ is limited to those remedies provided in Subchapter I.

IX. Conclusion

RCDSS never contested Watlington's status as a career State employee or that she is subject to the provisions of the SHRA. We affirm the ALJ's conclusion of law that Watlington was a career State employee subject to the SHRA, and as such RCDSS must show just cause for her termination. We reverse the ALJ's conclusion of law that Subchapter J applies, and hold Subchapter I governs this case.

The ALJ failed to make appropriate findings of fact or conclusions of law to allow us to review the substantive just cause determination. We remand to the ALJ to make findings of fact and conclusions of law applying the three-step inquiry as set out in *Warren* to the facts of this case. In doing so, the ALJ must apply the definitions of just cause and unacceptable personal conduct found in Title 25, Subchapter I of the North Carolina Administrative Code.

We reverse that portion of the ALJ's order awarding Watlington back pay. On remand, the ALJ should determine whether RCDSS committed a procedural violation under Subchapter I. If a procedural violation exists, the ALJ is bound by and limited to those remedies provided under Subchapter I. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges ELMORE and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 APRIL 2017)

CHERRY CMTY. ORG. v. STONEHUNT, LLC No. 16-905	Mecklenburg (15CVS16825)	Dismissed
CRABTREE v. SMITH No. 16-864	Wake (15CVS15523)	Affirmed
IN RE A.M.D. No. 16-943	Caldwell (14J139)	Affirmed
IN RE A.P. No. 16-931	Forsyth (15J267) (15J268)	Affirmed
IN RE A.S. No. 16-1077	Forsyth (15J185)	Affirmed
IN RE C.M.B. No. 16-952	Guilford (14JT385) (14JT386) (14JT387) (14JT388) (14JT389)	Affirmed
IN RE D.R. No. 16-994	McDowell (13JA126-127)	Affirmed
IN RE FORECLOSURE OF GUPTON No. 16-835	Wake (15SP699)	Affirmed
IN RE J.H. No. 16-897	Robeson (14JT236-237)	Affirmed
IN RE J.L.J. No. 16-1085	Iredell (14JT58-59)	Affirmed
IN RE K.S.B. No. 16-894	Wake (14JT332-333)	Affirmed
IN RE SMITH No. 16-882	Mecklenburg (15SPC1360)	Reversed and Remanded
LAW FIRM OF MICHAEL A. DEMAYO, LLP v. SCHWABA LAW FIRM No. 16-899	Mecklenburg (15CVS6967)	Affirmed

SE. REAL ESTATE & DISC. CO. v. BANK OF N.C. No. 16-633	Transylvania (15CVS674)	Vacated and remanded in part, dismissed in part.
STATE v. CARROLL No. 16-986	Affirmed (04CRS58398)	Davidson
STATE v. CASTANEDA-PENA No. 16-806	Guilford (15CRS70341-43)	Affirmed
STATE v. CREWS No. 16-902	Rutherford (15CRS50829)	Affirmed
STATE v. HART No. 16-784	Onslow (15CRS52257)	No Error
STATE v. JOHNSON No. 16-907	Johnston (15CRS54930)	AFFIRMED and REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. LAM No. 16-651	Iredell (11CRS54355-56) (11CRS54434)	Remanded in Part
STATE v. LOCKLEAR No. 16-900	Richmond (98CRS5131-32) (99CRS874-875)	Dismissed
STATE v. MARTIN No. 16-795	Catawba (14CRS52550)	Affirmed in part, Dismissed in part.
STATE v. McCASTER No. 16-640	Alamance (14CRS55089)	No Error
STATE v. McNAIR No. 16-1006	Pamlico (13CRS50407) (13CRS700495)	Vacated and Remanded for a New Sentencing Hearing.
STATE v. NETTLES No. 16-923	New Hanover (10CRS57913) (10CRS58745)	Affirmed
STATE v. PALM No. 16-831	Durham (15CRS55343)	NO ERROR IN PART; DISMISSED IN PART WITHOUT PREJUDICE

STATE v. PERRY No. 16-722	Carteret (13CRS55626) (14CRS485) (14CRS50609) (14CRS52915)	Affirmed
STATE v. RAMEY No. 16-876	Forsyth (14CRS59009) (15CRS3550)	No Error
STATE v. VALENTINE No. 16-427	New Hanover (13CRS55682-89) (13CRS55691) (13CRS8312-15)	No error. Remanded.
STATE v. WALKER No. 16-794	Mecklenburg (15CRS216915)	Affirmed
STATE v. WILLIAMS No. 16-686	Wake (13CRS217871) (14CRS528)	No Error
STONEWALL CONSTR. SERVS., LLC v. FROSTY PARROTT BURLINGTON, LLC No. 16-982	Alamance (15CVS124)	Dismissed

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