256 N.C. App.—No. 1 Pages 1-164

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 2, 2019

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[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
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COURT OF APPEALS

CASES REPORTED

FILED 17 OCTOBER 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appealability—waiver—sentencing hearing—failure to object or request continuance—Rule 10(a)(1)—Defendant waived any argument in an opium trafficking case that a sentencing hearing should not have been conducted at a particular time, or in front of a particular judge, by failing to either object to the commencement of the hearing or request a continuance as required by N.C. R. App. P. 10(a)(1). **State v. Meadows, 124.**

Preservation of issues—abandoned during appellate oral arguments—The Court of Appeals did not address appellant's asserted claims for negligence and nuisance in his amended complaint where on appeal appellant's counsel abandoned these claims at oral argument. **Parker v. Desherbinin, 55.**

Preservation of issues—child custody hearing—time constraint—failure to request additional time—The trial court did not abuse its discretion in a child custody case by terminating plaintiff life partner's testimony and limiting plaintiff's evidentiary presentation to one hour where plaintiff failed to request any additional time at the hearing. **Moriggia v. Castelo, 34.**

Preservation of issues—sentencing argument—failure to object at trial—consecutive sentences—Defendant failed to preserve for appellate review in an opium trafficking case her sentencing argument, that imposition of "consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug

EVIDENCE

Conclusions of law—adverse possession—color of title—unresolved factual issues—metes and bounds description—The trial court erred in a property dispute case by making a conclusion of law that appellant had not established adverse possession to the south side of the disputed area bounded by the chain link fence. There remained unresolved factual issues of whether the metes-and-bounds description contained in appellant's deed and the incorporated reference to a 1982 survey accurately described the extent of appellant's property to establish he possessed color of title to the remaining disputed area. **Parker v. Desherbinin, 55.**

Findings of fact—construction of fence—property line—boundary of property—sufficiency of evidence—The trial court erred in a property dispute case by making a finding of fact that appellant constructed a fence along what he believed to be the northern boundary line of his property where the overwhelming non-contradicted evidence indicated appellant constructed a fence within the boundary of his property as purportedly established by a 1982 survey. **Parker v. Desherbinin, 55.**

Findings of fact—disputed area not mowed—possession of disputed area—concession to open and continuous possession—The trial court erred in a property dispute case by making a finding of fact that the disputed area could not be mowed because it was so overgrown and there was nothing visible to indicate anyone was in possession of or maintaining the disputed area. Appellees conceded to appellant's open and continuous possession of that portion of the disputed area up to the location of appellant's chain link fence. **Parker v. Desherbinin, 55.**

Witness testimony—contacted attorney—terminated pregnancies—reason for marrying victim—already admitted without objection—no prejudicial error—The trial court did not abuse its discretion in a first-degree murder case by allowing certain witness testimony, including a statement by defendant that she had already contacted an attorney when the police came to her house to investigate her husband's death, that defendant had terminated two pregnancies, and that defendant stated she married the victim because he had cancer and would be dying soon—where the same evidence was already admitted without objection or there was no reasonable possibility of a different result given the overwhelming evidence of defendant's guilt. **State v. Madonna, 112.**

HOMICIDE

First-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation—The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss the charge where there was substantial evidence of premeditation and deliberation, including that the married couple was arguing, defendant wife had begun a romantic relationship with her therapist and planned to ask her husband for a divorce, a home computer revealed internet searches about killing, defendant got a gun and knife from her nephew, defendant texted her therapist afterwards that it was almost done and got ugly, defendant disposed of her bloodstained clothing, and defendant threw away some of her husband's important belongings. **State v. Madonna, 112.**

First-degree murder—motion to dismiss—sufficiency of evidence—self-defense—The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss where the State presented substantial evidence tending to contradict defendant wife's claim of self-defense, including the frailty and numerous disabilities of her husband. Further, even after the victim had been wounded twice by gunshots, defendant stabbed him twelve times. **State v. Madonna, 112.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JESSICA ELAINE VANN BRADLEY, PLAINTIFF
v.
JOSHUA LENNON BRADLEY, DEFENDANT

No. COA16-1303

Filed 17 October 2017

Jurisdiction—personal jurisdiction—minimum contacts—due process—divorce—child custody and support

The trial court did not err in a divorce and child custody and support case by denying defendant husband's motion to dismiss based on lack of personal jurisdiction where the parties never lived together in North Carolina and lived abroad for the majority of the marriage. Defendant had sufficient minimum contacts with North Carolina to satisfy due process, including two marriage ceremonies, a baby shower, storage of marital property, and directing mail to be delivered to plaintiff wife's father while the parties were abroad.

Appeal by defendant from order entered 13 July 2016 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 9 August 2017.

Rice Law, PLLC, by Mark Spencer Williams, Christine M. Sprow, and Ashton Overholt, and The Law Firm of Mark Hayes, by Mark L. Hayes, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Matthew H. Mall, and Michael J. Crook, for defendant-appellant.

DAVIS, Judge.

During the four-year marriage of Joshua and Jessica Bradley, they lived — at various times — in England, Australia, New Jersey, and New York. However, they were married in North Carolina, and over the course of their marriage Joshua engaged in various acts to maintain his ties with this state. The sole issue in this appeal arising from Jessica's divorce action is whether the trial court correctly concluded that North Carolina possessed personal jurisdiction over Joshua. Because we conclude that Joshua had sufficient minimum contacts with North Carolina such that the exercise of jurisdiction over him by a North Carolina court is consistent with principles of due process, we affirm the trial court's order denying Joshua's motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

Factual and Procedural Background

Joshua was born and raised in Virginia. Jessica is from North Carolina. The parties first met in Virginia while Jessica was in graduate school and Joshua was in law school. After Jessica completed her schooling in Virginia, she returned to North Carolina to complete her Master's Degree. She was living in North Carolina with her parents (the "Vanns") in Bladen County at the time that she and Joshua married.

Upon Joshua's graduation from the University of Virginia School of Law in 2009, he was admitted to the New York bar and began working at a law firm in New York City. As part of his employment with the firm, he was sent to work on temporary assignments in various locations. At the time the couple married, Joshua was on a temporary assignment to Sydney, Australia.

Jessica and Joshua had two wedding ceremonies — both of which took place in Bladen County. The first was a "legal marriage ceremony" in March 2011, and the second was a "formal" ceremony in August 2011. For each ceremony, Joshua flew to North Carolina for a few days and then returned to Australia.

The parties lived in Australia as a married couple from September 2011 until July 2013. In July 2013, Joshua was recalled by his employer to the firm's New York office. The parties resided in New York for two months and then moved to New Jersey in October 2013 where they leased real property and lived for nine months.

In May or June 2014, Joshua received another temporary assignment to work in London, England. The parties moved to London and lived

there from July 2014 until June 2015. Because they were moving abroad, they decided to store various items of their personal property in a storage unit. Joshua contacted Jessica's father, Jesse Vann ("Mr. Vann"), and asked him to rent a storage unit in Fayetteville, North Carolina for this purpose. Mr. Vann agreed to do so and rented the storage unit in his own name. Joshua proceeded to ship various property — including marital property of the parties — to Mr. Vann, which he placed in the storage unit in Fayetteville. Joshua continuously paid the fees associated with the storage unit for the next 23 months.

While the parties were living abroad, Joshua arranged for a portion of their mail to be sent to the Vanns' home in North Carolina, and they also received additional mail at his parents' home in Virginia and at his employer's address in New York. Among the items of mail he received at the Vanns' home were certain "boxed shipments."

In May 2014, the parties learned that Jessica was pregnant. During the pregnancy, the parties had two baby showers in the United States — one in Bladen County, North Carolina and one in Virginia. The parties' child, Eden, was born on 1 February 2015 in London, England.

In May 2015, the parties agreed that they would live apart for a period of time. The family flew to Virginia where Jessica and Eden began living with Joshua's parents.

In June 2015, Joshua and Jessica officially decided to separate. Jessica and Eden moved from Joshua's parents' home in Virginia to live with her parents in Bladen County. At the time this action commenced, Jessica was living in North Carolina with Eden, and Joshua was still living in London.

On 1 March 2016, Jessica filed a complaint in New Hanover County District Court seeking child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees. On 1 April 2016, Joshua filed a motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, asserting that the trial court lacked personal jurisdiction over him. On 14 April 2016, he filed an affidavit in support of his motion. Four days later, he filed an amended motion to dismiss.

A hearing was held on Joshua's amended motion to dismiss on 15 June 2016 before the Honorable Jeffrey Evan Noecker. Prior to the hearing, Joshua filed a second affidavit. On 13 July 2016, the trial court entered an order denying Joshua's amended motion to dismiss and concluding that it possessed personal jurisdiction over Joshua. Joshua filed a timely notice of appeal.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we have appellate jurisdiction to hear Joshua's appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) ("[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." (citation, quotation marks, and brackets omitted)). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

However, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." N.C. Gen. Stat. § 1-277(b) (2015). Thus, Joshua has a right of immediate appeal. *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009) (holding that "N.C. Gen. Stat. § 1-277(b) allows . . . for an immediate appeal of the denial of a motion to dismiss based on personal jurisdiction"), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010).

II. Personal Jurisdiction

Joshua contends that the trial court erred in denying his motion to dismiss under Rule 12(b)(2) as to Jessica's claims for child support, post-separation support, alimony, and equitable distribution.[1] "The standard

1. Joshua does not contest the fact that the trial court possesses jurisdiction with respect to the parties' child custody dispute. "The jurisdiction of the courts of this State to make child custody determinations is controlled by N.C. Gen. Stat. Sec. 50A-3 . . . ." *Hart v. Hart*, 74 N.C. App. 1, 5-6, 327 S.E.2d 631, 635 (1985). "Personal jurisdiction over the nonresident parent is not a requirement under the [statute]." *Id.* at 7, 327 S.E.2d at 635.

of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record." *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation, quotation marks, and brackets omitted), *disc. review denied*, 365 N.C. 574, 724 S.E.2d 529 (2012). We have held that "[t]he trial court's determination regarding the existence of grounds for personal jurisdiction is a question of fact." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357, 583 S.E.2d 707, 710 (2003), *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004).

> The determination of whether the trial court can properly exercise personal jurisdiction over a non-resident defendant is a two-part inquiry. First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution.

Filmar Racing, Inc. v. Stewart, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001) (internal citations and quotation marks omitted).[2]

"In order to determine whether the exercise of personal jurisdiction comports with due process, the trial court must evaluate whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Eluhu*, 159 N.C. App. at 358, 583 S.E.2d at 710 (2003) (citation, quotation marks, and brackets omitted). "The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court." *Bell*, 216 N.C. App. at 544, 716 S.E.2d at 872 (citation and quotation marks omitted).

> Factors for determining existence of minimum contacts include (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 617, 532 S.E.2d 215, 219 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

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2. Joshua does not dispute that North Carolina's long-arm statute permits the exercise of jurisdiction over him by a North Carolina court. *See* N.C. Gen. Stat. § 1-75.4 (2015).

"The Court must also weigh and consider the interests of and fairness to the parties involved in the litigation." *Sherlock v. Sherlock*, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001) (citation omitted). However, as the United States Supreme Court has stated:

> [T]he Due Process Clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294, 62 L. Ed. 2d 490, 499-500 (1980).

As an initial matter, we note that the United States Supreme Court has held the mere fact that a defendant's wedding ceremony took place in a particular state does not — by itself — establish personal jurisdiction over him by the courts of that state. *See Kulko v. Superior Court of Cal.*, 436 U.S. 84, 93, 56 L. Ed. 2d 132, 142 (1978) ("[W]here two New York domiciliaries, for reasons of convenience, marry in the State of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident . . . ."); *see also Southern v. Southern*, 43 N.C. App. 159, 163, 258 S.E.2d 422, 425 (1979) (citing *Kulko* for proposition that England lacked personal jurisdiction over defendant despite fact that parties were married in London because there was "no indication in the record that England was the parties' matrimonial domicile or that there were any contacts other than the marriage itself sufficient to justify imposing upon defendant the burden of defending suit in England").

Therefore, in order for North Carolina's courts to exercise jurisdiction over Joshua, he must have had sufficient contacts with North Carolina to satisfy due process standards. Before analyzing the trial court's findings in its 13 July 2016 order, we find it instructive to review prior case law from our appellate courts on this subject.

A. Cases Where No Personal Jurisdiction Existed

In *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), the parties were married in Illinois, but after four years of marriage they separated. The plaintiff took custody of their young daughter and moved to North Carolina. For ten years, the defendant mailed child support payments to the plaintiff and visited the child in North Carolina. *Id.* at 478, 329 S.E.2d at 665. When the defendant stopped payments after ten years, the plaintiff sued him for child support in North Carolina while he was living in Tokyo, Japan. The defendant moved to dismiss the complaint, arguing that the court did not have personal jurisdiction over him. The trial court denied the motion. *Id.*

On appeal, our Supreme Court held that the trial court had erred in denying the defendant's motion to dismiss. *Id.* at 478, 329 S.E.2d at 666. The Court ruled that "the defendant ha[d] engaged in no acts with respect to North Carolina by which he ha[d] purposefully availed himself of the benefits, protections and privileges of the laws of this State." *Id.* at 480-81, 329 S.E.2d at 667.

> In the instant case the child's presence in North Carolina was not caused by the defendant's acquiescence. Instead, it was solely the result of the plaintiff's decision as the custodial parent to live here with the child. As previously noted, the Supreme Court has expressly stated that unilateral acts by the party claiming a relationship with a non-resident defendant may not, without more, satisfy due process requirements. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). We conclude that *Kulko* compels a finding that this defendant did not purposefully avail himself of the benefits and protections of the laws of this State. A contrary conclusion would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside. *See Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978).

Id. at 479, 329 S.E.2d at 666.

The Court also determined that the defendant's six visits over ten years to North Carolina to visit the child were insufficient to confer jurisdiction over him. *Id.* In comparing the case to *Kulko*, the Court observed that

> [t]he father's visits to California in *Kulko* were fewer and more distant in time from the litigation than were the visits in this case. The visits by this defendant to North Carolina, however, were no less temporary than those in *Kulko* and were so unrelated to this action that he could not have reasonably anticipated being subjected to suit here.

Id. at 480, 329 S.E.2d at 667.

Finally, the Supreme Court acknowledged that "the presence of the child and one parent in North Carolina might make this State the most convenient forum for the action." *Id.* However, the Court ruled that this fact alone "does not confer personal jurisdiction over a non-resident defendant." *Id.* (citation omitted). The Court stated that it was "mindful that North Carolina has an important interest in ensuring that nonresident parents fulfill their support obligations to their children living here[,]" but that "[a]bsent the constitutionally required minimum contacts . . . this interest will not suffice to make North Carolina a proper forum in which to require the defendant to defend the action . . . ." *Id.* (citation omitted).

In *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988), the plaintiff and defendant were married in Washington and owned real and personal property in that state. After the parties separated, the plaintiff moved to North Carolina. *Id.* at 455, 363 S.E.2d at 874. The plaintiff subsequently filed a complaint in North Carolina for divorce, child custody, child support, and equitable distribution. *Id.* at 453, 363 S.E.2d at 872-73. In determining that it possessed personal jurisdiction over the defendant, the trial court took into consideration the fact that "certain property of the parties was located in North Carolina." *Id.* at 455, 363 S.E.2d at 874.

On appeal, we held that the trial court lacked personal jurisdiction over the defendant because he had never lived in North Carolina and the record did not specify whether he had consented to his personal property being brought into North Carolina. *Id.* at 456, 363 S.E.2d at 874. In so holding, we stated that

> [t]he fact that there exists some personal property in North Carolina in which the defendant may have an interest because of the equitable distribution statutes is not alone sufficient to establish jurisdiction over the defendant or his property. If there was evidence the defendant brought the property into North Carolina or consented to the placement of property in North Carolina, this would be

> some evidence of contacts with the forum State, the defendant and the litigation. This however, would not itself necessarily be decisive concerning the issue of jurisdiction.

Id. (internal citations omitted).

Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990), involved a suit by the plaintiff against the defendant in North Carolina seeking alimony and equitable distribution, alleging that the defendant had committed adultery during the marriage. The defendant filed a motion to dismiss for lack of personal jurisdiction, asserting that the complaint contained no evidence that the parties were married in North Carolina, that he was living in the state, or that the misconduct had occurred in the state. *Id.* at 302, 390 S.E.2d at 768. Moreover, the defendant argued that he had

> left the State of North Carolina more than three and one-half years prior to the commencement of this action, had resided in South Carolina since that time, owned no property in North Carolina, conducted no business in this State, and had not invoked the protection of North Carolina law for any purpose or reason since leaving this State.

Id. at 300, 390 S.E.2d at 767. The plaintiff, in turn, contended that because the defendant had "abandoned" her in North Carolina while they were legally married, he had sufficient contacts with the state. *Id.* at 304, 390 S.E.2d at 769.

The trial court dismissed the plaintiff's complaint, and we affirmed, stating that

> plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case. . . . [T]he mere fact that the marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant. Were it otherwise, this State could exercise personal jurisdiction over a foreign defendant solely by virtue of a plaintiff's unilateral act of moving to North Carolina prior to the termination of the marriage. This is plainly impermissible.

Id. at 304, 390 S.E.2d at 769-70 (citations omitted).

In *Shamley v. Shamley*, 117 N.C. App. 175, 455 S.E.2d 435 (1994), the plaintiff and defendant were married in New York. After twenty years of living in New Jersey, the plaintiff began looking to buy houses, and eventually he bought a home in North Carolina. *Id.* at 176-77, 455 S.E.2d at 436. The defendant accompanied him to North Carolina, but she did not take part in purchasing the house. *Id.* at 181, 455 S.E.2d at 438. While she was in North Carolina during another visit, the defendant purchased an automobile, which she later had titled in New Jersey. *Id.* Upon the parties' separation, the plaintiff sued for absolute divorce and equitable distribution in North Carolina, and the defendant brought a similar suit in New Jersey. *Id.* at 177, 455 S.E.2d at 436. The trial court determined that it did not have personal jurisdiction over the defendant and dismissed the case. *Id.* at 177-78, 455 S.E.2d at 436.

On appeal, we affirmed, holding that the defendant's "only voluntary contacts with North Carolina were during a brief visit in which she looked at houses with [plaintiff] and another visit in which she purchased an automobile . . . ." *Id.* at 182, 455 S.E.2d at 439. We concluded that she "could not, on the basis of these contacts, reasonably anticipate being haled into court here." *Id.*

Finally, *Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011), involved parties who were married in New York and lived together as husband and wife for 41 years. *Id.* at 409, 717 S.E.2d at 67. Five years prior to their divorce, the couple moved to Mooresville, North Carolina to live near their adult children. *Id.* However, after four months, the defendant returned to live in the couple's New York home. *Id.* at 409, 717 S.E.2d at 67-68. The plaintiff subsequently purchased a home in Statesville, North Carolina. *Id.* at 409, 717 S.E.2d at 68. She spent the final three years of the marriage living at times in New York with the defendant and at other times in North Carolina near her children, whom the defendant also briefly visited. *Id.* Upon the parties' separation, the plaintiff filed a complaint for post-separation support, alimony, absolute divorce, and equitable distribution in North Carolina. *Id.* The defendant moved to dismiss the action, and the trial court denied his motion, concluding that it possessed personal jurisdiction over him. *Id.* at 409-10, 717 S.E.2d at 68.

On appeal, we determined that the defendant's "limited contacts with North Carolina" — including the four months that he lived in North Carolina with the plaintiff — were "analogous to those in *Shamley* . . . ." *Id.* at 412, 717 S.E.2d at 69. We concluded that "[b]ecause Defendant could not reasonably anticipate being haled into court on the basis of these contacts, the trial court's exercise of personal jurisdiction over Defendant would violate his due process rights." *Id.*

B. Cases Where Personal Jurisdiction Was Found to Exist

In *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979), the plaintiff was living in Missouri and the defendant in Alabama when the plaintiff filed suit in North Carolina for alimony and child support. She argued that jurisdiction existed over the defendant because he "own[ed] real property in North Carolina which could be used to satisfy the divorce judgment." *Id.* at 345, 255 S.E.2d at 412. The trial court found that personal jurisdiction existed because the parties had jointly purchased a house in Montreat, North Carolina. *Id.* at 353, 255 S.E.2d at 413.

On appeal, we affirmed, holding that because the defendant was making payments on the house but not paying the plaintiff spousal and child support "the North Carolina property [wa]s certainly a part of the source of the underlying controversy between the plaintiff and the defendant." *Id.* (quotation marks omitted). Thus, we reasoned that

> not allowing plaintiff to obtain jurisdiction over defendant (who left the state of his domicil[e] less than one month after being ordered to make such payments to his wife and children, purchased real estate in North Carolina and incurred financial obligations as a result thereof) could clearly result in defendant being allowed to avoid the court ordered payments by purchasing North Carolina real estate. . . . Clearly, the cause of action here was a direct and foreseeable outgrowth of defendant's contacts with this state.

Id. at 354, 255 S.E.2d at 413.

In *Harris v. Harris*, 104 N.C. App. 574, 581, 410 S.E.2d 527, 532 (1991), the defendant was born in Virginia but attended public schools and universities in North Carolina. *Id.* at 575, 410 S.E.2d at 528. He and the plaintiff were married in North Carolina and established a marital residence in this State for three years during which time their first child was born. *Id.* For the remainder of their eighteen-year marriage, the parties lived in Virginia, although they returned to visit family members in North Carolina during that time. Even after moving to Virginia, the defendant — who owned a dog training business — maintained business contacts with dog trainers, sellers, and purchasers in North Carolina, traveling to the state "at least once a year to participate in dog training exercises or dog shows and competitions." *Id.* at 576, 410 S.E.2d at 529. Upon the parties' divorce, the plaintiff and one of the parties' children returned to live in North Carolina. *Id.*

The plaintiff filed an action for child support, and the defendant moved to dismiss the complaint for lack of personal jurisdiction. *Id.* at 576. The trial court concluded that personal jurisdiction existed over the defendant. *Id.*

Observing that "the defendant has substantial past and present contacts with North Carolina[,]" this Court affirmed the trial court's order, stating as follows:

> The defendant moved to North Carolina at an early age and lived here until 1974. He and the plaintiff were married here in 1971, had a child here in 1973, and resided in North Carolina as husband and wife for nearly three years before moving to Virginia. While in Virginia, they maintained contacts with family members in North Carolina, visiting them during the various holidays. In 1989, the parties separated and the plaintiff returned to North Carolina with their third child and was joined later by their second child. Since the parties' separation, the defendant has maintained his contacts with family members in this State, visiting them on at least two occasions. Furthermore, the defendant has established and maintained business contacts in North Carolina and has travelled routinely to this State to participate in business-related activities. Viewed in light of North Carolina's important interest in ensuring that non-resident parents fulfill their support obligations to their children living here, the quantity, nature, and quality of the defendant's past and present contacts with North Carolina support a finding of "minimum contacts" and therefore support the exercise of personal jurisdiction over him in our courts, probably the most convenient forum for this action.

Id. at 581-82, 410 S.E.2d at 532 (internal citations and quotation marks omitted).

Bates v. Jarrett, 135 N.C. App. 594, 521 S.E.2d 735 (1999), involved a wife and husband who were married and lived in North Carolina for nearly eight years. *Id.* at 600, 521 S.E.2d at 739. Upon their divorce, the husband moved out of the state. The wife sought a domestic violence protective order in Cumberland County, North Carolina but failed to serve the husband. Nevertheless, the husband made an appearance at a domestic violence hearing. *Id.* at 600-01, 521 S.E.2d at 739.

Upon the couple's separation, the husband allowed the wife to bring the couple's Subaru into North Carolina, but then — without the wife's consent — he sold the car and conveyed the title to another couple who was living in North Carolina. *Id.* The couple who bought the Subaru were involved in a motor vehicle accident while driving the vehicle, and the insurance proceeds were paid to them. *Id.*

The wife filed suit against both the Subaru's purchasers and her husband, contending that she had not consented to the sale of the vehicle. *Id.* at 601, 521 S.E.2d at 739. In the same lawsuit, she also filed an equitable distribution claim against her husband. *Id.* at 595, 521 S.E.2d at 736. The husband moved to dismiss the claim against him, arguing that the trial court did not possess personal jurisdiction over him. The trial court concluded that it lacked personal jurisdiction over the husband. *Id.* at 596, 521 S.E.2d at 736.

On appeal, we held that personal jurisdiction existed over the husband. In so holding, we observed that the marital couple had "resided in this State from 1985 until 1992 or 1993" and that the husband had "consented to [the wife] bringing the Subaru to this State." *Id.* at 600, 521 S.E.2d at 739. Moreover, we noted that the husband "had additional contact with the State. He appeared at the domestic violence hearing without being served with process." *Id.* at 600, 521 S.E.2d at 739. Finally, we reasoned that "the actions of [the husband] . . . involving the Subaru constitute sufficient minimum contacts with the State such that he should have reasonably anticipated being haled into Court here over the issues of possession and ownership of this vehicle." *Id.* at 601, 521 S.E.2d at 739.

In *Lang v. Lang*, 157 N.C. App. 703, 579 S.E.2d 919 (2003), the defendant and his wife were married in Germany and remained married for twelve years. One daughter — the plaintiff — was born of the marriage. After the marriage ended, the couple agreed to a separation agreement whereby the defendant would pay spousal and child support. "Sometime thereafter, defendant moved to Henderson County, North Carolina." *Id.* at 704, 579 S.E.2d at 921. There he became involved in the "business of selling real estate in Henderson County, North Carolina" and "signed, as a seller, offers to purchase and contract for real property located in North Carolina . . . ." *Id.* at 709, 579 S.E.2d at 923 (quotation marks omitted). At that time, the plaintiff and her mother both sought support orders in North Carolina based upon the defendant's actions in choosing to live and conduct business activities within the state. *Id.*

Thirty years after the separation agreement was executed, the plaintiff filed another suit against the defendant in North Carolina to enforce

the support judgment she had previously secured against him. *Id.* at 704, 579 S.E.2d at 920-21. The defendant argued that the trial court did not have jurisdiction over him because he "was never a resident or citizen of the State[,]" but the court denied his motion. *Id.* at 704-05, 579 S.E.2d at 921. The trial court found, in pertinent part, that the defendant had been "issued a North Carolina operator's license[,]" had owned a subdivision in Henderson County, North Carolina for ten years and was present in the subdivision "hundreds of times[;]" had been showing homes in the subdivision and "taking back mortgages to assist with the financing[;]" and had purchased and registered a new automobile in North Carolina. *Id.* at 705-06, 579 S.E.2d at 921 (quotation marks omitted).

This Court held that the evidence of the defendant's business activities supported the trial court's finding that his contacts in North Carolina were "continuous and systematic[.]" *Id.* at 709, 579 S.E.2d at 923. We concluded that these contacts were "sufficient to support the conclusion that defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws and could therefore reasonably anticipate being haled into court in North Carolina." *Id.* (citation, quotation marks, and brackets omitted).

In *Butler v. Butler*, 152 N.C. App. 74, 566 S.E.2d 707 (2002), the parties were married in Florida and lived in the Bahamas during the first four years of their marriage. After five years of marriage, the couple purchased a house together in Moore County, North Carolina where the plaintiff and the couple's daughters lived for the remaining four years of the marriage. *Id.* at 75, 566 S.E.2d at 708. The defendant continued living in the Bahamas but visited his family in North Carolina. In addition, he maintained a membership with the "Moore County Hounds, a social and sporting association and ha[d] participated in its activities in Moore County." *Id.* at 77, 566 S.E.2d at 709 (brackets omitted). When the parties separated, the plaintiff sued in North Carolina for child support, alimony, post-separation support, and equitable distribution. *Id.* at 75-76, 566 S.E.2d at 708. The defendant moved to dismiss under Rule 12(b)(2), but the trial court found that he had sufficient minimum contacts with North Carolina to permit the court to exercise personal jurisdiction over him. *Id.* at 76, 566 S.E.2d at 708.

We affirmed, holding as follows:

> Defendant's name appears on both the deed and the [Moore County] home mortgage. Defendant testified that he was convinced that North Carolina was the best place

> for his daughter and stepdaughter to receive an education. Based on this competent evidence, the trial court found as fact that one reason defendant purchased the house in North Carolina was to allow his daughter to be schooled here. Following their move to North Carolina, defendant visited plaintiff and the girls at least once a month for two years, staying in the house for three or more days at a time. During this period, plaintiff and defendant were still married. Thus, we agree with the trial court's characterization of the house in Moore County as a "marital residence." In addition to visiting his family in this State, defendant maintained a membership in Moore County Hounds, a social and sporting association, and participated in the association's activities in Moore County. Finally, the evidence shows that defendant further benefitted from his connections with this State by using the equity line of credit on the Moore County house for business purposes.

Id. at 82, 566 S.E.2d at 712. For these reasons, we determined that "the record supports the conclusion that defendant purposefully availed himself of the benefits and protections of this State's laws." *Id.* at 83, 566 S.E.2d at 713.

In the present case, Jessica relies most heavily on our decision in *Sherlock*. In that case, the parties were married in Durham, North Carolina but never actually lived in the state, instead living abroad for the majority of their nearly sixteen-year marriage. They "resided in Egypt, Korea, the Philippines, India, Indonesia, Australia, and Thailand[,]" and "a six month stay in Georgia was the only time during their marriage that they lived in the United States." *Sherlock*, 143 N.C. App. at 304, 545 S.E.2d at 761. Upon their separation, the plaintiff sued the defendant in North Carolina seeking post-separation support. *Id.* at 301, 545 S.E.2d at 759. The trial court denied the defendant's motion to dismiss for lack of personal jurisdiction. *Id.*

On appeal, we determined that although the defendant was "seldom physically present within the state," he had sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction over him. *Id.* at 306, 545 S.E.2d at 762. In so holding, we summarized the defendant's contacts with North Carolina as follows:

> (1) their marriage ceremony was performed in Durham, North Carolina. Consequently, [the parties'] marriage license was filed there, and the provisions of Chapter 52,

> "Powers and Liabilities of Married Persons," governed various legal aspects of their relationship during the marriage; (2) while he was overseas, the defendant used his father-in-law's Durham address to receive important mail, including federal income tax documents; (3) between 1983 and 1989 the defendant's salary was directly deposited into a Wachovia bank account in Durham, North Carolina; (4) between 1984 and 1995 the defendant had a North Carolina drivers' license. To obtain a license, the defendant must have had at least a nominal "residence" in North Carolina; (5) in 1984, the defendant executed a Power of Attorney in Durham, and made Albert Sheehy, his father-in-law, his Attorney in Fact. This document was filed in the Durham County Registry; (6) in his capacity as Attorney in Fact, Mr. Sheehy conducted business on behalf of plaintiff and defendant while they were overseas; (7) in 1984, the defendant made a Last Will and Testament, naming Mr. Sheehy, of Durham, the executor of his will, and Mary Meschter, also of Durham, as alternate executor; (8) from 1992 to 1995 the defendant retained Frank Brown, a Durham accountant, to receive and pay bills on his behalf; and (9) in 1992, plaintiff and defendant opened an investment account with Edward D. Jones, Oxford, North Carolina, consisting of IRA accounts, money market funds, and mutual funds.

Id. at 304-05, 545 S.E.2d at 761.

Based on these contacts, we ruled that the defendant had "availed himself to the privilege of conducting activities within North Carolina, thus invoking the benefits and protections of its laws." *Id.* at 305, 545 S.E.2d at 762 (citation, quotation marks, and brackets omitted). In so holding, we emphasized the uniqueness of the factual scenario in *Sherlock*:

> This Court recognizes that a state does not attain personal jurisdiction over a defendant simply by being the center of gravity of the controversy or the most convenient location for the trial of the action. In the ordinary divorce case, it might be improper to assert jurisdiction over a defendant who has spent so little time in the forum state. However, the [parties'] history is unusual; their frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or

> abroad, require this Court to evaluate their situation on its own merits.

Id. at 306, 545 S.E.2d at 762 (internal citation and quotation marks omitted).

C. Application of Case Law to Present Action

In the present case, the trial court made the following pertinent findings of fact:

> 14. Joshua took a position as an attorney with Sullivan & Cromwell, LLP, a law firm with its headquarters in New York, New York. At all times since accepting this employment in October 2010, he has continued to be employed with Sullivan & Cromwell and is presently employed with this firm. Joshua's employment dictated the location the parties resided throughout their marriage.
>
> . . . .
>
> 16. Joshua and Jessica are Husband and Wife, having lawfully intermarried on or about 28 March 2011 in Bladen County, North Carolina. This was a legal marriage ceremony so that the parties could share one visa application as a married couple to apply for a visa to live in Australia while on temporary assignment with Sullivan & Cromwell.
>
> 17. The parties' marriage application, license and certificate of marriage was [sic] filed in the Bladen County Register of Deeds.
>
> 18. After the parties were legally married, Joshua flew to Sydney[,] Australia in connection with his temporary work assignment there for his employer on or about 5 May 2011. He returned to North Carolina on or about 11 August 2011 for the parties' second wedding ceremony.
>
> 19. The parties had a second "formal" marriage ceremony to which friends and family were invited in Dublin, North Carolina on 14 August 2011. Both parties attended and participated in the event after which they honeymooned in Europe.

20. With the approval of Jessica's father, Jess[e] Van[n], Joshua and Jessica used Mr. Vann's mailing address in Bladenboro, North Carolina as a home base for the receipt of mail and boxed shipments while the parties lived in Australia and then later London.

21. Joshua and Jessica used Jesse Vann's mailing address with his permission in Bladenboro, North Carolina as their home base to receive mail while they lived in Australia and London for such mail as:

    a. One Child Matters, a sponsorship of a child (in both names);

    b. Citibank (joint account);

    c. Capital One investing (which is an investment account in Joshua's sole name);

    d. Citigroup (an account in Joshua's sole name);

    e. TD Ameritrade (an account in Joshua's sole name).

22. The North Carolina address served as their headquarters for mail in the United States (although Joshua also received some mail at his parents' address in Virginia and his employer's address in New York.) All of the mail was statements for credit cards and investment accounts, which the Defendant administered online. On one occasion, Mr. Vann did overnight mail that perceived [sic] to be important to the parties in London.

23. The parties lived together in Australia as a married couple from on or about 3 September 2011 until July 2013.

24. In July 2013, the parties relocated to New York as Joshua was recalled by his employer to the New York Office. They lived in New York for approximately two months after which they established a residence in New Jersey.

25. The parties lived in New Jersey from October 2013 until May or June 2014 when Joshua undertook a temporary work assignment at the law firm's London Office.

26. The parties lived together in London from July 2014 until June 2015.

27. Prior to moving to London, the parties discussed storing items of personal property — much of it marital property but some of it the separate property of Joshua and some of it the separate property of Jessica — in North Carolina while they were to be living in London and they agreed to store the marital and separate property in Fayetteville, North Carolina.

28. Joshua contacted Jesse Vann, Jessica's father to see if he would facilitate the rental of a storage unit in Fayetteville and the receipt of the personal items.

29. On 27 June 2014, Joshua directed a moving company engaged by his employer to wit: Sullivan and Cromwell, to have marital property along with some of his and Jessica's separate property moved from New Jersey to a storage unit in Fayetteville, North Carolina. Joshua intentionally directed marital property to the State of North Carolina.

30. On or about 16 July 2014, Jessica's father, Jesse Vann, rented a storage unit acting under instructions from Joshua Bradley at ExtraSpaceStorage in Fayetteville, North Carolina. Mr. Vann took off a day of work, drove 42 miles to rent the storage unit and signed to receive the property that Joshua had sent to the unit from New Jersey.

31. The unit was rented by Mr. Vann in his own name. By agreement between Joshua and Mr. Vann, Joshua paid the storage unit rental fees and has continued to do so for twenty-three (23) months.

32. Mr. Vann acted as the agent of Joshua in renting the storage unit in North Carolina and receiving the goods on behalf of Joshua. Joshua arranged for Jesse Vann to act in this capacity.

33. The parties learned they were expecting a child in May 2014.

34. A baby shower was held 26 October 2014 in Dublin, North Carolina which Jessica and Joshua both

attended. Both parties also attended a baby shower in . . . Virginia.

35. There was one child born of the parties' marriage to wit: EDEN JOEL VANN BRADLEY born 1 February 2015 in London, England.

36. In late May 2015, Joshua suggested, and the parties agreed, that Jessica return to the United States with the baby. The parties flew back to the United States in June with EDEN after which Joshua returned to work in London while Jessica and Eden lived with Joshua's parents in Virginia for approximately one month until relocating to North Carolina.

37. Joshua has been and admits to being in the State of North Carolina on at least the following dates:

    a. 25 March 2011 through 29 March 2011

    b. 4 May 2011 through 5 May 2011

    c. 11 August 2011 through 15 August 2011

    d. 3 June 2012 through 15 June 2012

    e. 27 November 2013 through 30 November 2013

    f. 20 December 2013 through 26 December 2013

    g. 17 April 2014 through 21 April 2014

    h. 20 June 2014 through 29 June 2014

    i. 25 October 2014 through 1 November 2014

38. At no time after the parties were married did the parties live together as husband and wife within the State of North Carolina. The parties never purchased real property within the State of North Carolina. There is no evidence that Joshua ever had a NC [d]river's license or filed taxes in the State.

. . . .

40. Joshua admits that he "acquiesced to Plaintiff living in North Carolina with the minor child following our separation." However, the Court finds that Joshua did more than acquiesce and actually orchestrated events

which led to Jessica and Eden living in North Carolina in that:

a. He flew back to the United States with Jessica and Eden after discussing living apart for a while and left them at his parents' home in Virginia and returned to London.

b. Jessica began living at his parents' residence in Virginia with EDEN and at her parent's [sic] home in North Carolina with EDEN.

c. At some point, Joshua communicated to Jessica while she was residing with his parents in Virginia and after he had returned to London that their marriage was over.

d. Based on Joshua's actions, it was foreseeable or should have been foreseeable to Joshua that Jessica would return to North Carolina with Eden given his statements to her while she and the minor child were residing with his parents in Virginia.

e. Jessica had no other place to go and Joshua was in London when he broke the news of their separation.

f. It was foreseeable Jessica would return to the State where her parents lived, where she grew up, graduated high school and went to undergraduate college.

g. Jessica went to North Carolina with Joshua's knowledge and with no objection from him.

h. Therefore, Jessica and the minor child, EDEN, resides [sic] in this State as a result of the acts or directives of Joshua.

. . . .

43. Joshua engaged in purposeful conduct which directed his activities through the State of North Carolina.

44. [Joshua] has filed an Affidavit wherein he admits that North Carolina is the "home state" of the minor child, EDEN, and that North Carolina has jurisdiction

over the claim of custody of the minor child under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).

45. It would be inconvenient for the parties to litigate this matter elsewhere in that:

    a. Child Custody must be litigated in North Carolina as North Carolina is the "home state" under the UCCJEA, and the only state with jurisdiction over Eden's Custody.

    b. Joshua must appear and defend the child custody action in North Carolina if he wishes to present evidence on the child custody issue.

    c. It is therefore reasonable to expect him to travel here and to litigate custody here.

    d. It is illogical and inconvenient for the parties to litigate child custody here and the remaining claims in New Jersey even if New Jersey determines it has personal jurisdiction over Jessica.

    e. It is convenient for the parties to litigate the matter in North Carolina.

    f. Joshua resides in London and must engage in International travel to litigate this matter in New Jersey or North Carolina. There is little difference in the travel options and cost for him in this regard.

    g. Jessica resides in North Carolina.

    h. If this Court granted Defendant's motion, it would require litigation in two states and the parties to have two lawyers in two states. That is inconvenient and is one factor that must be considered.

46. All of Joshua's actions taken together which have been directed toward North Carolina along with his time in the State, his marriage twice in the State, the use of North Carolina as a "home base," sending marital property to be stored, maintained and kept even to this day in North Carolina and his orchestration of events which led to Jessica and Eden being in

the State of North Carolina are facts upon which this Court considers highly relevant.

47. [Joshua] does not contest that North Carolina is the "home state" under the UCCJEA for the minor child, EDEN, nor does he contest that North Carolina has authority to determine the issue of child custody regardless of whether it has *in personam* jurisdiction over him.

Based on these findings of fact, the trial court made the following conclusions of law:

1. The Court has jurisdiction over the parties to this action, the minor child whose custody is involved in this action, and over the subject matter of this action.

2. North Carolina is the "home state" of the minor child, EDEN, as that term is defined by N.C.G.S. 50A-201 (a)(1) and [it] is appropriate for this Court to assume jurisdiction over this matter for the purposes of making an initial child custody determination.

3. The Court should assume, and does assume continuing jurisdiction over the child support matters raised in this proceeding in conformity with the Uniform Interstate Family Support Act (UIFSA) codified at N.C. Gen. Stat. § 52C *et. seq*.

4. Personal jurisdiction over the Defendant is not required to address child custody.

5. Statutory authority for the exercise of personal jurisdiction over the non-resident Defendant exists under North Carolina's "long arm statute" as codified under N.C. Gen. Stat. § 1-75.4(12).

6. The Defendant has had reasonable notice of the claims filed in North Carolina as he was properly served with same.

7. The Defendant has purposefully availed himself of conducting activities within the State of North Carolina thus invoking the benefits and protections of its laws.

8. The Defendant "should reasonably" anticipate being haled into court[ ] in North Carolina as a result of his relationship with the State of North Carolina.

9. It is highly relevant that the Defendant directed marital property to be sent to the State of North Carolina and stored here. If Joshua's items and marital property had been damaged or destroyed in the storage unit in Fayetteville, North Carolina, he would have a cause of action in the State of North Carolina. Likewise, if he neglected to pay the rental fee he could reasonably be expected to be haled into Court in North Carolina (at least through an interpleader action).

10. The Defendant has sufficient contacts with the State of North Carolina to warrant assertion of personal jurisdiction over him such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

11. The quality and the nature of Defendant's contacts with the forum state make it such that it is reasonable and fair to require him to conduct his defense in the State of North Carolina.

12. Exercise of personal jurisdiction over the non-resident Defendant complies with the due process requirements of the Fourteenth Amendment of the U.S. Constitution.

The overwhelming majority of the above-quoted findings of fact are not challenged by Joshua, and those unchallenged findings are therefore binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").[3]

Having thoroughly reviewed the trial court's findings of fact, the record, and the relevant case law, we agree with Jessica that *Sherlock* is the most analogous case to the present action. Here, as in *Sherlock*, the couple lacked a permanent residence during their marriage. Instead,

3. While Joshua challenges portions of Finding Nos. 32 and 40, he is only challenging them to the extent that they contain the trial court's determination that (1) Mr. Vann acted as Joshua's "agent[;]" and (2) Joshua "orchestrated" Jessica's move to North Carolina following their separation.

Joshua and Jessica lived in various locations (both within and outside the United States) as dictated by Joshua's employer. Specifically, during the four years of their marriage, the parties spent the majority of the time living abroad in London and Australia but also lived in New Jersey for nine months and in New York for two months.

Thus, the facts of the present case clearly demonstrate that this is not the "ordinary divorce case[.]" *Sherlock*, 143 N.C. App. at 306, 545 S.E.2d at 762. As in *Sherlock*, the parties' "history is unusual; their frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or abroad, require this Court to evaluate their situation on its own merits." *Id.*

In considering the factors relevant to the personal jurisdiction analysis, we first take note of the fact that Joshua and Jessica were married in North Carolina, participating in two separate wedding ceremonies. While Joshua is correct that "marriage by itself cannot support a . . . court's exercise of [personal] jurisdiction over a spouse[,]" *Kulko*, 436 U.S. at 93, 56 L. Ed. 2d at 142, the wedding ceremonies may properly be considered in conjunction with Joshua's other contacts with North Carolina. We also note that a baby shower for the parties was held in North Carolina to celebrate Jessica's pregnancy.

Second, the trial court found as fact that the parties stored various items of property — including marital property — in North Carolina. We deem significant the fact that not only did Joshua consent to storing the property in this state but, in addition, he (1) personally made several of the necessary arrangements for the storage; and (2) continued to pay rental fees for the storage of the property for the 23-month period preceding the hearing in the trial court. Although he could have instead elected to store the property in New Jersey (where he and Jessica had lived for nine months), in Virginia (where his parents resided), or in some other location, Joshua affirmatively chose to do so in North Carolina.[4]

Joshua argues that the rental contract for the storage unit was in Mr. Vann's name rather than in Joshua's own name. However, this distinction does not change the fact that it was *Joshua* who affirmatively chose to store his and Jessica's property in North Carolina and continued to do so for almost two full years. In so doing, he has sought to avail himself of "the benefits, protections and privileges of the laws of this State." *See Miller*, 313 N.C. at 480-81, 329 S.E.2d at 667.

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4. While the trial court did not make a finding as to the specific amount of property the couple stored in North Carolina, evidence was presented at the hearing that the storage rental unit contains a net weight of 2,552 pounds of personal property.

Third, Joshua chose to have at least some portion of his mail directed to the Vanns' Bladen County mailing address. While he attempts to downplay the significance of this factor by arguing that the mail was "unimportant," the point remains that — once again — he voluntarily chose North Carolina for this purpose.

Finally, while we recognize that the purpose of the due process analysis is to protect the *defendant's* due process rights, our case law nevertheless requires that we also take into account as secondary factors the interest of the forum state and the convenience of the parties. *See B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986) (citation omitted) (considering "[t]wo secondary factors, interest of the forum state and convenience to the parties" in applying minimum contacts analysis).

North Carolina has a recognized interest in this action in that the parties were married in this state and Jessica and Eden are both residents of North Carolina. *See Miller*, 313 N.C. at 480, 329 S.E.2d at 667 ("We are . . . mindful that North Carolina has an important interest in ensuring that non-resident parents fulfill their support obligations to their children living here."); *Butler*, 152 N.C. App. at 82, 566 S.E.2d at 712 (" . . . North Carolina has an important interest in the resolution of plaintiff's claims in the instant action, since plaintiff and the parties' daughter currently reside in this State.").

Similarly, although the convenience of a forum alone cannot confer personal jurisdiction over a non-resident defendant, *Miller*, 313 N.C. at 480, 329 S.E.2d at 667 (citation omitted), we cannot ignore the fact that North Carolina is clearly the most convenient forum for this action. It is undisputed that the child custody litigation will be handled in North Carolina and that Joshua will likely be required to travel to the state in connection with that proceeding. If Jessica were required to file the present action in a separate jurisdiction, the parties would then have to simultaneously litigate two lawsuits in two separate states — both arising from the parties' marriage. Furthermore, the portion of the couple's marital property currently located in the North Carolina storage unit will presumably be among the items of property distributed in the equitable distribution proceeding.

We recognize that the contacts of the *Sherlock* defendant with North Carolina were more extensive than Joshua's contacts with this state in the present case. However, we reject Joshua's argument that the facts of *Sherlock* constitute a "floor" for purposes of establishing sufficient minimum contacts in this context. To the contrary, this Court expressly

stated in *Sherlock* that "[t]he quantity and quality of defendant's contacts with North Carolina *far exceed* the 'minimum contacts' required for jurisdiction . . . ." *Sherlock*, 143 N.C. App. at 306, 545 S.E.2d at 762 (emphasis added).

In sum, based on our consideration of the relevant factors, we are satisfied that Joshua has sufficient minimum contacts with North Carolina such that the exercise of personal jurisdiction over him would not offend "traditional notions of fair play and substantial justice." *Id.* at 302, 545 S.E.2d at 760 (citation and quotation marks omitted). Thus, we hold that the trial court possessed personal jurisdiction over Joshua.

Conclusion

For the reasons stated above, we affirm the trial court's 13 July 2016 order.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

IN THE MATTER OF E.B., M.B., A.B.

No. COA17-198

Filed 17 October 2017

1. Termination of Parental Rights—grounds—neglect—domestic violence—sufficiency of findings

The trial court erred in a termination of parental rights case by concluding grounds existed based on neglect under N.C.G.S § 7B-1111(a)(1) and (2) to terminate respondent father's parental rights where the trial court's vague findings did not support that there was a continuation of domestic violence or that grounds existed to terminate respondent's parental rights based on neglect and willful failure to correct the conditions which led to the juveniles' removal from his care.

2. Termination of Parental Rights—living arrangements of children—possibility of future domestic violence

The trial court in a termination of parental rights case was instructed to make additional findings of fact and conclusions of law on remand concerning where the children would live if they were

to return to respondent father's care by considering the effect that living with the mother would have on the children, including the possibility of future domestic violence.

Judge BRYANT concurring in the result only.

Judge HUNTER, JR. concurring in a separate opinion.

Appeal by respondent-father from orders entered 22 November 2016 by Judge Frederick Wilkins in Rockingham County District Court. Heard in the Court of Appeals 10 August 2017.

Beverley A. Smith, for Petitioner-Appellee Rockingham County Department of Social Services.

Lauren Golden, for guardian ad litem.

Peter Wood, for Respondent-Appellant father.

MURPHY, Judge.

"Harvey"[1] the father of juveniles E.B., M.B., and A.B. ("Ernie," "Molly," and "Annie,"[2]), appeals from an order terminating his parental rights. The trial court declared that Harvey had willfully abandoned his children and that he made no reasonable progress on the case plan, thus rendering them neglected. After careful review, we reverse and remand for additional findings of fact and conclusions of law.

Background

On 10 December 2014, the Rockingham County Department of Social Services ("DSS") filed a petition alleging that Ernie, Molly, and Annie were neglected and dependent juveniles due to "severe and ongoing domestic violence" in their home. DSS stated that the family came to its attention after Harvey assaulted a child who was in his home. That child, who is not one of the juveniles who is the subject of this action, entered DSS's care and informed DSS that there was domestic violence in Harvey's home. DSS learned that on 5 June 2013, Ernie was injured

1. The father will be referred to by a pseudonym to protect the identities of the children.

2. The children will be referred to by pseudonyms to protect their identities. E.B. is "Ernie," M.B. is "Molly," and A.B. is "Annie."

when his mother ("Gert"[3]) threw a metal cup which hit Ernie in the face. Harvey and Gert gave differing stories as to whether Gert intended to throw the cup at Eddie or at Harvey. Harvey's family was referred for in-home services.

On 8 December 2014, a social worker went to Harvey's home for a scheduled visit to provide services. During a check of the home, the DSS worker heard an altercation taking place inside of the home and decided to call the police. On arrival, the social worker observed a lamp, and then wooden pieces from a broken table thrown from a window in the residence. The social worker called the police. Harvey and Gert later acknowledged to the social worker that they had been in an altercation. All three juveniles were present during the incident. Harvey and the juveniles were transported to the paternal grandmother's home with, according to DSS, "the understanding that they were to remain there for the time being while new arrangements were made to address the ongoing domestic violence."

On 10 December 2014, DSS social worker Jordan Houchins went to the residence to discuss the 8 December 2014 incident with Gert. The social worker found their home in ruins. There were multiple holes in walls in the residence; all of the tables in the house had been destroyed; and there were broken dishes on the floor of the juveniles' bedrooms. These conditions resulted from numerous domestic violence incidences. Gert told the social worker that she and Harvey had hit each other during these altercations. Gert, however, refused to seek a domestic violence protection order and did not want to go to a shelter. When the social worker examined the juveniles' bedrooms, she found Harvey hiding under a blanket in one of the beds. Harvey claimed to be sleeping, and denied that he was hiding from the social worker. He became belligerent when confronted by the social worker. The social worker attempted to assume emergency custody of the children. Harvey then picked up Molly, an infant, and left the residence. Molly was not appropriately dressed as she was wearing only a "onesie" and it was a "bitterly cold morning." Law enforcement subsequently located Harvey and Molly several blocks from the residence. DSS subsequently obtained non-secure custody of all the juveniles.

On 10 November 2015, the trial court adjudicated the juveniles to be neglected and dependent after Harvey and Gert admitted to the altercations alleged in the petition. The trial court ordered Harvey to comply

3. Gert will be referred to by a pseudonym in order to protect the identities of the children.

with a case plan, which included: (1) complete a domestic violence offender treatment/education and counseling; (2) complete an approved parenting class; (3) submit to a mental health assessment and comply with all recommendations; (4) obtain and maintain suitable housing for the juveniles; (5) obtain employment with income sufficient to provide for the basic needs of the juveniles; and (6) obtain transportation sufficient to provide for Harvey's and the juveniles' basic needs.

The trial court initially ordered a permanent plan of reunification for the juveniles. The trial court later changed the primary permanent plan to adoption because Harvey and Gert "continue[d] to engage in domestic violence." The secondary plan remained reunification. On 28 September 2016, DSS filed a petition to terminate Harvey's and Gert's parental rights pursuant to N.C.G.S. § 7b-1111(a)(1) (neglect) and (2) (failure to make reasonable progress) (2015).

Analysis

[1] N.C.G.S. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). We review the trial court's conclusions of law de novo. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

In the instant case, the trial court concluded that grounds existed to terminate Harvey's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). First, regarding N.C.G.S. § 7B-1111(a)(1), where termination is based on neglect, our General Statutes define a "[n]eglected juvenile" as:

> [a] juvenile 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; or who lives in an environment injurious to the juvenile's welfare; . . . or who has been placed for care or adoption in violation of law.

N.C.G.S. § 7B-101(15) (2015). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the

dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding." *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citations and quotations omitted).

Second, to terminate a parent's rights under N.C.G.S. § 7B-1111(a)(2), the trial court must perform a two-part analysis. The trial court must determine by clear, cogent and convincing evidence that: (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months; and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005) (internal citations omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Here, in support of its conclusion that grounds existed pursuant to N.C.G.S § 7B-1111(a)(1) and (2) to terminate Harvey's parental rights, the trial court found as fact:

> 7. The minor children were adjudicated to be neglected and dependent juveniles on February 5 2015 . . . .
>
> . . . .
>
> 12. Both parents entered counseling at Hope Services in February and March of 2016 following an incident of domestic violence in January of 2016.
>
> 13. After attending weekly sessions of counseling at Hope Services, another incident of domestic violence occurred on July 5, 2016.
>
> 14. All three minor children were placed in the nonsecure custody of the Department due to severe domestic violence between the parents. The domestic violence was also a finding of fact in the adjudication order from February of 2015.

Based on these findings, the trial court concluded:

> 17. The respondent-father . . . neglected the juveniles within the meaning of N.C.G.S. §§ 7B-101 and 7B-1111(a)(1), in that: The minor children were adjudicated neglected and dependent on February 5, 2015 based on their exposure to domestic violence by the respondent parents. *There is no evidence of changed circumstances related to the respondent as he continues to engage in domestic violence with the respondent-mother.* It is likely that the respondent-father's neglect would be repeated in the future if the children were returned to his care.

> 18. Pursuant to N.C.G.S. § 7B-1111(a)(2), the respondent-father . . . left the minor children in foster care 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. The children have been placed in foster care since December 10, 2014, and *the respondent-father has not taken corrective action to alleviate those conditions that led to the children's removal as there is the continuation of domestic violence between the respondent parents.*

(Emphasis added).

Harvey contends that the trial court's findings concerning domestic violence were insufficient to support the court's conclusions of law. We agree.

Our Supreme Court has stated:

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each . . . link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, it is apparent from the court's conclusions of law 17 and 18 that the sole basis for termination of Harvey's parental rights was the alleged continuation of domestic violence between Harvey and Gert. However, the only findings made by the trial court concerning continuing incidents of domestic violence were findings 12 and 13, in which the court merely found that the "incident[s]" of domestic violence "occurred" in January and July of 2016. The trial court's succinct findings shed little light on the circumstances of the domestic violence, its severity, or the impact on the juveniles. Most importantly, entirely absent from the findings are facts showing Harvey was engaged in the domestic violence incident involving Gert. Instead, the evidence clearly demonstrated that Gert was the aggressor and was the only one involved in domestic violence. Thus, there is insufficient evidence to support the trial court's conclusion that

Harvey continued to engage in domestic violence. We conclude that the trial court's vague findings regarding domestic violence lack the required specificity necessary "to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982); *see also In re Gleisner*, 141 N.C. App. 475, 481, 539 S.E.2d 362, 366 (2000) (the trial court's "vague and apparently inaccurate" finding of fact could not be used as a basis for the trial court's determination that the juvenile was neglected because it "impedes our ability to determine whether the trial court's conclusions are supported by the findings.").

Consequently, we hold the trial court's findings do not support the trial court's determination that there was a continuation of domestic violence, as well as its conclusion that grounds existed to terminate Harvey's parental rights based on neglect and willful failure to correct the conditions which led to the juveniles' removal from Harvey's care.

[2] However, there remains an issue concerning Harvey's living situation. As was found during the original adjudication of neglect of the children, Harvey appears to live with Gert. The trial court terminated her parental rights, but she did not appeal that order. On remand, the trial court must make additional findings of fact and conclusions of law concerning where the children will live if they are to return to Harvey's care. It should inquire into the effect that living with Gert will have on the children, including the possibility of future domestic violence. Accordingly, we reverse the trial court's order terminating Harvey's parental rights and remand for further findings of fact.

REVERSED AND REMANDED.

Judge BRYANT concurs in the result only.

Judge HUNTER, JR. concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurring in separate opinion.

I concur with the majority opinion. The trial court's findings do not support the conclusion that grounds existed to terminate the father's parental rights. The trial court seems to base this conclusion on two incidents of domestic violence which occurred in 2016. However, as a result of these incidents the mother was charged with assault and resisting an officer. There is nothing in the record indicating the role, if any, the father played in these incidents.

Furthermore, there is evidence in the record tending to show the father has made progress on his case plan. Specifically, he completed a parenting class, submitted to a mental health assessment, obtained employment as a truck driver, obtained and maintained transportation, and obtained stable housing. He has complied with the child support order and interacted appropriately with the children during visits, in addition to attending weekly domestic violence counseling services.

On remand the trial court needs to address these issues to determine whether this and other evidence support a finding that the father did or did not make sufficient progress on his case plan during the time the children were in the custody of the Department of Social Services. I would leave to the trial court the decision whether or not to take additional evidence on remand.

LEONORA MORIGGIA, Plaintiff
v.
LINDA CASTELO, Defendant

No. COA16-444

Filed 17 October 2017

1. Appeal and Error—standard of proof—child custody—clear, cogent, and convincing evidence—avoidance of unnecessary delay

The Court of Appeals in a child custody case reviewed the conclusions of law based upon the findings as if they were based upon clear, cogent, and convincing evidence in order to avoid unnecessary delay. On remand, the trial court should make findings based upon this standard of proof, and should affirmatively state the standard of proof in the order.

2. Child Custody and Support—life partners—standing—contradictory conclusions of law—subject matter jurisdiction—consideration of facts preceding child's birth

The trial court erred in a child custody case by granting defendant life partner's motion to dismiss under Rule 12(b)(1) and dismissing plaintiff life partner's complaint for lack of standing where the order made contradictory conclusions of law on subject matter jurisdiction. Further, the trial court should have considered the facts preceding the child's birth in making its conclusions and should not

have relied upon the facts that the parties were not married, pursued no legal adoption, and did not list plaintiff as a parent on the birth certificate.

3. Appeal and Error—preservation of issues—child custody hearing—time constraint—failure to request additional time

The trial court did not abuse its discretion in a child custody case by terminating plaintiff life partner's testimony and limiting plaintiff's evidentiary presentation to one hour where plaintiff failed to request any additional time at the hearing.

Appeal by plaintiff from order entered 4 January 2016 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 16 November 2016.

Hatch, Little & Bunn, LLP, by Justin R. Apple and Kathy H. Lucas, for plaintiff-appellant.

Rik Lovett & Associates, by S. Thomas Currin II, for defendant-appellee.

STROUD, Judge.

Plaintiff Leonora Moriggia ("plaintiff") appeals from the trial court's order granting defendant Linda Castelo ("defendant")'s motion to dismiss under Rule 12(b)(1) and dismissing plaintiff's complaint for lack of standing. On appeal, plaintiff argues that she has standing to maintain an action for custody and that defendant acted inconsistently with her parental status by intentionally and voluntarily creating a family unit and making plaintiff a *de facto* parent. Because the trial court's findings of fact do not support its conclusion that plaintiff has no standing to maintain a custody action, we vacate the order and remand for further proceedings.

Background

Plaintiff's complaint alleged that plaintiff and defendant were a lesbian couple who never married but "were in a committed and loving relationship from January 2006 until October 2014[.]" The couple decided during the relationship to have a child. Defendant was selected to carry the child because plaintiff had already experienced a pregnancy when she gave birth to her biological daughter, Trisha,[1] whom

1. We use pseudonyms throughout to protect the identity of the minor children.

she brought into the relationship. Both parties' eggs were harvested, but after attempts at artificial insemination were unsuccessful, they agreed to use a donor sperm and donor egg. On 11 June 2013, the minor child, Raven, was born.

The parties separated in October 2014, and on 11 March 2015, plaintiff filed her complaint for child custody seeking joint temporary and permanent custody of Raven. Defendant answered on 1 May 2015 with a motion to dismiss and alternative counterclaim for child custody, seeking sole legal and physical custody. In her motion to dismiss plaintiff's complaint, defendant contended that plaintiff "is not a parent of [Raven] either legally or biologically" and argued that she "does not have standing to bring and maintain a child custody action against Defendant, who is [Raven]'s legal and physical mother." The hearing on temporary custody and defendant's motion to dismiss was held on 21 July 2015, and the trial court took the motion to dismiss under advisement. On 4 January 2016, the trial court entered an order dismissing plaintiff's complaint for child custody for lack of standing.

The trial court's order found, in relevant part, that:

> 7. Plaintiff and Defendant were involved in a romantic, homosexual relationship and considered each other to be life partners.
>
> 8. Plaintiff and Defendant lived together from January 2006 until December 2008, at which time they separated, and then resumed living together from January 2010 until October 2014.
>
> 9. The parties broke off their relationship in October of 2014 but continued to live together in the same residence until Plaintiff left on February 14, 2015.
>
> 10. Plaintiff filed this custody action on March 11, 2015.
>
> 11. When the parties briefly separated in December of 2008 . . . Defendant would have visitation with [Trisha] and [Trisha] would frequently spend the night with Defendant at her residence.
>
> 12. During the parties' relationship they discussed their family and together planned on adding at least one child to their family.
>
> 13. Beginning in 2012, the parties attended appointments at Carolina Conceptions where they discussed *in vitro*

fertilization. Both parties jointly signed a contract with Carolina Conception for the conception of the minor child, [Raven], in this matter.

14. The parties discussed using artificial insemination as a means of getting pregnant and it was agreed Defendant would go through the pregnancy. . . .

15. When the Defendant was determined to be infertile, the Plaintiff's eggs were harvested in an attempt to artificially inseminate the Defendant; however, the Plaintiff did not produce enough eggs for the procedure.

16. The parties then discussed and researched adoption, both attending an informational meeting; however, shortly thereafter agreed that the adoption process was not for them because of the cost and potential for the biological parent to attempt involvement with any potential adoptive child. Plaintiff and Defendant nonetheless decided to continue seeking to enlarge their family. The parties then went back to Carolina Conceptions and elected to proceed with the artificial insemination process using donor sperm and donor egg through the anonymous process.

17. Defendant ultimately became pregnant via *in vitro* fertilization by a donor sperm and a donor egg. Plaintiff and Defendant share no genes with the child and have a completely different genetic code.

. . . .

19. Once the parties became aware that Defendant was pregnant, they made an announcement to [Trisha] welcoming her into the "Big Sister's Club." . . . . Defendant told [Trisha] that she was [Raven]'s big sister.

20. On August 29, 2012, Defendant was listed as Recipient and Plaintiff as "Partner", collectively they were referred to as "Recipient Couple". The parties acknowledge in the Contract that any child resulting from the procedure will be their legitimate child in all aspects, including descent and distribution as our child. . . .

21. Plaintiff contended that her $5,575 check made out to Carolina Conceptions was a contribution to the $20,000 overall cost and was intended by Plaintiff to create a

family with Defendant. She also testified that she owed the Defendant these funds as satisfaction of an outstanding debt Plaintiff owed to Defendant.

22. Defendant contends that the $5,757 [sic][2] was in satisfaction of an outstanding debt Plaintiff owed Defendant.

23. The parties also pulled a combined $18,000 out of their 401(k) retirement accounts combined to pay the costs of the artificial insemination procedure.

. . . .

25. Prior to the pregnancy, the Defendant intended that Plaintiff serve as a parent to [Raven]. At the time of [Raven]'s birth, Defendant had changed her mind as to Plaintiff's role as a parent to [Raven]. She began excluding Plaintiff from any parenting role, insisting that she, alone, be treated as [Raven]'s mother.

26. The parties planned the baby's nursery together, Plaintiff's friend purchased [Raven's] crib. [Raven's] dresser and other furniture and some clothing for the baby were purchased using a gift card received from the baby showers.

27. There were two baby showers. One shower was held in New Jersey on Defendant's behalf, and Plaintiff and Defendant's family contributed financially toward the shower. Half of the people in attendance were Plaintiff's family and friends.

. . . .

30. Just before Defendant went into labor, Plaintiff and her mother thoroughly cleaned the family's home to get it ready for [Raven]'s arrival. The Defendant posted a note thanking her "mother in law" for assisting in the cleaning for "our daughter".

31. During the artificial insemination process with Carolina Conceptions, Plaintiff would be included in the

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2. This appears to be a typo in the trial court's order, as the previous finding and the hearing transcript indicate that plaintiff's check was for $5,575.00, not $5,757.00. We also note that findings 21 and 22 are not findings of fact but are recitations of each party's contentions regarding a disputed fact.

email communications. Defendant would refer to Plaintiff and Defendant as "We" when inquiring about the next steps and would sign the email as "Linda & Lee".

32. The Plaintiff attended all of the Defendant's ultrasound and other prenatal appointments unless the appointment was just to take her blood pressure since she was an at risk pregnancy.

33. The Plaintiff and Defendant both attended the recipient classes required by Carolina Conceptions and parenting classes during Defendant's pregnancy.

34. During Defendant's pregnancy she sent an e-mail to Plaintiff indicating how much she loved Plaintiff and couldn't wait to raise the "niblet" together.

35. Plaintiff has a bond with [Raven]. [Trisha] also has a bond with [Raven].

36. Defendant encouraged a sisterhood between the children, [Trisha and Raven], and the sisterhood was to be permanent and ongoing well beyond the parties' life time.

37. The Defendant once gave Plaintiff a Mother's Day card addressed to "Leemo" on [Raven]'s behalf.

38. In a text, Defendant assured Plaintiff after they separated that she would continue to see [Raven] as she was her "mama too".

39. Plaintiff and [Trisha] lived with Defendant during conception, birth and for the first twenty (20) months of [Raven]'s life.

40. Only the Defendant's name appeared on the Birth Certificate on the announcement of the child's birth.

41. After the birth of [Raven], Defendant sent an email to Carolina Conceptions thanking them on behalf of [plaintiff], Big Sister [Trisha] and Baby [Raven]. She states, "[Plaintiff, Trisha and I] are so elated to have her as part of our extended family," and they have "made us the happiest family on earth." Pictures were then included of the birth announcement, Plaintiff holding [Raven] and Defendant and [Raven].

. . . .

43. Plaintiff is not listed as a parent on the child's Birth Certificate.

44. The Plaintiff was present during Defendant's labor at Rex Hospital. . . .

45. The Plaintiff was identified as "co parent" to [Raven] by the hospital and Defendant did not dispute the identification.

46. The Defendant identified Plaintiff on her General Consent to admission when being admitted for delivery and identified her as "life partner".

47. Upon birth, Plaintiff was excluded so Defendant could bond with the child without Plaintiff present.

48. After the birth of [Raven], Defendant made postings on social media with pictures of Plaintiff, [Raven and Trisha], referring to them as her family.

49. The Plaintiff knew of a nanny for [Raven] through a classmate of [Trisha's] and the parties met with and interviewed Angela Lopez together for the position. Angela Lopes [sic] was hired as [Raven's] nanny and served in the capacity until late December of 2014.

50. [Raven's nanny] was under the belief that both parties were equally responsible for [Raven]. . . . It was not until after the parties broke up in October that Defendant approached her and asked that she communicate with her directly.

51. Subsequent to [Raven]'s birth, the Plaintiff was not held out as [Raven]'s parent and the Defendant did not cede decision making authority.

52. The Plaintiff did not create a permanent parent-like relationship with the minor child, only a "significant loving, adult care taker" relationship, not that of a parent.

53. No steps were made by the parties to make the family unit permanent. The parties were not married in this or any other state.

54. After the birth of [Raven], Plaintiff and Defendant discussed that should Plaintiff pass away, Defendant would care for [Raven and Trisha]. Should Defendant pass away,

Plaintiff would care for [Raven and Trisha] and should both parties pass away leaving behind their children, the Defendant's sister, Judy, would care for both [Raven and Trisha].

55. Defendant paid for daycare costs exclusively from her own funds from the birth of the child until the parties separated.

56. Other than [Raven's] daycare costs incurred by Defendant and [Trisha's] afterschool costs incurred by Plaintiff, the parties equally contributed to the household finances.

57. Defendant insisted on providing care and bonding with her child when she was home, to the exclusion of Plaintiff.

. . . .

59. After the parties ended their romantic relationship, the Defendant placed [Raven] in a daycare facility and listed Plaintiff as an emergency contact until January 9, 2015. Defendant did give access to her sisters.

60. Plaintiff was not involved in the preparation of the child's baptism, though she did provide [Trisha's] baptism gown for [Raven]. While the Plaintiff was in attendance, she was not a part of the ceremony.

. . . .

62. Defendant selected [Raven's] pediatrician and made all decisions for daycare, medical care and pediatrician choices. The Plaintiff attended at least one well-baby visit and took [Raven] to the doctor with Defendant, when she was sick. Plaintiff was listed as an emergency contact on the pediatrician records and "Partner" as relationship to Defendant.

63. During the relationship Defendant was the primary caretaker for [Raven].

64. [Raven] and [Trisha] had a special and loving bond as sisters and were close to each other.

65. Both parties contributed to the household expenses.

. . . .

68. One of the reasons for the break-up was Defendant's insistence upon being the primary parent to the child. . . .

69. After separation the Plaintiff mailed monthly checks for $300 to the Defendant for "Child Support" which were never cashed by the Defendant and were mailed back to the Plaintiff.

70. Defendant did not allow Plaintiff visitation after both parties separated, nor was there any mention of a visitation schedule for the Plaintiff to see the child at the time of separation.

71. The Defendant took no steps to make the Plaintiff the caregiver of the child, should the Defendant predecease the child.

72. On March 6th, 2015, the Defendant sent Plaintiff a text stating that since Plaintiff "threatened to sue for visitation" she could never let her take her daughter without her being present.

73. After March, 2015, the Defendant's intent was that the Plaintiff no longer be involved in the child's upbringing.

74. While prior to the birth, the Defendant intended for the parties to equally participate in the care for [Raven], at the time of her birth, Defendant's intentions changed.

75. Prior to the child's birth, the parties planned together for the minor child.

76. At all times relevant to custody, however, that is, at all times after the birth of the child, the Defendant demonstrated her desire to be the child's sole parent.

77. The Court finds that there was no voluntary creation of a family unit, or a permanent parent-like relationship; nor does the Court find that the Defendant ceded her parental authority to the Plaintiff for any manner.

The trial court then concluded:

1. The parties are properly before the Court, and the Court has jurisdiction over the subject matter, custody, of this action and has personal jurisdiction of the parties to this action.

> 2. However, Plaintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1). Similarly, since she has failed to establish her standing to raise the matter, she has failed to state a claim upon which relief can be granted.
>
> . . . .
>
> 6. Despite some isolated instances of Defendant acknowledging Plaintiff as a parent to [Raven], following the birth of the minor child, the Defendant did not cede parental authority to the Plaintiff.
>
> 7. The Plaintiff was a loving caretaker for the minor child, had a substantial relationship with [Raven], but was not intended by Defendant to be a parental figure.
>
> . . . .
>
> 9. There were no acts inconsistent with the Defendant's parental rights, such as to grant Plaintiff the right to claim third party custody.

Plaintiff timely filed her notice of appeal to this Court.

Discussion

On appeal, plaintiff raises several issues, beginning with whether plaintiff has standing to maintain an action for child custody and the trial court erred in dismissing her complaint.

I. Preliminary matters

[1] Before we address the substantive issues raised by plaintiff, we note the trial court's order does not indicate the standard of proof for any of its findings of fact, nor does the transcript assist us in determining if the trial court relied upon clear, cogent and convincing evidence for any of the findings. Neither party has raised this issue on appeal, but since it is integral to the jurisdictional determination and since we are remanding this case for further proceedings, we note that on remand the trial court must be clear that it is applying the "clear, cogent, and convincing" standard. "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessene*r, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). *See also Heatzig v. MacLean*, 191 N.C. App. 451, 460, 664 S.E.2d 347, 354 (2008) ("The evidence required to show that a parent has acted inconsistently with her constitutionally

protected parental status must be clear, cogent and convincing."). Of course, we realize that here, the trial court concluded that defendant's conduct was *not* inconsistent with her protected status as a parent. But the difficulty in reviewing this order comes in part from the fact that the findings the trial court made -- if made by clear, cogent, and convincing evidence -- do not support the trial court's conclusion. On remand, the trial court shall make findings based upon this standard of proof and should affirmatively state the standard of proof in the order on remand.

In our analysis below, we will therefore review *de novo* the trial court's conclusion on lack of subject matter jurisdiction based upon the uncontested findings of fact, while recognizing that *if* those findings were not based upon the proper standard of proof, the findings would not be sufficient as a matter of law to show that defendant's actions were "inconsistent with his or her protected status" and could not support plaintiff's standing. And although there is no affirmative statement of the standard in the order, we also have no reason to believe that the trial court failed to use the correct standard of clear, cogent, and convincing evidence for the findings. As a practical matter, if we remanded only for the trial court to state the standard it actually used in this order, thus requiring another appeal from the revised order, we would delay a final disposition of this custody matter for a long time, and that delay would not be in the best interest of the child. We will thus review the conclusions of law based upon the findings as they stand and as if they were based upon clear, cogent, and convincing evidence.

II. Standing to Maintain Action for Child Custody

[2] Plaintiff argues the trial court erred by concluding that she did not have standing to bring a custody claim and dismissing her complaint under Rule 12(b)(1). We first note that the order makes contradictory conclusions of law on subject matter jurisdiction, since standing is an issue of subject matter jurisdiction:

> Based upon the foregoing findings of fact and upon the stipulation of the parties in open court, the court CONCLUDES AS A MATTER OF LAW:
>
> 1. The parties are properly before the Court, and the Court has *jurisdiction over the subject matter*, custody, of this action and has personal jurisdiction of the parties to this action.
>
> 2. However, *Plaintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1).* Similarly, since she has failed to establish her

> standing to raise the matter, she has failed to state a claim upon which relief can be granted.

(Emphasis added).

Subject matter jurisdiction is *the* basis for motions under Rule 12(b)(1): "Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss. Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted). *See also Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." (Citations omitted)).

Although the trial court first concluded that it had jurisdiction over the "subject matter, custody," it then concluded that "[p]laintiff does not have standing to raise this matter, and it should be dismissed pursuant to Rule 12(b)(1)." But in any event, we review standing *de novo*, so we may resolve this contradiction based upon the trial court's findings of fact. *See Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46 ("Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." (Citation omitted)).

Under N.C. Gen. Stat. § 50-13.1(a) (2015), "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" *See also Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) ("Standing in custody disputes is governed by N.C. Gen. Stat. § 50-13.1(a) (2007), which states that any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. Nevertheless, as with N.C. Gen. Stat. § 50-13.2, our courts have concluded that the federal and state constitutions place limitations on the application of § 50-13.1." (Citation, quotation marks, brackets, and ellipses omitted)).

In *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998), this Court held "that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." This Court clarified in *Ellison* that

> we confine our holding to an adjudication of the facts of the case before us: where a third party and a child have

> an established relationship in the nature of a parent-child relationship, the third party does have standing as an "other person" under N.C. Gen. Stat. § 50-13.1(a) to seek custody.

Id. at 395, 502 S.E.2d at 895. *See also Smith v. Barbour*, 154 N.C. App. 402, 408, 571 S.E.2d 872, 877 (2002) ("Both parents and third parties have a right to sue for custody. In a custody dispute between a parent and a non-parent, the non-parent must first establish that he has standing, based on a relationship with the child, to bring the action." (Citation omitted)).

In *Mason*, this Court elaborated on *Ellison* further and noted that

> despite the statute's broad language, in the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has indicated that there are limits on the "other persons" who can bring such an action. A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.

Mason, 190 N.C. App. at 219, 660 S.E.2d at 65 (citations and quotation marks omitted). The *Mason* Court found "no serious dispute that Mason established that she had standing under N.C. Gen. Stat. § 50-13.1," where her complaint alleged that she jointly raised the child with her domestic partner Dwinnell, that they signed an agreement acknowledging Mason as a "de facto" parent, that she had formed a parenting relationship with the child, and that the minor child had spent his life with both Mason and Dwinnell providing emotional and financial support and care. *Id.* at 220, 660 S.E.2d at 65.

This Court has elaborated further on standing in custody disputes, explaining:

> As in many custody cases, the struggling of adults over children raises concern regarding the consequences of the rulings for the children involved. Our General Assembly acted on this concern by mandating that disputes over custody be resolved solely by application of the "best interest of the child" standard. Nevertheless, our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts, do not allow this standard to be used as between a legal parent and a third party unless the evidence establishes that the

> legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent. No litmus test or set of factors can determine whether this standard has been met. Instead, the legal parent's conduct would, of course, need to be viewed on a case-by-case basis[.]

Estroff v. Chatterjee, 190 N.C. App. 61, 63-64, 660 S.E.2d 73, 75 (2008) (citations, quotation marks, and footnote omitted). Thus, to maintain a claim for custody on this basis, the party seeking custody must allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent. *See*, *e.g.*, *Heatzig*, 191 N.C. App. at 454, 664 S.E.2d at 350 ("If a legal parent (biological or adoptive) acts in a manner inconsistent with his or her constitutionally-protected status, the parent may forfeit this paramount status, and the application of the 'best interest of the child' standard in a custody dispute with a non-parent would not offend the Due Process Clause.").

This Court also noted in *Heatzig* that "in order to constitute acts inconsistent with a parent's constitutionally protected status, the acts *are not* required to be 'bad acts' that would endanger the children." *Id.* at 455, 664 S.E.2d at 351. Similarly, in *Boseman v. Jarrell*, our Supreme Court explained:

> A parent loses this paramount interest [in the custody of his or her children] if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status. However, there is no bright line beyond which a parent's conduct meets this standard. . . . [C]onduct rising to the statutory level warranting termination of parental rights is unnecessary. Rather, unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct can also rise to this level so as to be inconsistent with the protected status of natural parents.

Boseman v. Jarrell, 364 N.C. 537, 549-50, 704 S.E.2d 494, 503 (2010) (citations, quotation marks, brackets, and ellipses omitted).

Turning to the order on appeal, the trial court's uncontested findings of fact -- which we are treating as being based upon clear, cogent, and convincing evidence as discussed above -- show that plaintiff and defendant were in a committed relationship and jointly decided to have a child and to raise that child together. They continued to live together as a family unit until their relationship ended, when Raven was about

20 months old. When their relationship deteriorated and they ultimately separated, defendant changed her intentions, but she had participated in creating a family unit which included plaintiff. For example, as the trial court found, Raven's relationship with Trisha, plaintiff's child, was "a special and loving bond as sisters[.]"

The trial court's findings of fact are to some extent contradictory. For example, the court found that "[s]ubsequent to [Raven]'s birth, the Plaintiff was not held out as [Raven]'s parent. . . ." But the trial court also made findings of fact of instances of plaintiff being held out as a parent. Specifically, the trial court found that defendant gave plaintiff a Mother's Day card "addressed to 'Leemo' on [Raven's] behalf"; that defendant had "assured Plaintiff after they separated that she would continue to see [Raven] as she was her 'mama too' "; that "Defendant sent an email to Carolina Conceptions thanking them on behalf of Lee, Big Sister [Trisha] and Baby [Raven]. She states, 'Lee, [Trisha] and I are so elated to have her as part of our extended family,' and they have 'made us the happiest family on earth.' "; and that the parties had discussed that the survivor would care for both children upon the death of either party.

Plaintiff also argues that the trial court erred in failing to consider facts and circumstances preceding Raven's birth. We agree. Specifically, the trial court found that "[a]t all times relevant to custody, however, that is, at all times *after the birth of the child*, the Defendant demonstrated her desire to be the child's sole parent." (Emphasis added). The trial court based its conclusion that plaintiff had no standing upon its finding that defendant changed her intention to co-parent with plaintiff immediately after Raven's birth, despite her former intention to create a joint family, as shown during the parties' extensive efforts to conceive and preparation for Raven's birth. Even setting aside the fact that other findings tend to indicate that defendant continued to have the intention to co-parent with plaintiff at least until the parties' separation, the trial court's findings state it *did not consider* the parties' actions prior to Raven's birth because they were not "relevant" to this inquiry on intent. But defendant's actions prior to the child's birth are relevant to determining her intention.

Although the events prior to birth alone are not controlling, they must be considered along with actions after the child's birth. All of North Carolina's prior cases addressing similar same-sex partners who had a child and then separated have discussed the parties' actions in planning and preparing for their family even before the child's conception and birth. *See*, *e.g.*, *Estroff*, 190 N.C. App. at 69, 660 S.E.2d at 78 ("[I]t is appropriate to consider the legal parent's intentions regarding

the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated."). *See also Davis v. Swan*, 206 N.C. App. 521, 528, 697 S.E.2d 473, 478 (2010) ("Here, the trial court made numerous findings of fact, which are unchallenged on appeal, that demonstrate Swan's intent jointly to create a family with [her former domestic partner] Davis and intentionally to identify her as a parent of the minor child.").

Although the specific facts of each case are unique, prior cases have addressed the parties' actions leading up to the inception of the custody dispute, including actions before a child's birth, as relevant to determining this intention. These cases naturally involve same-sex couples, so each couple had to decide who would carry the child and how the child would be conceived. For example, in *Boseman*, our Supreme Court noted the parties' actions prior to the child's birth:

> The record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act -- and acted -- as a parent. The *parties jointly decided to bring a child into their relationship*, *worked together to conceive a child*, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even "agrees that [plaintiff] . . . is and has been a good parent."

Boseman, 364 N.C. at 552, 704 S.E.2d at 504 (emphasis added).

It is true that in *Boseman*, the parties took additional actions to make the parental relationship between the plaintiff and the child permanent, since the parties jointly participated in an adoption proceeding so the defendant would become the child's legal parent. *Id.* at 540, 704 S.E.2d at 497. That adoption was vacated in *Boseman*, but the underlying custody action remained. *Id.* at 553, 704 S.E.2d at 505. But if the parties' actions prior to the child's birth in *Boseman* were irrelevant, the Supreme Court would not have noted these actions. These facts are part of the relevant inquiry, along with the parties' actions after the child is born.

In all of these cases, whether months or years after the child's birth, the parties became estranged, and either during the time immediately

preceding the estrangement or at that time, the biological parent's intentions as to the former partner changed and she denied her partner access to the child. The birth parent *changed* her intentions in every case, but her intention at that point is not controlling. The issue is whether, before the end of the relationship, she had the intent to create that relationship with the partner and whether she overtly did so, leading both the child and others to believe that the partner was in a parental role. Our Court has noted that the trial court should focus on the parties' actions and intentions prior to their estrangement, and may include the time *prior* to the child's birth:

> [T]he court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.
>
> . . . .
>
> We agree with the New Jersey Supreme Court that the focus must, however, be on the legal parent's intent during the formation and pendency of the parent-child relationship between the third party and the child. *Intentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so*.

Estroff, 190 N.C. App. at 70-71, 660 S.E.2d at 78-79 (citations, quotation marks, and brackets omitted) (emphasis added).

Estroff indicates that the actions and intentions during the relationship of the parties, during the planning of the family, and before the estrangement carry more weight than those at the end of the relationship, since the court noted that "[i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between

her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." *Id.* at 70-71, 660 S.E.2d at 79 (citation, quotation marks, and brackets omitted). *See also Davis*, 206 N.C. App. at 526, 697 S.E.2d at 477 ("Also, the trial court must consider the intent of the legal parent, in addition to her conduct.").

Here, by finding that the parties' actions and intentions prior to Raven's birth were *not* relevant, the trial court failed to consider all of the factors which show "intent during the formation and pendency of the parent-child relationship between the third party and the child." *Id.* at 70, 660 S.E.2d at 79 (citation and quotation marks omitted). Instead, the trial court focused more on the defendant's change of intention upon the ending of the relationship, which is "not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created[.]" *Id.* at 70-71, 660 S.E.2d at 79 (citation, quotation marks, and brackets omitted). To the contrary, the facts as to the parties' planning of Raven's birth and clearly stated intentions, particularly in relation to the process through Carolina Conceptions and at the hospital, tend to show the intent to form a family unit, with defendant as a co-parent. Had the parties separated immediately upon Raven's birth, these actions prior to birth would not alone establish standing for defendant's custody claim, since defendant and Raven would never have formed a relationship, but that is not this case. Living together as a family for over a year would demonstrate a continuing intention, even though defendant's intentions later changed.

The trial court also focused on other facts with limited relevance to the proper legal conclusion. For example, the trial court found that the parties did not take "steps. . . to make the family unit permanent":

> 52. The Plaintiff did not create a permanent parent-like relationship with the minor child, only a "significant loving, adult care taker" relationship, not that of a parent.
>
> 53. No steps were made by the parties to make the family unit permanent. The parties were not married in this or any other state.

Marriage was not an available option for these parties in North Carolina prior to their relationship ending in October 2014.[3] Other states

3. Nor would adoption have been an option. *See Boseman*, 364 N.C. at 546; 704 S.E.2d at 501 (finding adoption decree void and plaintiff [former same-sex partner of

recognized same-sex marriages earlier, but marriage of the parties still would not change the legal relationship between plaintiff and Raven. Heterosexual couples often marry after one party has had a child from a previous relationship, but the legal marriage itself does not give the step-parent any claim to parental rights in relation to the child. *See*, *e.g.*, *Moyer v. Moyer*, 122 N.C. App. 723, 724-25, 471 S.E.2d 676, 678 (1996) ("At common law, the relationship between stepparent and stepchild does not of itself confer any rights or impose any duties upon either party. In contrast, if a stepfather voluntarily takes the child into his home or under his care in such a manner that he places himself *in loco parentis* to the child, he assumes a parental obligation to support the child which continues as long as the relationship lasts. . . . However, the fact that a stepfather is *in loco parentis* to a minor child during marriage to the child's mother does not create a legal duty to continue support of the child after the marriage has been terminated either by death or divorce." (Citations omitted)); *Duffey v. Duffey*, 113 N.C. App. 382, 387, 438 S.E.2d 445, 448-49 (1994) ("If we are to impose the same obligations and duties on a stepparent, then it is only fair to confer the same rights and privileges, such as visitation and custody, to a stepparent. However, to do so would necessarily interfere with a child's relationship with his or her noncustodial, natural parent. Clearly this is not what the legislature intended.").

And although both same-sex and heterosexual marriages are intended to be permanent, sometimes they end in divorce, and the divorce of the partners does not change the legal relationship of the partners to their children. This Court has rejected the argument that the legal ability to marry or adopt has "legal significance":

> Likewise, we find immaterial Dwinnell's arguments that she and Mason could not marry, and Mason could not adopt the child under North Carolina law. We cannot improve on the Pennsylvania Supreme Court's explanation as to why "the nature of the relationship" has no legal significance to the issues of custody and visitation: *"The ability to marry the biological parent and the ability to*

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defendant] not legally recognizable as the minor child's parent where "[p]laintiff was not seeking an adoption available under Chapter 48. In her petition for adoption, plaintiff explained to the adoption court that she sought an adoption decree that would establish the legal relationship of parent and child with the minor child, but not sever that same relationship between defendant and the minor child. As we have established, such relief does not exist under Chapter 48." (Citations omitted)).

> *adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.* What is relevant, however, is the method by which the third party gained authority to do so."

Mason, 190 N.C. App. at 218-19, 660 S.E.2d at 64 (citation omitted) (emphasis omitted) (emphasis added). Likewise, the trial court found that plaintiff was "not listed as a parent on the child's Birth Certificate," but it would have been impossible in North Carolina for her to have been listed on the birth certificate when Raven was born in 2013, as same-sex marriage was not yet recognized. *See, e.g.*, *Mason*, *id.* at 211-12, 660 S.E.2d at 60 ("Although Dwinnell's name was the only name listed as a parent on the child's birth certificate, evidence was presented that the parties mutually desired to include both Mason and Dwinnell on the birth certificate, but the hospital refused to do so.").

Here, defendant's actions before Raven's birth -- if we assume that the trial court made its findings based upon clear, cogent, and convincing evidence -- indicate her intent to create a parental relationship between Raven and plaintiff. The trial court found that both parties signed a contract with Carolina Conceptions which states "that any child resulting from the procedure will be their legitimate child in all aspects" and identifies the parties collectively as "Recipient Couple." The trial court also found that "[p]rior to the pregnancy, the Defendant intended that Plaintiff serve as a parent to [Raven]." The court's order contains numerous other findings noting plaintiff's bond with Raven and emails and other correspondence by defendant identifying plaintiff as a mother to Raven and Trisha as Raven's sister. Based upon the uncontested findings and assuming that these findings were based upon clear, cogent, and convincing evidence, the trial court erred in concluding that plaintiff did not have standing to support her claim for custody. In addition, the trial court should have considered the facts preceding Raven's birth in making its conclusions and should not have relied upon the facts that the parties were not married, pursued no legal adoption, and did not list plaintiff as a parent on the birth certificate. We therefore vacate the order and remand this matter to the trial court for further proceedings consistent with this opinion.

III. Limitation of time for hearing

[3] Although we have determined that we must vacate and remand the trial court's order, we will discuss plaintiff's remaining issue as it may be relevant for the trial court's consideration of the issues on remand.

Plaintiff argues that the trial court abused its discretion in terminating plaintiff's testimony and limiting plaintiff's evidentiary presentation to one hour. But plaintiff requested no additional time at the hearing, so she has waived this argument on appeal. *See*, *e.g.*, *Hoover v. Hoover*, __ N.C. App. __, __, 788 S.E.2d 615, 618 ("N.C. R. App. P. Rule 10(a)(1) (2014) provides in relevant part that in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make and must have obtained a ruling upon the party's request, objection, or motion. As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." (Citations, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 794 S.E.2d 519 (2016).

At the start of the hearing, both the trial judge and plaintiff's attorney noted that the court was setting aside two hours for a temporary custody hearing. No objection was lodged in relation to the time constraint. Plaintiff argues on appeal that the trial court ended up doing much more than determining temporary custody, since the trial court dismissed the action, but the trial court could not address even temporary custody without first determining whether plaintiff had standing to pursue a custody claim. Under the local district court rules for a temporary custody hearing, which defendant filed as a memorandum of additional authority, Rule 7.3 notes that "[t]emporary custody hearings shall be limited to two (2) hours. Each party will have up to one (1) hour to present his or her case, including direct and cross-examination, opening and closing arguments." The rules also state that additional time may be requested by parties "[w]ith written notice to the opposing party at least seven (7) days prior to the scheduled hearing date[.]" Plaintiff did not request additional time under Rule 7.3. We find the trial court did not abuse its discretion by limiting plaintiff's presentation to one hour.

Conclusion

In conclusion, we must vacate the trial court's order dismissing plaintiff's custody complaint for lack of standing. Because the trial court's order does not properly address or weigh evidence of events before Raven's birth; relies at least in part on matters such as the parties' failure to marry; and does not indicate that the proper standard of clear, cogent, and convincing evidence was used, we vacate the trial court's order and remand to the court for further proceedings consistent with this opinion. Specifically, the trial court should enter a new order addressing the jurisdictional issue containing findings of fact based

upon clear, cogent and convincing evidence. Depending upon that order, if the custody claims remain to be determined, the trial court shall allow the parties to present evidence at another hearing.

VACATED AND REMANDED.

Judges HUNTER, Jr. and DAVIS concur.

RAYMOND CLIFTON PARKER, Plaintiff

v.

MICHAEL DeSHERBININ and wife, ELIZABETH DeSHERBININ, Defendants

No. COA17-377

Filed 17 October 2017

1. Evidence—findings of fact—construction of fence—property line—boundary of property—sufficiency of evidence

The trial court erred in a property dispute case by making a finding of fact that appellant constructed a fence along what he believed to be the northern boundary line of his property where the overwhelming non-contradicted evidence indicated appellant constructed a fence within the boundary of his property as purportedly established by a 1982 survey.

2. Evidence—findings of fact—disputed area not mowed—possession of disputed area—concession to open and continuous possession

The trial court erred in a property dispute case by making a finding of fact that the disputed area could not be mowed because it was so overgrown and there was nothing visible to indicate anyone was in possession of or maintaining the disputed area. Appellees conceded to appellant's open and continuous possession of that portion of the disputed area up to the location of appellant's chain link fence.

3. Evidence—conclusions of law—adverse possession—color of title—unresolved factual issues—metes and bounds description

The trial court erred in a property dispute case by making a conclusion of law that appellant had not established adverse possession to the south side of the disputed area bounded by the chain link fence. There remained unresolved factual issues of whether the

metes-and-bounds description contained in appellant's deed and the incorporated reference to a 1982 survey accurately described the extent of appellant's property to establish he possessed color of title to the remaining disputed area.

4. Appeal and Error—preservation of issues—abandoned during appellate oral arguments

The Court of Appeals did not address appellant's asserted claims for negligence and nuisance in his amended complaint where on appeal appellant's counsel abandoned these claims at oral argument.

Appeal by plaintiff from judgment entered 22 September 2016 and from order entered 1 December 2016 by Judge Mary Ann Tally in New Hanover County Superior Court. Heard in the Court of Appeals 26 September 2017.

Hodges, Coxe, Potter, & Phillips, LLP, by Bradley A. Coxe, for Plaintiff-Appellant.

H. Kenneth Stephens, II for Defendant-Appellees.

TYSON, Judge.

Raymond Clifton Parker ("Appellant") appeals from denial of a directed verdict made at the close of Appellant's evidence and renewed at the close of all evidence dated 29 August 2016, from a judgment entered on 22 September 2016 in favor of Michael and Elizabeth DeSherbinin (collectively "Appellees"), and from an order dated 1 December 2016, denying Appellant's motion for judgment notwithstanding the verdict, to amend the judgment and for a new trial. For the following reasons, we affirm in part, reverse in part the trial court's judgment, and remand for further findings of fact.

I. Background

Appellant and Appellees own adjoining tracts of real property located in New Hanover County, adjacent to the Intracoastal Waterway. Appellant acquired his property, located at 19 Bridge Rd., from himself as trustee of the Grace Pittman Trust by a general warranty deed dated 21 December 1983. The deed was recorded on 16 January 1984 in Book 1243, at Page 769, in the New Hanover County Registry.

The Appellees acquired their property, a vacant lot, located at 1450 Edgewater Club Rd., by a warranty deed from John Anderson Overton

and Holland Ann Overton, dated 16 December 2013 and recorded 17 December 2013 at Book 5788, at Page 1866, in the New Hanover County Registry. Appellees purchased their property with the intent to build a residence. The Appellees hired a surveyor, Marc Glenn, to survey the property and prepare a plat.

Glenn's survey (the "Glenn survey") fixed the boundary between Appellant's and Appellees' properties to be approximately 5 feet south of the line established in a survey completed in 1982 by surveyor George Losak (the "Losak survey") and recorded at Map Book 21, at Page 63, in the New Hanover County Registry. The Glenn survey shows a chain link fence installed by Appellant to the north of the boundary line between the parties' properties. The Glenn survey failed to reference the prior recorded Losak surveys or show any overlaps in the surveyed boundary lines.

In the Spring of 2014, Appellant and Appellees met regarding the boundary line between their properties. Appellant informed Appellees of an existing issue regarding the location of the boundary line. Appellees were also made aware, by their seller, prior to their purchase, that a dispute existed over the boundary line of the two properties. Appellees' attorney closed on the property as shown in the Glenn survey, certified title thereto and obtained title insurance thereon.

Appellees filed for a building permit for the residence they intended to construct at 1450 Edgewater Club Rd. Appellees attached a copy of the Glenn survey to their building permit application. Appellant complained and shared the recorded Losak survey with the New Hanover County planning and zoning office, prior to the issuance of the Appellees' building permit being issued, but to no avail.

Appellees continued to build their residence based on their belief the Glenn survey correctly showed the boundary. Appellant commissioned yet another survey from Charles Riggs, a registered licensed surveyor (the "Riggs survey"), while Appellees' house was under construction.

Appellant filed an initial complaint on 23 June 2015 and an amended complaint on 7 January 2016. Appellant asserted claims for negligence, nuisance, declaratory judgment to identify the boundary line, adverse possession under color of title, and adverse possession under twenty years of continuous possession. On 4 March 2016, Appellees filed an answer denying Appellant's claims and a counterclaim seeking a declaratory judgment to identify and establish the boundary line based upon their Glenn survey.

On 29 August 2016, the case came to trial. The parties agreed to waive trial by jury. Appellant moved for a directed verdict at the close of his evidence and renewed again at the close of all evidence. These motions were denied.

Among the findings of fact made by the trial court are the following:

> 7. The Plaintiff's and Defendants' properties adjoin each other with the Defendants' property lying adjacent to and to the north of Plaintiff's property.
>
> 8. A map of Edgewater Subdivision recorded in Map Book 2, at Page 113, is the original map of Edgewater Subdivision (herein "Edgewater Map") and created said subdivision.
>
> 9, Plaintiff's and Defendants' properties are portions of Lots 4 and Lot 5 as shown on the map of Edgewater Subdivision, as recorded in Map Book 2, at Page 113, of the New Hanover County Registry.
>
> 10. The Defendants engaged James B. Blanchard, PLS, a licensed registered land surveyor to perform a survey of the parties properties in February, 2016 to establish the dividing line between Lots 4 and 5 of Edgewater Subdivision as shown on Map Book 2, at Page 113, of the New Hanover County Registry and then to establish the boundary-line between the property of the parties.
>
> 11. At the trial of this matter, Defendants presented the testimony of Mr. Blanchard who was tendered to and accepted by the Court without objection by Plaintiff as an expert witness in land surveying.
>
> 12. That none of the original monuments shown on the Edgewater Map could be located by Mr. Blanchard.
>
> 13. Mr. Blanchard established the dividing line between Lots 4 and 5 of Edgewater Subdivision as follows:
>
> a. By determining the northern line of Edgewater Subdivision by determining the southern line of Avenel Subdivision, the adjoining property to the north of Edgewater, as shown on a map recorded in Map Book 31, at Page 36 (herein "Avenel Map") and a map recorded in Map Book 7, at Page 14, both in the New Hanover County Registry.

b. That concrete monuments evidencing the southern line of Avenel and the northern line of Edgewater are shown on the Avenel Map and were located by Mr. Blanchard.

c. Mr. Blanchard established a line southwardly and perpendicular to the northern line of Edgewater Subdivision and along the eastern right of way of Final Landing Lane, as shown on the Edgewater Map, for the distance shown on the Edgewater Subdivision Map required to reach the dividing line between Lots 4 and 5 all as shown on the Edgewater Map.

d. Mr. Blanchard located the northern line of the tract adjoining Edgewater Subdivision on the south, i.e. the southern line of Edgewater Subdivision, as shown on a map recorded in Map Book 11, at Page 17, of the New Hanover County Registry.

e. Mr. Blanchard found monuments confirming his determination of the southern line of Edgewater Subdivision as shown on the original Edgewater Map.

f. That the Edgewater Map showed a fence running along the northern line of Edgewater Subdivision and that Mr. Blanchard, during the performance of his field work, located remnants of a wire fence running along the line which he determined to be the northern line of Edgewater.

14. The Defendants introduced a map by Mr. Blanchard dated July 9, 2016 (Defendants' Exhibit 21, herein the "Blanchard Map"), showing the findings of his survey and illustrating his testimony and opinions as to the location of the boundary-line between Lots 4 and 5 of Edgewater Subdivision, as well as the boundary-line between the Defendants' tract to the north described in Deed Book 5788, at Page 1866, of the New Hanover County Registry, and Plaintiff's tract to the south described in Deed Book 1243, at Page 769, of the New Hanover County Registry.

15. George Losak, registered land surveyor, prepared a map for "The William Lyon Company" dated December 30, 1982, recorded in February 10, 1983 and in Map Book 21, at Page 63, of the New Hanover County Registry (the "Losak Survey") showing or purporting to show the property later purchased by Plaintiff.

16. In August 1983, Mr. Losak prepared a second map of the property for "The Grace Pittman Trust" which was recorded on September 7, 1983 in Map Book 22, at Page 20, of the New Hanover County Registry. The purpose of this map was to correct errors contained in the Losak Survey.

17. Plaintiff's deed dated December 21, 1983 and recorded on January 16, 1984 referred to the Losak Survey, recorded in Map Book 21, at Page 63, of the New Hanover County Registry.

18. The Losak Survey referred to hereinabove depicts pipes and monuments which Mr. Losak ignored in determining the boundary-line between the subject properties.

19. The Court finds Mr. Blanchard's testimony to be credible and correct as to the location of the boundary-line between the Plaintiff's and Defendants' properties.

20. The true location of the boundary-line between Plaintiff's property and Defendants' property is shown on the Blanchard Map dated July 9, 2016 which describes the dividing line between the parties' properties as follows:

. . . .

21. Defendants purchased their property, also known as 1450 Edgewater Club Road, in December of 2013.

22. At the time the Defendants purchased their property the Plaintiff and Defendants' predecessor in title were engaged in a dispute with regard to the boundary-line between the parties' tracts.

. . . .

24. The Defendants hired Polaris Surveying, LLC and Marc Glenn, PLS to survey the property and prepare a boundary survey, a site plan, and topographical survey.

25. Marc Glenn determined the boundary-line to be as shown on his map recorded in Map Book 58, at Page 363, of the New Hanover County Registry, which is substantially where Mr. Blanchard locates the boundary-line.

. . . .

30. After closing on their property the Defendants had a chance meeting with the Plaintiff on site on or about April or May of 2014 while they were meeting with a contractor during the design phase of their home.

31. During this chance meeting Plaintiff raised the boundary-line issue and told Defendants about the Losak Survey and the monuments Losak found, but he did not show any of the monuments to the Defendants nor did he point them out.

32. In October 2014, after hiring several surveyors and attempting to hire several other surveyors Plaintiff hired Charles Riggs to survey his property and to confirm the description contained on the Losak Surveys.

33. At the time Plaintiff hired Mr. Riggs the Defendants house was approximately forty percent (40%) complete.

34. Charles Riggs provided the Plaintiff with a survey reflecting his findings on January 30, 2015.

35. The Defendants first saw the Riggs Survey in 2015 when their house was approximately seventy percent (70%) complete.

36. The New Hanover County zoning ordinance requires a minimum side set back of fifteen feet (15') for structures built on Defendants' property.

37. In 1985, the Plaintiff constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of Defendants' property. This area is hereto referred to [as] the "Disputed Area".

38. After 2005, Plaintiff would occasionally reach through the fence or lean over the fence to trim vines growing on the property to the north of the fence, the property now owned by Defendants.

39. The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area.

The trial court also made the following relevant conclusions of law:

> 2. Plaintiff's and Defendants' chains of title and vesting deeds both establish that the dividing line between the property, i.e. their common boundary, is the dividing line between tracts 4 and 5 of Edgewater Subdivision as shown on the map of said subdivision recorded in Map Book 2, at Page 113, of the New Hanover County Registry or can only be determined by locating the line between Lots 4 and 5 of Edgewater Subdivision.
>
> 3. That the true boundary-line between Plaintiff and Defendants is as shown on the Blanchard Map referred to in the findings of fact and further more particularly described as follows:
>
> . . . .
>
> 4. That the Defendants were not negligent in purchasing their property or in proceeding with the construction of their residence on their property.
>
> 5. That the construction and location of Defendants' home does not violate the fifteen foot (15') minimum side set back requirement of the New Hanover County zoning ordinance.
>
> 6. That the actions of the Defendants did not constitute a substantial interference with the Plaintiff's use of his property and were not unreasonable and therefore do not constitute a nuisance.
>
> 7. That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title.

On 22 September 2016, the trial court found in favor of Appellees on all of Appellant's claims and entered judgment. Appellant filed a motion for judgment notwithstanding the verdict, a motion to amend the judgment, and a motion for a new trial which were all denied by the trial court on 1 December 2016. Appellant timely filed an amended notice of appeal on 30 December 2016.

II. Statement of Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

Where trial is other than by jury, "[t]he trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected." *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991) (emphasis and citation omitted).

> In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of North Carolina, LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted).

IV. Analysis

Appellant argues several of the trial court's findings of fact are unsupported by competent evidence, and several of the trial court's conclusions of law are not supported and improper in light of the relevant findings of facts and law. We address the disputed findings of fact and conclusions of law in turn.

A. Finding of Fact 37

[1] Appellant argues no competent evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence *along what he believed to be the northern-boundary line of his property* and the southern boundary-line of [Appellees'] property." (Emphasis supplied.). Appellees do not contest Appellant's assertion and testimony that the chain link fence was not placed on what Appellant considered to be the boundary line of the subject properties.

After reviewing the record and stipulations of counsel at oral argument, we hold that no evidence supports the trial court's finding of fact 37 that "Appellant constructed a fence along what he believed to be the northern-boundary line of his property." The overwhelming, non-contradicted evidence indicates Appellant constructed a fence within the boundary of his property as purportedly established by the Losak survey.

Appellant testified at trial that when he purchased the property at 19 Bridge Rd., a low fence referred to as the "neighbor's fence" was inside the boundary line on the Losak survey. The Losak survey indicates the "neighbor's fence" was one to five feet south of the boundary line purportedly established by the Losak survey.

Appellant testified that sometime in 1984 or 1985, he constructed a chain link fence adjacent to the "neighbor's fence" as indicated on the Losak survey. Appellant stated he did not put the chain link fence on what he believed to be the property line, because dogwood trees and vegetation existed along the purported property line. Appellant stated he wanted enough space to remain between the purported property line and the chain link fence to prevent the neighbors from damaging the fence.

Appellant additionally testified the chain link fence had not been moved since it was constructed in 1984 or 1985. Appellant submitted a photograph labeled Plaintiff's Exhibit 25.20 which showed the chain link fence as it was located in the mid-1980's and in the present day.

Appellant's expert, Charles Riggs, produced a survey which shows the Losak survey line claimed by Appellant and the Blanchard survey line claimed by Appellees, and determined by the trial court to be the boundary line. The Riggs survey indicates the chain link fence was located between the disputed survey lines.

Also submitted into evidence was a 5 December 2013 email from Holly Overton, Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the buyer's agent for Appellees, which discusses the location of the chain link fence. In her email, Ms. Overton mentioned the Losak survey line and the Blanchard survey line and stated the chain link fence "is located in the middle of the two property lines mapped."

As Appellant accurately argues, no testimony or other evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of [Appellees'] property." Appellees' only argument against Appellant on this point is that because "Appellant never located the chain link fence on the ground it is impossible to locate the fence with any more precision."

However, counsel agree the chain link fence is "known and visible" and is in the same location it was in when Appellant first built it in 1984 or 1985. Furthermore, no evidence was presented at trial to contradict the location of the chain link fence as surveyed by Appellant's surveyor, Riggs.

No competent evidence supports the trial court's finding of fact 37.

B. Finding of Fact 39

[2] Appellant argues insufficient evidence supports the trial court's finding of fact 39: "The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area." Appellees concede competent evidence was presented of Appellant's open and continuous possession of that portion of the Disputed Area up to the location of Appellant's chain link fence.

Appellant produced photographs, admitted into evidence, which tend to show the condition of the property as maintained by Appellant since he first acquired it in 1983. Appellant's unchallenged photographs depict a maintained and cleared lawn, with storage and buildings established along the fence line.

An email from Holly Overton, the Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the Appellees' agent, stated Appellant would trim bushes along the chain link fence in the Disputed Area and store his equipment. Appellees presented no evidence to dispute Appellant's continued maintenance of the property in the portion of the Disputed Area south of the chain link fence.

The trial court's finding of fact 39 is not supported by competent evidence, to the extent it expresses the Disputed Area "could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area".

C. Conclusion of Law 7

[3] Appellant argues the trial court's conclusion of law 7 is in error based upon the law of adverse possession and the unsupported findings of fact that he did not use, maintain, and possess the Disputed Area on his property's side of the chain link fence.

Conclusion of law 7 states: "That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title."

1. Adverse Possession for Twenty Years

In North Carolina, '[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period[.]' " *Jones*

v. Miles, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation omitted); *Federal Paper Board Co. v. Hartsfield*, 87 N.C. App. 667, 671, 362 S.E.2d 169, 171 (1987) (holding that "[t]itle to land may be acquired by adverse possession when there is actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another under claim of right or color of title for the entire period required by the statute.") (internal quotation marks and citation omitted).

Adverse possession of privately owned property without color of title must be maintained for twenty years in order for the claimant to acquire title to the land. N.C. Gen. Stat. § 1-40 (2015).

Presuming, *arguendo*, the trial court was correct in determining the Blanchard survey line was the correct boundary line between the parties' properties of Lots 4 and 5, uncontradicted evidence proves Appellant's actual occupation and continuous use of the property on the southern half of the Disputed Area since he acquired 19 Bridge Rd. in the early 1980s.

Appellant's installation of the chain link fence and his admitted maintenance of the area around and inside it since he established the fence in 1984 or 1985 shows his actual, open, notorious, exclusive and hostile use of property located on the south side of the chain link fence in the Disputed Area to support his claim for adverse possession under the requisite twenty year possession period. *See Blue v. Brown*, 178 N.C. 334, 337, 100 S.E. 518, 519 (1919) (holding a fence, maintained for many years, a hedgerow and possession for 30 or 40 years justified verdict for adverse possession); *Brittain v. Correll*, 77 N.C. App. 572, 575, 335 S.E.2d 513, 515 (1985) (holding a fence and other outbuildings showed claimants were asserting exclusive right over the disputed property); *Snover v. Grabenstein*, 106 N.C. App. 453, 459, 417 S.E.2d 284, 287 (1992) (holding that fence in place for more than fifty years such that the possession exercised by parties on either side of it was open, notorious and continuous so as to constitute adverse possession).

Appellees presented no evidence that they, or their predecessors-in-title, disputed or gave permission to Appellant to erect his chain link fence in the Disputed Area, until they sent a letter to Appellant in 2014, more than thirty years after Appellant built the fence. Appellees presented no evidence that anyone, other than Appellant, claimed, used, or maintained the area on the south side of the chain link fence after Appellant acquired 19 Bridge Rd. in 1983.

The uncontradicted evidence shows Appellant's actual, open, notorious, exclusive, continuous and hostile occupation and possession of

the area on the south side of the chain link fence within the Disputed Area for the statutory period. *See Federal Paper Board*, 87 N.C. App. at 671, 362 S.E.2d at 171.

Appellees' counsel conceded at oral argument before this Court that Appellant's uncontradicted evidence established adverse possession to the portion of the Disputed Area on the south side of the chain link fence. The trial court erred, as a matter of law, in concluding Appellant had not established adverse possession to the south side of the Disputed Area bounded by the chain link fence.

2. Color of Title

Appellant argues he is entitled to the entire Disputed Area on the north and south side of the chain link fence through adverse possession under color of title.

Appellant asserts the deed under which he acquired title to 19 Bridge Rd. establishes color of title so that he is entitled to the area of property located north of the chain link fence in the Disputed Area by adverse possession under color of title. By statute, when the claimant's possession is maintained under an instrument that constitutes "color of title," the prescriptive period is reduced from twenty to seven years. N.C. Gen. Stat. § 1-38(a) (2015).

Appellees argue Appellant's adverse possession under color of title claim fails, as a matter of law, because the Losak survey referenced in Appellant's deed stated an incorrect boundary line.

Our Supreme Court has held:

> A deed offered as color of title is such only for the land designated and described in it. *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673; *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677. "A deed cannot be color of title to land in general, but must attach to some particular tract." *Barker v. Southern Railway*, 125 N.C. 596, 34 S.E. 701. To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60; *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759.
>
> . . . .
>
> When a party introduces a deed in evidence which he intends to use as color of title, he must, in order to give

> legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. *Smith v. Fite*, 92 N.C. 319. *He must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers-in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. Wachovia Bank & Trust Co. v. Miller*, 243 N.C. 1, 89 S.E.2d 765; *Skipper v. Yow*, 238 N.C. 659, 78 S.E.2d 600; *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692; *Locklear v. Oxendine, supra; Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451.

McDaris v. "T" Corp., 265 N.C. 298, 300-01, 144 S.E.2d 59, 61 (1965) (emphasis supplied).

A plaintiff's burden at trial is also well established:

> [I[n order to present a prima facie case [of adverse possession], [a plaintiff] must . . . show that the disputed tract lies within the boundaries of their property. *See Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967); *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959). *Plaintiffs thus bear the burden of establishing the on-the-ground location of the boundary lines which they claim. Virginia Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 391, 343 S.E.2d 188, 194, *disc. review denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). If they introduce deeds into evidence as proof of title, they must "locate the land by fitting the description in the deeds to the earth's surface." *Andrews v. Bruton*, 242 N.C. 93, 96, 86 S.E.2d 786, 788 (1955).

Chappell v. Donnelly, 113 N.C. App. 626, 629, 439 S.E.2d 802, 805 (1994).

The evidence shows Appellant acquired title to 19 Bridge Rd. pursuant to a recorded deed in 1983. Appellant's deed contains a metes-and-bounds description, and refers and incorporates into the deed the recorded survey prepared by George Losak. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[.]").

The trial court's conclusion of law 7 is not supported by the trial court's findings of fact and is in error as a matter of law, to the extent it states Appellant has not established adverse possession of the Disputed

Area south of the chain link fence. *See Hanson*, 205 N.C. App. at 299, 695 S.E.2d at 499 (citation omitted). There remain unresolved factual issues of whether the metes-and-bounds description contained in Appellant's deed and the incorporated reference to the Losak survey accurately describe the extent of Appellant's property.

Even though the trial court found the Blanchard survey accurately shows the true boundary line between the Appellant and Appellees' properties, the court made no findings regarding whether Appellant had shown the on-the-ground boundary lines described in his deed and depicted in the Losak survey referenced therein. To determine whether Appellant has adversely possessed the remaining portion of the Disputed Area under color of title, it is necessary for the trial court to make findings of fact regarding whether Appellant can fit the description of the deed and survey under which he claims color of title to the portion of the Disputed Area north of his chain link fence. *Andrews*, 242 N.C. at 96, 86 S.E.2d at 788.

We reverse and remand this matter to the trial court to determine whether the deed and survey under which Appellant acquired title sufficiently describes the remaining portion of the Disputed Area.

3. Lappage

Appellant argues this case involves an issue regarding the parties presenting overlapping claims of ownership to the Disputed Area, known as a "lappage."

In a case of "lappage," a dispute between property owners where their respective titles purport to grant ownership to and over an overlapping area, the adverse claimant is not required to show actual possession of the entire area under lappage:

> It is thoroughly established law that when a person having color of title to a particular tract of land, which the written instrument, that is color of title, describes *by known and visible lines and boundaries*, enters into and adversely holds a part of such tract under the authority ostensibly given him by such instrument asserting ownership of the whole, *his ensuing possession is not limited to the portion of the tract as to which there has been an entry or actual possession, but is commensurate with the limits of the tract to which the instrument purports to give him title*, provided that at the inception, and during the continuance of the possession, there has been no adverse

> possession of the tract in whole or in part by another: and in this State such possession, if exclusive, open, continuous and adverse for seven consecutive years, the title being out of the State, will ripen into an unimpeachable title to the whole, provided there has been and is no adverse possession of the tract in whole or in part during such seven consecutive years by another.

Wachovia Bank & Tr. Co. v. Miller, 243 N.C. 1, 6, 89 S.E.2d 765, 769 (1955) (emphasis supplied) (citations omitted).

If on remand, the trial court determines the Appellant's metes-and-bounds deed description and incorporated reference to the Losak survey contained in Appellant's deed can be located upon the ground and is sufficient to establish Defendant possessed color of title to the remaining Disputed Area, Defendant will be entitled to quiet title to the entirety of the Disputed Area, based on his undisputed adverse possession for twenty years of that portion of the Disputed Area south of the chain link fence. *See id.*

D. Nuisance and Negligence Claims

[4] Appellant asserted claims for negligence and nuisance in his amended complaint. On appeal, Appellant's counsel abandoned these claims at oral argument. Therefore, we decline to address the parties' arguments regarding these claims. Those portions of the trial court's judgment relating to negligence and nuisance are affirmed.

V. Conclusion

A review of the record evidence and the testimony presented at trial and stipulations of counsel on appeal, shows some of the findings of fact made by the trial court are not supported by any competent, substantial evidence. The trial court's conclusion that Appellant was not entitled to the portion on the south side of the chain link fence within the Disputed Area by virtue of adverse possession for twenty years is error as a matter of law.

Unresolved factual issues remain regarding whether Appellant's deed and the recorded Losak survey referenced and incorporated therein provide color of title to the entirety of the Disputed Area, requiring remand to the trial court for further findings of fact. Conclusion of law 7 is reversed and the matter remanded to the trial court to make additional findings of fact and conclusions of law with regard to Appellant's claim of adverse possession by color of title, and to enter judgment accordingly.

We remand this case with instructions to the trial court to enter judgment to quiet title and award Appellant ownership to the portion of the Disputed Area on the south side of Appellant's chain link fence. If the physical location of the chain link fence is not otherwise sufficiently located, the trial court is to direct James Blanchard, P.L.S. or another licensed surveyor, to physically locate, fit and describe the location of Appellant's chain link fence. The expense of said survey shall be taxed as court costs.

On remand, Appellant bears the burden of establishing that the boundaries described in his deed and the incorporated Losak survey, through which he acquired title to 19 Beach Rd., describe the portion of the Disputed Area north of the chain link fence. *See McDaris*, 265 N.C. at 300-01, 144 S.E.2d at 61 (citation omitted).

If the trial court finds and concludes that Appellant meets this burden, the trial court is to also enter judgment quieting title and awarding Appellant ownership of that portion of the Disputed Area north of the chain link fence and to the entire Disputed Area. *See Wachovia Bank*, 243 N.C. at 6, 89 S.E.2d at 769.

The decision of the trial court is affirmed in part, reversed in part and the case is remanded for further findings as noted herein. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and INMAN concur.

NICHOLAS A. RIDDLE, PLAINTIFF
v.
BUNCOMBE COUNTY BOARD OF EDUCATION; JAMES BEATTY, IN HIS INDIVIDUAL CAPACITY, AND IN HIS OFFICIAL CAPACITY WITH THE BUNCOMBE COUNTY BOARD OF EDUCATION; AND RODERICK BROWN, JR., IN HIS INDIVIDUAL CAPACITY, AND IN HIS OFFICIAL CAPACITY WITH THE BUNCOMBE COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA16-1155

Filed 17 October 2017

Emotional Distress—negligent infliction of emotional distress—motion to dismiss—temporary fright—reasonable foreseeability

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's negligent infliction of emotional distress claims as a proximate result of defendants' allegedly negligent acts which led to the death of plaintiff's high school football teammate and friend. Allegations of "temporary fright" were insufficient to satisfy the element of severe emotional distress, and plaintiff's allegations were also insufficient to establish the reasonable foreseeability of his severe emotional distress under the *Ruark* factors.

Appeal by plaintiff from order entered 19 May 2016 by Judge Gary Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 19 April 2017.

Charles G. Monnett III & Associates, by Randall J. Phillips, for plaintiff-appellant.

York Williams, L.L.P., by Gregory C. York and Jared A. Johnson, for defendant-appellees.

Ball Barden & Cury, P.A., by Alexandra Cury, for defendant-appellee Roderick Brown, Jr., in his individual capacity.

CALABRIA, Judge.

Nicholas A. Riddle ("plaintiff") appeals from the trial court's order dismissing his action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). Plaintiff alleged negligent infliction of emotional distress claims against the Buncombe County Board of Education ("BCBE"); James Beatty ("Beatty"), individually and in his official capacity with the BCBE; and Roderick Brown, Jr. ("Brown"), individually and in his official capacity with the BCBE (collectively, "defendants"). On appeal, the

issue is whether it was reasonably foreseeable that plaintiff would suffer severe emotional distress as a proximate result of defendants' allegedly negligent acts, which led to the death of plaintiff's teammate and friend, Donald Boyer Crotty ("Crotty"). After careful review, we hold that plaintiff's injury was not reasonably foreseeable. Therefore, we affirm the trial court's order dismissing plaintiff's action.

I. Background

As plaintiff's claims were dismissed pretrial pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), "the facts set forth herein are taken from the allegations of the complaint, which must be taken as true at this point." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 286, 395 S.E.2d 85, 87, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

In July 2011, Beatty was a teacher and the varsity football coach at T.C. Roberson High School ("T.C. Roberson") in Buncombe County, North Carolina. Plaintiff and Brown were members of the football team. T.C. Roberson football players had access to various equipment, including a John Deere motorized vehicle ("the John Deere") that was routinely used to move items during and after practice. Beatty authorized the team's use of the John Deere, notwithstanding the fact that all players were minors and that none of BCBE's representatives had ever trained or instructed them regarding the vehicle's safe operation.

According to the complaint, on 11 July 2011, plaintiff, Brown, and other members of the team were scrimmaging and participating in drills on the T.C. Roberson football field. Beatty instructed Brown to use the John Deere to transport large Gatorade coolers across the field from an area near the 50-yard line. Brown, traveling at an unsafe and excessive rate of speed, drove the John Deere across the field as plaintiff, Crotty, and several players walked toward him. When they realized that Brown was driving directly at them, the players moved to avoid the John Deere. However, Brown simultaneously turned the steering wheel to the right and collided with Crotty, entrapping him with the front hood of the vehicle. Crotty's head struck the asphalt running track, and the John Deere's right tires traveled over his body and head. Crotty immediately displayed signs of brain injury and was only partially responsive as witnesses tended to him.

On 11 February 2016, plaintiff filed the instant action in Buncombe County Superior Court.[1] Plaintiff alleged, *inter alia*, that Beatty and

1. Plaintiff also filed a separate cause of action against BCBE alleging violations of his constitutional rights. Plaintiff voluntarily dismissed the constitutional claim at the hearing on defendants' motion to dismiss on 9 May 2016.

Brown committed negligent acts that proximately and foreseeably caused plaintiff to suffer severe emotional distress, and that all defendants were jointly and severally liable for plaintiff's injury.[2] On 1 April 2016, defendants filed an answer denying negligence and asserting various affirmative defenses. Defendants' answer also included a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Following a hearing, the trial court granted defendants' motion to dismiss. Plaintiff appeals.

II. Analysis

Plaintiff argues that the trial court erroneously granted defendants' motion to dismiss because he sufficiently alleged claims for negligent infliction of emotional distress arising out of concern for (1) himself and (2) his teammate and friend, Crotty. We disagree.

A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"An action for the negligent infliction of emotional distress may arise from a concern for one's own welfare, or concern for another's." *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000). To state a claim for negligent infliction of emotional distress, the plaintiff must allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (citation and internal ellipsis omitted).

The term "severe emotional distress" means "an emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression,

2. In addition to negligent infliction of emotional distress, plaintiff's complaint also asserted a claim for "uninsured and/or underinsured motorist coverages." However, because plaintiff's appellate brief does not address this claim, we will not discuss it further on appeal.

phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* at 672, 435 S.E.2d at 322. While no physical injury is required, *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97, North Carolina courts have consistently reiterated that the plaintiff's emotional distress must be severe in order to recover under this tort. *See id.* (explaining that "mere temporary fright, disappointment or regret will not suffice"); *see also Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (affirming the trial court's 12(b)(6) dismissal of the plaintiff's claim where the sole allegation of emotional distress was "serious on and off the job stress, severely affecting his relationship with his wife and family members"), *disc. review denied*, 366 N.C. 235, 731 S.E.2d 413 (2012).

Moreover, absent reasonable foreseeability, the defendant will not be liable for the plaintiff's severe emotional distress. *See Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993) (stating that "[p]art of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages"). Accordingly, where the defendant's conduct would not cause injury to a person of normal sensitivity, "proof of knowledge by the defendant of the plaintiff's peculiar susceptibility to emotional distress is required . . . ." *Wrenn v. Byrd*, 120 N.C. App. 761, 767, 464 S.E.2d 89, 93 (1995) (construing *Gardner*, 334 N.C. at 667, 435 S.E.2d at 328 (additional citations omitted)), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

"Questions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. "[T]he trial judge is required to dismiss the claim as a matter of law upon a determination that the injury is too remote." *Wrenn*, 120 N.C. App. at 765, 464 S.E.2d at 92. In actions arising from concern for another's welfare—frequently called "bystander claims"—factors bearing on foreseeability include "the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. However, these are not "mechanistic requirements," and "[t]he presence or absence of such factors simply is not determinative in all cases." *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322.

Here, as in many negligent infliction of emotional distress cases, the dispositive issue is foreseeability. At the hearing on 9 May 2016, the trial court granted defendants' motion to dismiss after finding no "reasonable foreseeability . . . that would lead to the plaintiff's alleged severe

emotional distress." The following paragraphs of plaintiff's complaint address the foreseeability of his injury:

> 25. As Defendant Brown approached the players who were walking and then struck Donald Crotty, Plaintiff Nicholas A. Riddle narrowly avoided being struck by the John Deere while still in close proximity to Donald Crotty, and experienced fear, terror and severe emotional distress for his own safety and the safety of the other football players.
>
> . . .
>
> 27. Plaintiff witnessed the injuries to Crotty from being struck by [the] John Deere vehicle, experienced severe emotional distress at that time, and the Plaintiff has in fact since continued to suffer since the event from the type of severe emotional distress recognized and diagnosed by professionals trained to do so, and has required care, treatment, therapy and medications from medical and mental healthcare providers as a proximate result thereof.
>
> 28. Plaintiff and Donald Crotty were both personally known to Defendants Beatty and Brown as fellow teammates and friends; Plaintiff was physically present in the immediately [sic] vicinity of, and contemporaneously observed, Defendants' negligent acts and the resulting injuries to Donald Crotty; and, Defendants Beatty and Brown knew or reasonably should have foreseen that their negligence and resulting injury to Donald Crotty would cause . . . the severe emotional distress suffered by Plaintiff Nicholas A. Riddle, and that Plaintiff would be susceptible thereto.

Taking these allegations as true, we first address plaintiff's claim arising from concern for himself. The sole allegation that could arguably support such a claim is in paragraph 25, in which plaintiff states he "narrowly avoided being struck by the John Deere while still in close proximity to Donald Crotty, and experienced fear, terror and severe emotional distress for his own safety . . . ." However, allegations of "temporary fright" are insufficient to satisfy the element of severe emotional distress. *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97. While plaintiff avers in paragraph 27 that he "has in fact since continued to suffer since the event from the type of severe emotional distress recognized and diagnosed by professionals trained to do so," the remainder of the paragraph's allegations clearly pertain to his distress at "witness[ing]

the injuries to Crotty," i.e. plaintiff's "concern for another." Accordingly, plaintiff's claim arising from concern for himself fails as a matter of law.

We next address plaintiff's claim arising out of concern for his teammate and friend, Crotty. As plaintiff acknowledges, this appears to be a "case of first impression" in North Carolina's bystander claim jurisprudence, as our prior cases have all involved close familial relationships. *See, e.g.*, *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994) (husband-wife and parent-child); *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993) (parent-child); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993) (parent-child); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, *P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990) (parent-unborn child); *Wrenn v. Byrd*, 120 N.C. App. 761, 464 S.E.2d 89 (1995) (wife-husband). Plaintiff cites no case from *any jurisdiction* legitimizing a bystander claim similar to that which he alleges in this case. However, he is correct that under *Ruark*, "the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned" is but one factor to consider in determining foreseeability. 327 N.C. at 305, 395 S.E.2d at 98.

Nevertheless, applying the *Ruark* factors to the complaint, we conclude that plaintiff's allegations are insufficient to establish the reasonable foreseeability of his severe emotional distress. That plaintiff "was physically present in the immediate[] vicinity of, and contemporaneously observed" Crotty's injuries favors foreseeability. *Id.* However, no factor is determinative in all cases. *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322. Here, plaintiff's allegations regarding his relationship with Crotty fail to support the foreseeability of his injury. Except for paragraph 28's statement that defendants knew plaintiff and Crotty "as fellow teammates and friends," the complaint contains no allegation or facts suggesting that the pair shared an unusually close relationship. Nor does plaintiff explain how his friendship with Crotty demonstrates any "peculiar susceptibility" to severe emotional distress. *Wrenn*, 120 N.C. App. at 767, 464 S.E.2d at 93.

In conclusion, we hold that plaintiff's complaint fails to state a cognizable claim for negligent infliction of emotional distress arising from concern for himself or Crotty. Therefore, we affirm the trial court's order dismissing plaintiff's action.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DYQUAON KENNER BRAWLEY, DEFENDANT

No. COA17-287

Filed 17 October 2017

Indictment and Information—larceny from merchant—identity of victim—entity capable of owning property

The superior court lacked jurisdiction to try defendant for the charge of larceny from a merchant under N.C.G.S. § 14-72.11(2) where the charging indictment failed to identify the victim. The name "Belk's Department Stores" did not itself import that the victim was a corporation or other type of entity capable of owning property.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 21 September 2016 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 7 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

DILLON, Judge.

Dyquaon Kenner Brawley ("Defendant") appeals from the trial court's judgment convicting him of larceny from a merchant. Defendant challenges the trial court's jurisdiction stemming from an alleged error in his indictment. After thorough review, we vacate the judgment on jurisdictional grounds.

I. Background

In September of 2015, Defendant was caught on surveillance stealing clothing from a Belk's department store in Salisbury. Defendant removed the security tags from multiple shirts before fleeing the premises.

A grand jury indicted Defendant for larceny from a merchant. A jury convicted him of the charge. Defendant timely appealed.

II. Summary

The charging indictment in this case identifies the victim as "Belk's Department Stores, an entity capable of owning property." On appeal, Defendant argues that the trial court lacked jurisdiction to render a verdict against him because the charging indictment failed to adequately identify *the victim* of the larceny. Based on jurisprudence from our Supreme Court and our Court as explained below, we are compelled to agree. We therefore vacate Defendant's conviction.

III. Analysis

We review the sufficiency of an indictment *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"It is hornbook law that a valid bill of indictment [returned by a grand jury] is a *condition precedent* to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment." *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) (emphasis added).[1] "To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (internal citations and quotation marks omitted). Therefore, "[a] conviction based on an invalid indictment must be vacated." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015).

In the present case, the jury convicted Defendant of larceny from a merchant under N.C. Gen. Stat. § 14-72.11(2). One essential element of any larceny is that the defendant "took the property *of another*." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (emphasis added).

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1. Our Supreme Court has explained that "every [defendant] charged with a criminal offense has a right to the decision of twenty-four of his fellow-citizens upon the question of guilt [as to every element of the crime charged:] *First*, by a grand jury [of twelve]; and, *secondly*, by a petit jury [of twelve.]" *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890). Indeed, our state Constitution recognizes that "no person shall be put to answer any criminal charge [in superior court] but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22; *see State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952) (explaining the history and purpose of this constitutional requirement).

Here, the grand jury returned an indictment alleging that Defendant:

> did steal, take and carry away two polo brand shirts by removing the anti-theft device attached to each shirt, *the personal property of Belk's Department Stores*, *an entity capable of owning property*, having a value of $134.50[.]

(Emphasis added.) It certainly could be argued that the indictment sufficiently alleges that the two polo shirts did not belong to Defendant, and, therefore, were the property "of another." However, our Supreme Court has consistently held that the indictment must go further by clearly specifying the *identity* of the victim. *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443.

In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, "itself imports an association or a corporation [or other legal entity] capable of owning property[;]" or, (2) there is an allegation that the victim, as named, "if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]" *Id.*

A victim's name imports that the victim is an entity capable of owning property when the name includes a word like "corporation," "incorporated," "limited," "church," or an abbreviated form thereof. *Id.* Here, however, the name "Belk's Department Stores" does not itself import that the victim, as named in the indictment, is a corporation or other type of entity capable of owning property: "Stores" is not a type of *legal* entity recognized in North Carolina. *See*, *e.g.*, *State v. Brown*, 184 N.C. App. 539, 542-43, 646 S.E.2d 590, 592 (2007) (holding "Smoker Friendly Store" insufficient).

The indictment does, though, include an allegation that Belk's is "an entity capable of owning property." The issue presented by this case, therefore, is whether alleging that Belk's is some unnamed type of entity capable of owning property is sufficient *or* whether the specific type of entity must be pleaded. We hold that the holdings and reasoning in decisions from our Supreme Court and our Court compel us to conclude that the allegation that Belk's is some unnamed type of "entity capable of owning property" is not sufficient.

Our Supreme Court has held on numerous occasions that where the larceny victim is not a natural person or an entity whose name imports that it is a legal entity, the indictment must specify that the victim "is a corporation or *otherwise a legal entity capable of owning property*."

Campbell, 368 N.C. at 86, 772 S.E.2d at 443 (emphasis added).[2] The State essentially argues that the italicized portion of this quote from *Campbell* means that an indictment which fails to specify the victim's entity type is, nonetheless, sufficient so long as the indictment otherwise alleges that the victim is a legal entity. Defendant argues that the italicized language should not be read so literally, but rather our Supreme Court meant that the indictment must specify the victim's entity type, whether a corporation or otherwise. For the following reasons, we must accept Defendant's interpretation.

First, the allegations regarding the identity of the victim in the present case are essentially the same as those which our Supreme Court has consistently held to be insufficient. For instance, like the indictment in the present case, the indictment in *Thornton* – the seminal case from our Supreme Court on the issue – (1) alleged a victim name which otherwise did not import a natural person or entity capable of owning property, identifying the victim as "The Chuck Wagon"; (2) failed to specify the victim's entity type; and (3) essentially alleged that the victim, otherwise, was capable of owning property. *Thornton*, 251 N.C. at 659-60, 111 S.E.2d at 901-02. In the present case, the indictment alleged that Belk's was an entity capable of owning property by expressly stating as such. In *Thornton*, the indictment alleged that The Chuck Wagon was an entity capable of owning/possessing property by alleging that that The Chuck Wagon "entrusted" certain of *its* property to the defendant, who in turn converted the property "*belonging to* said The Chuck Wagon" for his own use. *Id.* (emphasis added). In sum, our Supreme Court in *Thornton* held that an indictment identifying the victim as "The Chuck Wagon" and alleging that the The Chuck Wagon could have property "belonging" to it did not satisfy the requirement that the victim be identified. *Id.* at 662, 111 S.E.2d at 904. There is no practical difference between the allegations in *Thornton* and those in the present case concerning the victim's identity. We are bound by the holding in *Thornton* and similar holdings.

Second, our Supreme Court has consistently held that it is the State's burden to prove the victim's identity. *See*, *e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443. Merely stating that the victim named is an entity capable of owning property fails to identify with specificity the identity of the victim. For instance, it is permissible in North Carolina for a

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2. *See also*, *e.g.*, *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960); *State v. Jessup*, 279 N.C. 108, 112, 181 S.E.2d 594, 597 (1971) (holding that a larceny indictment must "allege the ownership of the property either in a natural person or [in] a legal entity capable of owning" property).

limited partnership and a corporation to share the same name, so long as they are different entity types. As such, it is *possible* for there to be a "Belk's Department Stores, a corporation" and, at the same time, a "Belk's Department Stores, a limited partnership." Allowing the State merely to allege "Belk's Department Stores" as some entity type capable of owning property would relieve the State of its obligation to identify with sufficient specificity who the victim was. Indeed, our Supreme Court once vacated a conviction where the indictment alleged the victim named was a sole proprietorship but the evidence at trial showed that the victim named was, in fact, a corporation, confirming that alleging the victim's entity type is crucial. *State v. Brown*, 263 N.C. 786, 787-88, 140 S.E.2d 413, 413-14 (1965) (holding it a fatal variance where indictment alleged victim as "Stroup Sheet Metal Works, H.B. Stroup, Jr., owner" and the evidence showed that the victim was "Stroup Sheet Metal Works, Inc.").

Third, the State does not cite, nor has our research uncovered, any North Carolina case where an indictment failing to allege a specific form of entity was deemed sufficient. In every instance, an indictment has been sustained only where the type of entity is specified.

We are further persuaded by our reasoning in *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969). In that case, the defendant was convicted of stealing three dresses from an entity referred to in the indictment solely as "Belk's Department Store, 113 E. Trade Street." *Id.* at 65, 169 S.E.2d at 242. We vacated the conviction, essentially explaining that the indictment was fatal because it failed to specify the type of legal entity "Belk's Department Store" was:

> Here, we cannot say that "Belk's Department Store" imports a corporation, there is no allegation that it is a corporation, nor is there any allegation that it is a proprietorship or a partnership. The name "Belk's Department Store" certainly does not suggest a natural person. . . . [W]e are compelled to hold the warrant is fatally defective.

Id. at 66, 169 S.E.2d at 242.

IV. Conclusion

The purpose of an indictment is to put a defendant on reasonable notice of the charge against him so that he may prepare for trial and to protect him from double jeopardy. *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2015). The indictment in the present case appears to be sufficient in accomplishing its purpose: it alleges the date and location of

the crime and the items that he stole. It is also clear from the indictment that the grand jury found that the items did not belong to Defendant but were the property "of another." However, our Supreme Court has consistently held that the State must allege not only facts sufficient to show that the property did not belong to Defendant, but also the identity of the actual owner. By merely alleging that the owner was "Belk's Department Stores, an entity capable of owning property," the State has failed to allege with specificity the identity of the actual owner.

Our Supreme Court has recently relaxed the requirement for specifying the victim's entity type in indictments charging injury to *real* property. *See Spivey*, 368 N.C. at 744, 782 S.E.2d at 875 (holding an identification of the owner as "Katy's Eats" sufficient to identify the real property at issue). However, our Supreme Court has not relaxed this rule with respect to indictments charging larceny of *personal* property. *Id.*; *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443. Therefore, we must conclude that the superior court lacked jurisdiction to try Defendant as charged.

VACATED.

Judge HUNTER, JR., concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the State has failed to allege with specificity the identity of the owner in defendant's indictment for larceny against a merchant. As such, I would find no error with respect to the trial. However, I would find that the restitution ordered by the court was not supported by evidence in the record, and would vacate that order and remand for a new hearing on restitution.

On or about 19 September 2015, defendant and Ms. Lamaya Sanders ("Ms. Sanders") were driving from Greensboro to Salisbury when defendant suggested to Ms. Sanders that they go to Belk's and steal some polo shirts. Ms. Sanders agreed to help. Defendant selected a black polo shirt and Ms. Sanders removed the tag and placed it in her bag. She also removed a tag from a red polo shirt and placed it in her bag. Defendant picked out other shirts, but Ms. Sanders could not remove the tags. Defendant and Ms. Sanders then left the store.

The thefts were filmed on the Belk's' security system. The loss prevention officer called the Salisbury police and obtained the tag number

for defendant's vehicle as he and Ms. Sanders fled the parking lot. Based upon the information provided by the Belk's' loss prevention officer, the Salisbury police obtained warrants for defendant and Ms. Sanders. Ms. Sanders pleaded guilty in District Court in November 2018 and had completed her active sentence when she was subpoenaed and testified against defendant.

On 16 May 2016, the grand jury indicted defendant alleging that he:

> unlawfully, willfully and feloniously did: steal, take and carry away two polo brand shirts by removing the anti-theft device attached to each shirt, the personal property of *Belk's Department Stores*, *an entity capable of owning property*, having a value of $134.50.

(emphasis added).

The issue presented by defendant's appeal is whether it is sufficient to allege a store name, together with the allegation that the store is a legal entity capable of owning property, to meet the requirements of N.C. Gen. Stat. § 15A-924(5). The statute states that a criminal pleading must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(5) (2015).

Contrary to the holding of the majority's opinion, I believe this indictment adequately identified the victim of the larceny and was sufficient to convey jurisdiction on the Superior Court to determine the guilt or innocence of defendant.

Defendant was charged with violating N.C. Gen. Stat. § 14-72.11(2) which in pertinent part provides:

> A person is guilty of a Class H felony if the person commits larceny against a merchant . . .
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

N.C. Gen. Stat. § 14-72.11(2) (2015).

In *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015), the larceny indictment alleged that the defendant stole the personal property

of "Andy Stevens and Manna Baptist Church." *Id.* at 86, 772 S.E.2d at 443. The issue before the North Carolina Supreme Court was whether the larceny indictment was fatally flawed because it did not specifically state that the church was an entity capable of owning property. *Id.* at 84, 772 S.E.2d at 442. Our Supreme Court held:

> The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. . . . To be valid a larceny indictment must allege the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property.

Id. at 86, 772 S.E.2d at 443 (internal quotation marks and citations omitted). The North Carolina Supreme Court, overruling the line of the Court of Appeals cases deciding otherwise, further held that "alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property[.]" *Id.* at 87, 772 S.E.2d at 444. Accordingly, the larceny indictment was upheld as valid on its face and the decision of the Court of Appeals was reversed and remanded.

Given the complexity of corporate structures in today's society, I think an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation. Contrary to the majority's belief that our Supreme Court has not relaxed the rule with respect to indictments charging larceny, I believe that our Supreme Court has refined its earlier holding in *State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960), through its ruling in *Campbell*. I also believe that *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969), which merely identified the victim as "Belk's Department Store, 113 E. Trade Street[,]" is distinguishable from the present case as there was no allegation that the victim was a legal entity capable of owning property.

Therefore, I vote to find no error in defendant's conviction. However, I do not believe that the State presented sufficient evidence to support the award of restitution in the Judgment. Thus, I would vacate and remand the matter for a new hearing on restitution.

STATE OF NORTH CAROLINA
v.
REUBEN TIMOTHY CURRY, DEFENDANT

No. COA16-1113

Filed 17 October 2017

1. Attorneys—motion to withdraw—personal conflict—inability to believe defendant—no disagreement about trial strategy—no identifiable conflict of interest

The trial court did not abuse its discretion in a first-degree murder case by denying defense counsel's motion to withdraw where it was based on a personal conflict regarding his inability to believe what defendant told him, and where counsel had represented defendant for nearly three years and there was no disagreement about trial strategy or an identifiable conflict of interest.

2. Constitutional Law—effective assistance of counsel—failure to articulate specific nature of problems

Defendant's trial counsel did not provide ineffective assistance of counsel in a first-degree murder case by allegedly failing to articulate "the specific nature of the problems" between counsel and defendant where defendant was the sole cause of any purported conflict and there was no reasonable assertion by defendant that an impasse existed requiring a finding that counsel was professionally deficient. Further, the parties agreed about the trial strategy.

3. Constitutional Law—effective assistance of counsel—failure to take third opportunity to cross-examine witnesses

Defendant's trial counsel did not provide ineffective assistance of counsel in a first-degree murder case by allegedly failing to take advantage of a third opportunity to cross-examine one of the State's witnesses concerning who actually shot the victim. Defendant was convicted because he was a participant in an attempted robbery and ensuing "gun battle," and there was no reasonable probability of a different result in this case.

Judge ZACHARY concurs in result only.

Appeal by defendant from judgment entered 4 March 2016 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Paul F. Herzog for defendant-appellant.

BERGER, Judge.

On March 4, 2016, Reuben Timothy Curry ("Defendant") was sentenced to life in prison after a Mecklenburg County jury found him guilty of first degree murder. Defendant alleges the trial court abused its discretion in denying defense counsel's motion to withdraw. Defendant also contends his trial counsel provided ineffective assistance on two separate grounds: (1) counsel failed to articulate "the specific nature of the problems" between counsel and Defendant such that the trial court was unable to determine if an impasse existed; and (2) counsel failed to take advantage of a third opportunity to cross-examine one of the State's witnesses. As to each of Defendant's arguments, we disagree.

Factual & Procedural Background

Ronny Steele ("Steele") died from a gunshot wound he suffered on February 25, 2013. Evidence presented at trial tended to show that Defendant was a participant in an ambush-style attempted robbery and ensuing "gun battle" in which Steele was killed. Defendant was indicted for first-degree murder and robbery with a dangerous weapon.

Just prior to trial, Defendant provided defense counsel with a list of three facts he wished to concede: (1) he was at the scene of the crime; (2) he "had or fired a gun"; and (3) he was part of an attempted robbery. A closed hearing was held regarding these possible admissions, and counsel advised the trial court that Defendant's newly discovered veracity would impact his ability to handle the case and implicate *Harbison* concerns. Defense counsel was concerned that he could no longer be an effective advocate for Defendant "knowing what I know now."

The trial court conducted the following colloquy with Defendant, in closed proceedings:

> THE COURT: Okay. Mr. Curry, would you stand please, sir.
>
> Once again, this conversation is not confidential but it's confidential in terms of where we are in the proceeding right now.

The DA is not present. The jury's not present. It's just me and the court reporter, your attorney, and you, the sheriff and the clerk and a family member of yours, I believe.

DEFENDANT: Yes, sir.

THE COURT: What your attorney is wanting to make sure you understand is you don't have to make admissions of any kind that you were there at the scene of this occurrence, that you had or fired a gun, or that you were part of what the jury may believe was an attempted robbery. Those are all getting real close to admissions -- some admissions of guilt on your part.

DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

DEFENDANT: I'm aware of it.

THE COURT: And that puts your attorney in a very, very precarious position because, as the trial goes forward, his job is that you carry all the weight to the end the presumption of not guilty that's with you right now. You understand?

DEFENDANT: Yes, Your Honor. I'm aware.

THE COURT: Why are you asking him to say things that may tend to indicate your guilt of this matter?

DEFENDANT: Because the things I asked him to say, they don't speak to the crime that I'm on trial for. So I'm really not trying to hide the fact because there were prior statements made during the investigation of this matter that the DA received and I -- I had worries about them maybe introducing those statements and trying to use them as the -- portray me into a liar.

THE COURT: Unless you take the stand, your prior statements won't ever -- the jury will never hear any statements you made -- well, I take it back.

They may -- if you were -- are there statements that are going to come in of [Defendant's] after Miranda?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Okay. And so the only statement --

[DEFENSE COUNSEL]: Well, first there was no Miranda warnings, but that part of the interrogation, the DA elected not to proceed with that part. So the part that --

THE COURT: Right. The interrogation that occurred at the law enforcement center, the DA said he's not going to use that at this point. The only thing that's going to come into evidence in terms of what you may have said were those -- I think the statements at the hospital.

DEFENDANT: Correct.

THE COURT: Right. Those statements that you may have made at the hospital to that very first detective that showed up there. And that was Detective Redfern.

DEFENDANT: Yes, sir.

[DEFENSE COUNSEL]: Correct.

THE COURT: But I don't think Detective Redfern's statements are going to go as far as you're asking your attorney to go in getting real close to that edge of making admissions against your interest. You're asking your attorney to ride a very fine line, in that, if he says you were there, if he says you had or fired a gun, and if he says that you may find that I was part of an attempted robbery, that's getting right up to the edge of going beyond your presumption of innocence and giving the jury stuff that you don't have to give the jury.

Your attorney can -- as he's done during the three or four days we've already been involved in this has argued to this jury at every phase that you're innocent until proven guilty beyond a reasonable doubt. He's never wavered from that. And you're asking him now to take some steps that put him in a very difficult position.

It's your case. And as I told you I think when I had the discussion with you earlier, your wishes control what happens.

DEFENDANT: Yes.

THE COURT: You have -- your attorney has to do what you say. In other words -- you'll get to this point much later in the trial. If you want to testify, he might advise you not to but you -- if you want to testify, no one can stop you.

DEFENDANT: Yes, Your Honor.

THE COURT: That's another part of the trial.

There's a theory in the law that says, if there's an impasse between the two of you on how you should proceed, that he has to follow your wishes. Now he's worried about following -- that's why he's brought it to my attention, outside of the DAs, is that he's worried that if he follows your wishes, you're putting him in a position of admitting things to this jury that he doesn't want to -- I don't think he wants to admit.

Do you, [defense counsel]?

[DEFENSE COUNSEL]: Do not, Your Honor.

THE COURT: I don't think he thinks that's in your best interest to admit these things.

DEFENDANT: We spoke briefly before you entered and I was getting his advice on it. So, I mean, I may not necessarily go through with it but I just would ask him --

THE COURT: Good. I'll give you some more time to talk with him about it because now that you and I have discussed it, you may see -- I think that his indication is -- how long have you been a defense attorney, [defense counsel]?

[DEFENSE COUNSEL]: Since 1986.

THE COURT: Okay. And his advice I think -- I'm telling you his advice is, don't ask him to include these things in your opening statement. It's against your interest and it is perilously close to proving some things that the State really has to prove. Okay?

DEFENDANT: Yes, Your Honor.

THE COURT: So I'm going to give you some more time to talk to [defense counsel] regarding this and then you may ask -- and then this will be part of the record but if you choose after this conversation to have him not include these things in the opening statement, they won't be included. There will be -- the jury and the DA will never know about it.

DEFENDANT: Okay.

THE COURT: Okay?

DEFENDANT: Yes, sir.

THE COURT: So go ahead and talk to [defense counsel].

Defendant and the court subsequently discussed this situation, and Defendant told the court,

> I mean, there's a method to my madness. I mean, I was thinking I don't want the jury to look at me as -- in a deceptive manner, like I'm trying to deceive them on certain parts of the case.
>
> But we discussed this. Like I said, I told him that if he felt more confident doing it the way that he was -- that he was initially going to do it, and I was fine with that.

The trial court then specifically asked Defendant about the admissions and his satisfaction with counsel:

> THE COURT: Okay. So now what's your decision about the issue of whether you were there or the issue of whether or not you fired a gun?
>
> DEFENDANT: I leave it to him. I let him -- he can go with what he had.
>
> THE COURT: You're not making any specific request that he include those things in his opening statement?
>
> DEFENDANT: No, sir, Your Honor.
>
> THE COURT: So you changed your mind regarding that issue?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And I think that's good advice that you follow -- I think your attorney's advice is that you not include those things in your opening statement. And so you're following your attorney's advice?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Are you making that decision of your own free will, fully understanding what you're doing?
>
> DEFENDANT: Yes, sir.

> THE COURT: Do you have any questions of me regarding that decision?
>
> DEFENDANT: None, Your Honor. No, sir, Your Honor.
>
> THE COURT: Are you satisfied with your attorney's services to this point in urging that you allow him to make the opening statement that he wants to make and not include these elements that you wanted?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with his services?
>
> DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: Okay. So he's going to make his opening the way he thinks it ought to be made in your behalf and not include those things -- one, two, and three -- that we discussed. He's not going to make those things.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you're okay with that?
>
> DEFENDANT: Yes, Your Honor.

Defense counsel again expressed to the court that the three new facts provided "five minutes before opening statement" and subsequent out-of-hand dismissal of those facts by Defendant created concerns about counsel's ability to zealously represent Defendant.

At trial, defense counsel gave an opening statement in which he told the jury, among other things, that Defendant "is not guilty of attempted armed robbery," that the evidence will "show that [Defendant] did not attempt to rob anyone," and that the "evidence will show that it was not a robbery or an attempted armed robbery." These statements were contrary to the facts Defendant disclosed to counsel.

Defense counsel, at the direction of the trial court and the North Carolina State Bar, filed a Motion to Withdraw As Counsel during the trial. Counsel's motion to withdraw specifically alleged the following:

(1) Defendant wanted counsel to raise the three factual issues discussed above. Counsel addressed these issues with the

trial court, and the court advised Defendant he should follow counsel's advice and not include the information in opening.

(2) Defendant and defense counsel continued to discuss the request, and Defendant agreed to withdraw one of his requests.

(3) When they returned to the courtroom, "[c]ounsel expressed to the [c]ourt that counsel was conflicted by what he had just learned by reading Defendant's request to be told to the jury in the Opening Statement."

(4) After additional discussion with the trial court, Defendant agreed that counsel could conduct opening without Defendant's three requested facts.

(5) Counsel and Defendant discussed how the proposed facts "caused a conflict in counsel's trial strategy and created a conflict concerning counsel['s] duties pursuant to the Rules of Professional Conduct."

(6) At that point, "discussions with Defendant[] and the statements made by Defendant only tended to exacerbate the conflicts."

(7) Defense counsel then believed that, based upon the seriousness of the charge and the Rules of Professional Conduct, that he needed to contact the North Carolina State Bar "to seek guidance and advice."

(8) Counsel was unable to reach the appropriate person with the Bar, and provided relevant information to the court. The trial court agreed that the issue "merited a discussion with Ethics Counsel at the North Carolina State Bar."

(9) Counsel spoke with Ms. Nichole P. McLaughlin, Assistant Ethics Counsel with the North Carolina State Bar, about the following: "the nature of the charge"; "the length of time counsel has represented the [D]efendant"; "where we were in the trial proceedings"; Defendant's request and subsequent discussions; and "how counsel perceived the information impacted the opening statement, ability to conduct effective cross examination and execute *the previously prepared trial strategy* going forward." (Emphasis added).

(10) Ms. McLaughlin advised counsel to review Rules of Professional Conduct 1.1,[1] 1.3,[2] 1.7,[3] and 1.16,[4] reminded counsel of the confidentiality requirements of Rule 1.6,[5] and to seek the trial court's permission to withdraw because he had "a personal conflict."

(11) Counsel reviewed the Rules of Professional Conduct and stated:

a. "There is a conflict to counsel [sic] adherence to Rule 1.3, Diligence to the client, and Rule 3.3 Candor towards the tribunal."

b. "There is a conflict to counsel [sic] adherence to Rule 1.6, Confidentiality of information and Rule 3.3, Candor towards the tribunal."

c. "There is conflict pursuant to Rule 1.3, Diligence, that counsel has reservation concerning the ability to zealous [sic] advocate on client's behalf."

d. Counsel's duty of candor to the trial court pursuant to Rule 3.3 "has resulted and will continue to result in such an extreme deterioration of the client-counsel relationship that counsel can no longer competently represent the client pursuant to Rule 3.3, Comment (16)."

(12) Counsel was concerned that his adherence to Rule 3.3 as it relates to the cross examination of one witness may have negatively impacted Defendant.

Defense counsel informed the court that the attorney-client relationship had been destroyed because "counsel does not know what to believe." Defense counsel and the court then had the following discussion:

> [DEFENSE COUNSEL]: I try and present my defense strategy based on what the evidence shows till the client tells me what happened. Then that does, I guess, some -- impose some requirement that counsel marshal the defense that client requests. But it goes back in this case

1. Rule 1.1 Competence
2. Rule 1.3 Diligence
3. Rule 1.7 Conflict of Interest: Current Clients
4. Rule 1.16 Declining or Terminating Representation
5. Rule 1.6 Confidentiality of Information

> of whether or not I can believe what he's told me. And my conclusion at this point is that I cannot believe anything that he's told me with regard to the mere material issues at point in this case because they've changed over time.
>
> THE COURT: And that's the vacillation that I'm talking about. If he has changed what he's telling his attorney, he can't benefit from that at this stage of this trial. You'll just have to do -- do the professional job that I know that you can do to represent him.

The trial court denied defense counsel's motion to withdraw. The jury convicted Defendant of first-degree murder on the theories of felony murder and lying in wait, and Defendant was sentenced to life in prison without parole. The State did not proceed on the robbery with a dangerous weapon charge. Defendant gave notice of appeal in open court.

Analysis

Defendant contends the trial court erred in denying counsel's motion to withdraw, and alleged defense counsel provided ineffective assistance by (1) failing to articulate that an impasse existed, and (2) failing to take advantage of an additional opportunity to cross examine one of the State's witnesses. As to each of Defendant's contentions, we disagree.

I. Motion to Withdraw

[1] A motion to withdraw as counsel may be granted upon "good cause" shown. N.C. Gen. Stat. § 15A-144 (2015). "Whether an attorney can withdraw as counsel is a matter in the sound discretion of the trial judge." *State v. Moore*, 103 N.C. App. 87, 100, 404 S.E.2d 695, 702 (citation omitted), *disc. rev. denied*, 330 N.C. 122, 409 S.E.2d 607 (1991). "Appellate courts will not second-guess a trial court's exercise of its discretion absent evidence of abuse." *State v. Smith*, 241 N.C. App. 619, 625, 773 S.E.2d 114, 118-19 (citation and quotation marks omitted), *disc. review denied*, 368 N.C. 355, 776 S.E.2d 857 (2015). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Defense counsel set forth several purported reasons to justify his withdrawal; however, all stemmed from what the State Bar called a "personal conflict." The content of the motion and the arguments of counsel to the court demonstrate that the "personal conflict" was directly related to his inability to believe what Defendant told him. As

the State Bar confirmed, defense counsel did not have an actual conflict, and there is no evidence he breached the rules of professional conduct. Counsel had represented Defendant for nearly three years, and had presumably expended significant time and resources preparing for trial. In addition, there was no disagreement about trial strategy, nor was there an identifiable conflict of interest. The trial court was correct to advise defense counsel that he would "just have to do - - do the professional job that I know that you can do to represent him." It cannot be said that the trial court's denial of the motion to withdraw was arbitrary or manifestly unsupported by reason.

Moreover, Defendant is required to show prejudicial error resulted from the denial of the motion to withdraw. *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495 ("In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." (citation omitted)), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). As more fully discussed below, Defendant has failed to establish a reasonable probability of a different result in this case.

II. Ineffective Assistance of Counsel

Ineffective assistance of counsel ("IAC") claims are typically "considered through a motion for appropriate relief filed in the trial court and not on direct appeal." *State v. Mills*, 205 N.C. App. 577, 586, 696 S.E.2d 742, 748 (2010) (citing *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001)). *See also State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal." (citation omitted)). "However, a defendant's ineffective assistance of counsel claim brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *Mills*, 205 N.C. App. at 586, 696 S.E.2d at 748 (citation and quotation marks omitted). No further investigation is necessary in this matter as there is ample evidence in the record to decide Defendant's two IAC claims.

Under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 23 of the North Carolina Constitution, "[a] defendant's right to counsel includes the right to effective assistance of counsel." *State v. Braswel*l, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). In *Braswell*, our Supreme Court "expressly adopt[ed] the test set out in *Strickland v. Washington* [, 466 U.S. 668, 80 L. Ed. 2d 674 (1984),] as a uniform standard to be

applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248.

On appeal, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness" to prevail. *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. To meet this burden, the defendant must satisfy a two part test:

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

Id. at 687, 80 L. Ed. 2d at 693. Furthermore, a defendant alleging that counsel failed to carry out his duties with the proficiency required by the Sixth Amendment must identify the specific acts or omissions of counsel that were not the result of "reasonable professional judgment." *Id.* at 690, 80 L. Ed. 2d at 674.

A. Purported Impasse

[2] Defendant asserts that his counsel was ineffective by "failing to articulate for the record the specific nature of the problems between himself and the defendant leading to an impasse." We disagree.

It is well established in our courts that "[t]actical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer." *State v. Ward*, ___ N.C. App. ___, ___, 792 S.E.2d 579, 582 (2016) (citations and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 795 S.E.2d 371 (2017). "However, when counsel and a fully informed criminal defendant . . . reach an absolute impasse as to such tactical decisions [during trial], the client's wishes must control . . . ." *Id.* (citation omitted). However, no actual impasse exists where there is no conflict between a defendant and counsel. *State v. Wilkinson*, 344 N.C. 198, 211-12, 474 S.E.2d 375, 382 (1996). Moreover, when a defendant fails to complain about trial counsel's tactics and actions, there is no actual impasse. *State v. McCarver*, 341 N.C. 364, 385, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). In the case at hand, there was neither disagreement regarding

tactical decisions, nor was there anything in the record which would suggest any conflict between defendant and defense counsel. Thus, no impasse existed.

Defendant's arguments on this issue go solely to issues surrounding counsel having "no confidence in anything his client told him, and that he did not know what to believe when it came to [Defendant's] statements about the events of February 25, 2013." Defendant makes no argument rooted in law that an impasse existed, besides using conclusory terms. In addition, Defendant points to no authority which would require a finding of an impasse where defense counsel did not believe what a criminal-defendant client told him.

Throughout the trial, defense counsel informed the court and Defendant of the nature of the concerns or disagreements the two had, but counsel specifically followed Defendant's wishes and desires concerning representation. Defense counsel gave the opening statement that he and Defendant agreed upon, despite counsel's knowledge that what he was relaying to the jury was inconsistent with the Defendant's newly discovered veracity. If Defendant was "fine with that," as he informed the court, no impasse existed. This is true regardless of defense counsel's personal conflict, ethical quandary, or Defendant's perceived malleability of the truth.

Defendant was the sole cause of any purported conflict that developed, and there has been no reasonable or legitimate assertion by Defendant that an impasse existed that would require a finding that counsel was professionally deficient in this case. Because Defendant, of his own free will, was in agreement with counsel as to the actions to be taken at trial, Defendant's contention that his counsel was ineffective is without merit, and this IAC claim is denied.

B. Failure to Cross-Examine Witness

[3] Defendant also alleges trial counsel provided ineffective assistance when he did not cross-examine witness Tarod Ratlif for a third time to inquire about his "recollection concerning who actually shot the victim." Defendant asserts that additional questioning "would have supported his theory" that Brandon Thompson ("Thompson") killed Ronny Steele. Defendant concedes that no additional investigation is needed, and this issue can be decided on the merits.

Ratlif testified on direct examination that a group that included Defendant and a group that included Thompson exchanged gunfire on the evening Steele was killed.

> Q. Okay. Can you tell me -- could you tell from where the gunshots were coming?
>
> A. Yes.
>
> Q. And from where did you hear gunshots coming?
>
> A. From both sides of me, from the left and the right.
>
> Q. So you can hear them coming from your left side and your right side?
>
> A. Yes, sir.
>
> Q. And do you know exactly how many gunshots you heard?
>
> A. No, sir. Not today.

Ratlif testified that after the shooting, Steele informed him he was hit, but Ratlif did not believe Steele.

In discussions with the trial court and Defendant regarding Ratlif's testimony, defense counsel stated, "Recalling Mr. Ratlif -- think I went about as far with Mr. Ratlif as I could do based upon what I knew . . . ." The trial court, regarding counsel's questioning of Ratlif, stated:

> But I thought that in your cross-examination of Mr. Ratlif and [another witness] that you set forth the theory that this, A, may not have been a robbery at all; and B, once somebody other than [Defendant] may have shot Mr. Steele in this gun battle. And I think you argued that this was a gun battle in your opening remarks. Nobody on the stand so far has pointed a finger at [Defendant] as the perpetrator of any crime.

That prompted the following exchange between the trial court and Defendant:

> DEFENDANT: I just want to state that I am concerned with his confidence of going forward as far as with the -- you know, his ability to be a fully effective, but I am -- I am -- I have been satisfied with his service so far and I feel like I wouldn't rather any different attorney be my attorney unless, you know, he is at the point to where he can't be fully effective going forward.
>
> THE COURT: He's a professional. He can -- [defense counsel] has said under my questioning, he's protecting

your rights. He's not divulging matters that -- client confidentiality matters. He's not divulging them. He's done, I thought, a fine job of setting forth your theory of the case so far that someone else shot Mr. Steele or maybe shot in a gun battle. That Mr. Ratlif or [another witness] has pointed a finger at you.

And I thought [defense counsel] did a good job of cross-examination pointing out conflicts in their testimony and their statements to the police in their prior testimony and prior matters involving the death of Mr. Steele. I know there have been prior trials where Mr. Ratlif and [another witness] testified. And I thought [defense counsel] pointed out some good conflicts. You know what I mean by that?

DEFENDANT: Yes, sir.

THE COURT: Some statements they made earlier that were different from the statements they were making in this trial.

Did you think [defense counsel] did a good job of that?

DEFENDANT: Yes, sir.

THE COURT: Okay. So as we go forward, he's going to -- he's going to keep me advised if you -- if we reach a stage where you want a particular thing to happen with your case and you don't think [defense counsel] understands it or is going to do it, as long as it's a lawful request and you're -- and you're not asking him to violate the law or perpetuate a fraud upon the [c]ourt and as long as any request that you make of [defense counsel] can be supported by a good faith argument for an extension modification or reversal of existing law, then he will comply with your wishes as the trial progresses in defending your case the way that you want to defend it. Okay?

DEFENDANT: Yes, sir.

THE COURT: And at this point, you are satisfied with [defense counsel's] representation of you in this trial?

DEFENDANT: Yes, Your Honor. I've been satisfied with [defense counsel].

Defense counsel in his motion to withdraw did state that he was concerned that his failure to ask additional questions regarding

Thompson's actions may have precluded jury instructions consistent with *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598 (1992), and *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924). Defendant acknowledges and the transcript reveals, however, that the trial court gave instructions consistent with *Bonner* and *Oxendine*. In addition, defense counsel argued in closing:

> And we know Brandon Thompson had a gun. But you haven't seen Brandon Thompson come into this courtroom. We know Brandon Thompson was shooting because Tarod Ratlif said he was shooting, but you haven't seen Brandon Thompson come into this courtroom and testify to you under oath that he did not have a gun. And if he had a gun, why didn't he give it to the police? He hasn't come in.

Ratlif testified that he heard gunfire coming from the direction of Defendant and Thompson. He also testified that Thompson had a gun and did not deny that Thompson had shot the gun. Counsel's questioning allowed him to argue to the jury that someone other than Defendant shot Steele. As the trial court noted, defense counsel "set forth the theory that this . . . may not have been a robbery at all; and . . . somebody other than [Defendant] may have shot Mr. Steele in this gun battle."

In fact, Defendant concedes in his brief that the jury considered whether Thompson shot Steele. During deliberations, the jury submitted the following question to the trial court: "If [Thompson] shot and killed [Steele,] how would that apply to element [two]?" While the prosecutor provided language that he believed addressed the jury's question, it was Defendant who requested the following instruction be given: "The killing of Ronny Steele must be the act of the [D]efendant or by someone with -- with whom the [D]efendant was acting in concert."

The trial court addressed several items with the jury, and then discussed the question regarding Thompson:

> THE COURT: The next is actually a question. The next thing says, "If [Thompson] shot and killed [Steele], how would that apply to element two?"
>
> In response to that question, this is the response from the Court:
>
> The killing of Ronny Eugene Steele must be by an act of the Defendant, Reuben Timothy Curry, or by an act of someone with whom the [D]efendant was acting in concert with.

Does that answer that question?

[JUROR]: Yes, sir.

The jury was properly instructed that Defendant could only be convicted if he, or "someone with whom the [D]efendant was acting in concert with" killed Steele. The jury deliberated on and considered whether Thompson shot Steele based on the question they submitted.

Even if we assume that Defendant satisfied the first *Strickland* prong for both issues, which he has not, Defendant cannot satisfy the second prong as there is no showing of prejudice. There was sufficient evidence before the trial court that Defendant, or those acting in concert with Defendant, shot and killed Steele. Defendant was at the crime scene. Defendant was convicted because he was a participant in an attempted robbery and ensuing "gun battle" during which Steele was fatally shot, even if he may not have fired the fatal bullet. There is no reasonable probability of a different result in this case. Based upon the abundant evidence in the record, Defendant's IAC claims are denied.

Conclusion

Upon consideration of the record herein and the arguments of counsel, we conclude the trial court did not abuse its discretion in denying defense counsel's motion to withdraw, and Defendant's IAC claims are denied.

NO ERROR IN PART; DENIED IN PART.

Judge DILLON concurs.

Judge ZACHARY concurs in result only.

STATE v. DUNSTON

[256 N.C. App. 103 (2017)]

STATE OF NORTH CAROLINA
v.
RICHARD DUNSTON, DEFENDANT

No. COA16-1254

Filed 17 October 2017

Drugs—maintaining vehicle for keeping or selling controlled substances—motion to dismiss—totality of circumstances—perpetrator

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a vehicle for keeping or selling controlled substances under N.C.G.S. § 90-108(a)(7) where based upon the totality of the circumstances there was substantial evidence introduced at trial for each essential element of the offense and that defendant was the perpetrator.

Judge DILLON concurring with separate opinion.

Judge ZACHARY dissenting.

Appeal by Defendant from judgment entered 14 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christina S. Hayes, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BERGER, Judge.

On April 14, 2016, a Wake County jury convicted Richard Dunston ("Defendant") of trafficking opium or heroin, and maintaining a vehicle for keeping or selling controlled substances. Defendant was sentenced pursuant to N.C. Gen. Stat. § 90-95(h)(4) (2015) and received a mandatory sentence of 90 to 120 months in prison, and ordered to pay a fine of $100,000.00. Defendant does not appeal his conviction or sentence from trafficking opium or heroin, but rather contends the trial court erred in denying his motion to dismiss the charge of maintaining a vehicle for keeping or selling controlled substances. We disagree.

Factual & Procedural Background

At trial, evidence tended to show that on September 6, 2013, officers with the Raleigh Police Department's Selective Enforcement Unit were conducting surveillance at a business known to have a high volume of illicit drug activity. Defendant was observed walking towards a white Cadillac in the parking lot. An individual, later identified as Defendant's nephew, Darius Davis ("Davis"), was in the driver's seat of the Cadillac. Defendant began speaking with Davis, and opened a package of cigars. Defendant removed the plastic filters from the cigars, and based upon the officer's training and experience, appeared to replace the tobacco in the cigars with marijuana. Defendant then licked the paper, re-rolled, and replaced the plastic filters back on the "cigars."

Davis was observed exchanging cash in a hand-to-hand transaction with an older male he met in the parking lot. Defendant and Davis then began an extended conversation with each other, and Defendant sat in the passenger seat of the Cadillac. Davis drove away from the business, and officers initiated a traffic stop of the vehicle.

Davis consented to a search of his person, which yielded a bag of marijuana. Defendant was then removed from the vehicle and searched. Defendant had no contraband on his person, not even the "cigars" he was observed handling earlier. Officers then conducted a search of the Cadillac, leading to the discovery of an open container of alcohol under the front passenger's seat and a travel bag containing a 19.29 gram mixture of heroin, codeine, and morphine on the back seat. The travel bag also contained plastic baggies, two sets of digital scales, and three cell phones. Defendant admitted that the Cadillac and travel bag belonged to him. Officers later determined, however, that the Cadillac was owned by Defendant's former girlfriend, Latisha Thompson ("Thompson").

Thompson and Defendant dated for approximately eleven years, but the relationship ended nearly five years before the trial. She acknowledged that the Cadillac was registered in her name, but Defendant purchased, used, and maintained the car. Thompson also testified that she believed associating with Defendant was not in Davis's best interests. Defendant then asked Thompson:

> [DEFENDANT]: So how -- so let me ask you a question: So why would you feel that Mr. Davis was getting himself into something he didn't deserve?
>
> [THOMPSON]: Because I knew. I was with you [for] 11 years.

[DEFENDANT]: Exactly what is that supposed to mean?

. . . .

[THOMPSON]: I knew the lifestyle. I knew what was going on.

At the close of evidence, Defendant made a general motion to dismiss, which the trial court denied. Defendant timely gave notice of appeal.

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Our Supreme Court has stated:

> In ruling on a motion to dismiss, both the trial court and the reviewing court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn from the evidence. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury.

State v. Artis, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989) (citations omitted), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Analysis

Defendant contends the trial court erred in denying his motion to dismiss, arguing that there was insufficient evidence to support his conviction of maintaining a vehicle for keeping or selling controlled substances. A defendant may properly be convicted of maintaining a vehicle for keeping or selling a controlled substance if the State proves beyond a reasonable doubt that the defendant knowingly kept or maintained a vehicle "used for the keeping or selling of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2015). Defendant contends

that our case law establishes a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance. We disagree.

Our Supreme Court held in *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994), "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *See also State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) ("[T]he fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not *by itself* demonstrate the vehicle was kept or maintained to sell a controlled substance." (emphasis added)); *State v. Thompson*, 188 N.C. App. 102, 105-06, 654 S.E.2d 814, 817 (this Court must look at the totality of the circumstances, examining such factors as the quantity of drugs, paraphernalia found at the location, the amount of money recovered, and "the presence of multiple cellular phones or pagers" (citations omitted)), *disc. rev. denied*, ___ N.C. ___, 662 S.E.2d 391 (2008).

When viewed in the light most favorable to the State, there was substantial evidence introduced at trial for each essential element of the offense of maintaining a vehicle for keeping or selling controlled substances, and that Defendant was the perpetrator. Here, Defendant was in the vehicle at a location known to law enforcement for a high level of illicit drug activity. Defendant was observed by law enforcement unwrapping cigars and re-rolling them after manipulating them. Based upon the law enforcement officer's training and experience, Defendant's actions were consistent with those commonly used in distributing marijuana. While in the parking lot, Davis, the driver of the vehicle, was observed in a hand-to-hand exchange of cash with another individual. When later searched by officers, Davis was discovered to have marijuana, and Defendant no longer possessed the "cigars" he was observed with earlier.

Additionally, Defendant possessed a trafficking quantity of heroin, along with plastic baggies, two sets of digital scales, three cell phones, and $155.00 in cash. Thompson, Defendant's ex-girlfriend and registered owner of the vehicle, testified that she was concerned about Defendant's negative influence on his nephew, Davis, because she "knew the lifestyle."

Based upon the totality of the circumstances, there was sufficient evidence for the jury to find Defendant knowingly kept or maintained the white Cadillac for the keeping or selling of controlled substances.

Conclusion

Defendant received a fair trial, and his motion to dismiss was properly denied by the trial court.

NO ERROR.

Judge DILLON concurs with separate opinion.

Judge ZACHARY dissents with separate opinion.

DILLON, Judge, concurring.

I fully concur in the majority opinion. I write separately to expound on portions of our Supreme Court's decision in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), which I believe address the concerns of the dissenting opinion.

The dissenting opinion correctly points out that evidence of a *single* drug transaction from a vehicle, by itself, will not sustain a conviction for keeping a vehicle for the sale of illegal drugs. However, it is not imperative that the State *in every case* put forth evidence of drug activity from the vehicle at two different points in time to get to the jury. Rather, evidence found in a vehicle by police in a single encounter *may* be sufficient to get to the jury where warranted by the totality of the circumstances:

> Although the contents of a vehicle are clearly relevant in determining [the vehicle's] use, its contents are not dispositive when, as here, they do not establish that the use of the vehicle was a prohibited one. The determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances.

Id. at 34, 442 S.E.2d at 30.

Our Supreme Court then cites, with approval, a decision from our Court as an example where the evidence found in a vehicle during a single stop was sufficient to establish that the vehicle was being kept for the sale of marijuana. "Where, for example, the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana . . . then defendant may be convicted of maintaining a vehicle . . . used for

or selling a controlled substance. *Id.* at 34, 442 S.E.2d at 30-31 (citing *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88 (1985)). Our Supreme Court then stated that, by contrast, "where the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance." *Id.* at 34, 442 S.E.2d at 31.

The evidence in the present case is much more like the evidence discovered in the *Bright* case. Here, as noted in the majority opinion, there was evidence of a drug transaction from the vehicle and the discovery of marijuana, a trafficking quantity of heroin, plastic baggies, two sets of digital scales, three cell phones, and $155 in cash.

In conclusion, the State is *not* required to put forth evidence of two separate drug transactions from a vehicle to get to the jury. The evidence found in a vehicle from one encounter *may* be sufficient, as it was in *Bright*. I agree with the conclusion reached in the majority opinion that the evidence in the present case was sufficient to get to the jury.

ZACHARY, Judge, dissenting.

For the reasons that follow, I respectfully dissent and vote to reverse the trial court's denial of defendant's motion to dismiss and to vacate defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

In order to prove a violation of N.C. Gen. Stat. § 90-108(a)(7), the State must establish that the defendant kept or maintained a vehicle *with the intent that it be "used for the keeping or selling* of" controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2017) (emphasis added). Our Supreme Court has held that a conviction under N.C. Gen. Stat. § 90-108(a)(7) requires evidence of intentional possession and use of a vehicle for prohibited purposes "that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Absent an admission, proof of a single incident is not sufficient to establish that one of the *defendant's purposes* in maintaining the vehicle involves the keeping and selling of narcotics. *See Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 ("[O]ur legislature [did not] intend[] to create a separate crime simply because the controlled substance was temporarily in a vehicle.").

As the majority correctly notes, "[t]he determination of whether a . . . place is used for keeping or selling a controlled substance 'will depend on the totality of the circumstances.' " *State v. Frazier*, 142 N.C.

App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30). It is evident that "the contents of a vehicle are clearly relevant in determining its use," although "its contents are not dispositive when . . . they do not establish that the use of the vehicle was a prohibited one." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30. The concurrence cites *State v. Bright* for the principle that one instance of narcotics being sold from or found in a vehicle may indeed satisfy the "totality of the circumstances" test for a felony conviction under N.C. Gen. Stat. § 90-108(a)(7). *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985). However, *Bright* is inapposite to a discussion of the issue at hand.

For one, *Bright* touched only on the elements of the *misdemeanor* charge under N.C. Gen. Stat. § 90-108—which does not require any showing of intent that the vehicle be used for the keeping or sale of controlled substances—and not on the different elements of the *felony* charge, which is the charge at issue here. *Id.* Moreover, this Court in *Bright* did not address the number of incidents required for a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, the chief question in *Bright* was whether a misdemeanor crime of " 'maintaining a motor [vehicle] to which persons resorted to for the keeping or sale of marijuana' exists." *Bright*, 78 N.C. App. at 241-42, 337 S.E.2d at 88 (quoting *State v. Church*, 73 N.C. App. 645, 327 S.E.2d 33 (1985)). This Court held that it did. *Id.* at 243, 337 S.E.2d at 89. In sum, *Bright* involved a different offense, and did not speak to whether the *felony* charge, which requires intent, could be established by only one incident.

In addition, our Supreme Court in *Mitchell* did not cite *Bright* for the proposition that one instance of drugs being found in a motor vehicle is enough to sustain a conviction under N.C. Gen. Stat. § 90-108(a)(7). Instead, *Mitchell* reiterated the principle that "an individual within a vehicle possessed marijuana on one occasion cannot establish that the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. *Bright* was simply cited as a contrasting example in which the totality of the circumstances test had been met in a misdemeanor case, where "the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana[.]" *Id.* Notwithstanding the one example from *Bright*, the Supreme Court reversed the defendant's conviction under N.C. Gen. Stat. § 90-108(a)(7).

Despite the precedent that *Mitchell* established, the majority relies on the "totality of the circumstances" test in order to hold that, in

appropriate circumstances, a defendant may nonetheless be convicted under N.C. Gen. Stat. § 90-108(a)(7) based upon a single instance of narcotics being sold from the defendant's vehicle. The majority asserts that a contrary view would improperly "establish[] a bright-line rule whereby one incident of keeping or selling controlled substances is insufficient to sustain a conviction for maintaining a vehicle for keeping or selling a controlled substance." However, the "bright-line rule" to which the majority refers has, indeed, been previously established by this Court. In *State v. Lane*, we followed exactly that rule, which had been promulgated by an earlier case:

> In *State v. Dickerson*, this Court held that one isolated incident of a defendant having been seated in a motor vehicle while selling a controlled substance is insufficient to warrant a charge to the jury of keeping or maintaining a motor vehicle for the sale and/or delivery of that substance. *State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002). This Court reasoned:
>
> Pursuant to N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word "keep . . . denotes not just possession, but possession that occurs over a duration of time." Thus, the fact "that an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." Likewise, *the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.*
>
> *Id.* (quoting N.C.G.S. § 90-108(a)(7) (2001) and *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994)) (alteration in original). The evidence in the case before us does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. We therefore agree with defendant that his motion to dismiss should have been granted.

State v. Lane, 163 N.C. App. 495, 499-500, 594 S.E.2d 107, 110-111 (2004) (emphasis added). It is axiomatic that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

The present case is functionally indistinguishable not just from *Mitchell*, but from both *Lane* and *Dickerson* as well. The circumstances upon which the majority bases its holding are features of the single incident, with the sole exception of a witness's generalized, undefined reference to defendant's "lifestyle." Absent from the record is any evidence which would indicate that defendant kept or sold controlled substances in the vehicle "over a duration of time[,]" *Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111, or on more than one occasion. Instead, the State's evidence establishes only that narcotics were present in defendant's vehicle for a few hours on 6 September 2013. The officers found no residue or remnants suggesting the prior presence of narcotics in the vehicle, or any storage or hiding compartments suggesting that narcotics had been kept in the vehicle in the past. *See Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (A conviction under N.C. Gen. Stat. § 90-108(a)(7) may be sustained where there is evidence "that [the] defendant had used the vehicle on a prior occasion to sell" or keep narcotics.). There is no record of defendant ever having previously been charged with, or convicted of, keeping or selling narcotics in his vehicle. *Id.* Moreover, in the instant case, defendant did not admit to selling drugs. *See Bright*, 78 N.C. App. at 240, 337 S.E.2d at 87. While "[t]he evidence, including defendant's actions [and] the contents of his car . . . are entirely consistent with drug use, or with the sale of drugs generally," that alone is not enough to "implicate [his] car with the sale of drugs." *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 (emphasis added).

In this case, the totality of the circumstances—including the ambiguous, unexplained reference to defendant's "lifestyle"—show only that defendant was found with narcotics in his vehicle on one occasion. Thus, all this Court has before us is one isolated incident. Without something else, I do not believe this one instance raises more than a mere "suspicion or conjecture" that defendant's purpose in maintaining the vehicle was for the keeping or selling of narcotics. *State v. Alston*, 310 N.C. 399, 404, 312 S.E.2d 470, 473 (1984). Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOANNA ROBERTA MADONNA, DEFENDANT

No. COA16-1300

Filed 17 October 2017

1. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss the charge where there was substantial evidence of premeditation and deliberation, including that the married couple was arguing, defendant wife had begun a romantic relationship with her therapist and planned to ask her husband for a divorce, a home computer revealed internet searches about killing, defendant got a gun and knife from her nephew, defendant texted her therapist afterwards that it was almost done and got ugly, defendant disposed of her bloodstained clothing, and defendant threw away some of her husband's important belongings.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—self-defense

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss where the State presented substantial evidence tending to contradict defendant wife's claim of self-defense, including the frailty and numerous disabilities of her husband. Further, even after the victim had been wounded twice by gunshots, defendant stabbed him twelve times.

3. Criminal Law—prosecutor's arguments—improper remarks—fundamental fairness—overwhelming evidence of guilt

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial and failing to intervene ex mero motu when the prosecutor made improper remarks during closing argument that did not render the trial and conviction fundamentally unfair based on the overwhelming evidence of defendant's guilt.

4. Evidence—witness testimony—contacted attorney—terminated pregnancies—reason for marrying victim—already admitted without objection—no prejudicial error

The trial court did not abuse its discretion in a first-degree murder case by allowing certain witness testimony, including a

statement by defendant that she had already contacted an attorney when the police came to her house to investigate her husband's death, that defendant had terminated two pregnancies, and that defendant stated she married the victim because he had cancer and would be dying soon—where the same evidence was already admitted without objection or there was no reasonable possibility of a different result given the overwhelming evidence of defendant's guilt.

Judge BERGER concurring in separate opinion.

Appeal by Defendant from judgment entered 28 September 2015 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

George B. Currin for the Defendant.

DILLON, Judge.

Joanna Roberta Madonna ("Defendant") appeals from judgment entered upon a jury verdict finding her guilty of first-degree murder.

I. Background

Defendant and Jose Perez ("Mr. Perez") met in 2008 and were married in 2009. In June 2013, Mr. Perez was killed during an altercation with Defendant. At trial, Defendant proceeded on a theory of self-defense.

Mr. Perez and Defendant were the only individuals at the scene of the altercation. Because Mr. Perez did not live to tell his version of events, Defendant's account of the altercation was the only direct evidence available at trial. Defendant testified to her version of events as follows: While driving in a car with Mr. Perez, Defendant told Mr. Perez that she wanted a divorce. Mr. Perez responded by saying that he would kill himself if she left him. Mr. Perez then clutched his chest, claimed that he was going to have a heart attack, and asked Defendant to pull over. After Defendant pulled the car over, she got out of the car to help Mr. Perez, but before she was able to reach the passenger door of the car, she heard a gunshot. Mr. Perez pointed the gun at Defendant and himself, and when Defendant attempted to take the gun from Mr. Perez, it went off and shot him in the face. Defendant dropped the gun, got back in the car, and began driving toward the VA hospital. Mr. Perez again started clutching

his chest and asking Defendant to pull over. When she again got out of the car to check on him, Mr. Perez jumped out of the car and knocked Defendant over, crushing her with his body weight. Defendant became concerned that Mr. Perez was going to choke her to death. Defendant saw a knife on the ground and "started swinging at [Mr. Perez]" until he was no longer holding her down. Defendant testified that at that point, she thought Mr. Perez would still be able to get up, so Defendant threw the knife in the woods, removed Mr. Perez's shoes so he could not chase her, and left the scene.

The State presented considerable circumstantial evidence which tended to contradict Defendant's version of events. Following the trial, the jury convicted Defendant of first-degree murder. Defendant timely appealed.

II. Analysis

On appeal, Defendant contends that the trial court erred in (1) denying her motions to dismiss, (2) denying her motion for mistrial and failing to intervene *ex mero motu* where the prosecutor made grossly improper remarks during closing argument, and (3) allowing inadmissible and prejudicial witness testimony. We address each argument in turn.

A. Motions to Dismiss

Defendant first argues that the trial court erred in denying her motions to dismiss at the close of the State's evidence and the close of all evidence. On appeal, Defendant contends that (1) the State failed to present substantial evidence of premeditation and deliberation, and (2) the State failed to present substantial evidence from which the jury could reasonably conclude that Defendant did *not* act in self-defense.

We review the trial court's denial of a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

Id. (citations omitted). Substantial evidence is "relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997).

1. Premeditation and Deliberation

[1] To establish the offense of first-degree murder, the State must show that the defendant unlawfully killed the victim with malice, premeditation, and deliberation. *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). Premeditation is defined as "thought [] beforehand for some length of time, however short[.]" *State v. Robbins*, 275 N.C. 537, 542, 169 S.E.2d 858, 861-62 (1969). Deliberation means that the act is done "in a cool state of the blood in furtherance of some fixed design." *State v. Buffkin*, 209 N.C. 117, 125, 183 S.E. 543, 548 (1936). "The question as to whether or not there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances." *Id.* at 125, 183 S.E. at 547. Factors to be considered in determining whether the defendant committed the crime after premeditation and deliberation include:

> (1) [W]ant of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Hamlet, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984).

The following evidence relevant to the issue of premeditation and deliberation was presented at trial:

Mr. Perez suffered from a heart condition and other ailments. In the months leading up to the June 2013 death of Mr. Perez, Defendant and Mr. Perez began arguing, mostly about financial issues. Defendant had begun a romantic relationship with her therapist and planned to ask Mr. Perez for a divorce.

Pursuant to a search of a home computer, law enforcement discovered internet searches from March 2013 including "upon death of a veteran," "can tasers kill people," "can tasers kill people with a heart condition," "what is the best handgun for under $200," "death in absentia USA," and "declare someone dead if missing 3 years."

On the day Mr. Perez was killed, Defendant visited her nephew, who was a gun enthusiast. While visiting, Defendant expressed concerns about her personal safety due to break-ins in her neighborhood, and her nephew gave her a gun and a knife. Shortly after being given these weapons, Defendant returned home and asked Mr. Perez to go on a drive with her so that she could ask him for a divorce. Defendant took both the gun and the knife with her in the car and used the weapons to kill Mr. Perez, shooting him and then stabbing him approximately twelve (12) times.

Later in the day, after killing Mr. Perez, Defendant texted her therapist "it's almost done" and "it got ugly." Following Mr. Perez's death, Defendant disposed of her bloodstained clothing, threw away Mr. Perez's medications and identification, and maintained that Mr. Perez had either gone to Florida or was at a rehabilitation center.

We hold that this evidence was relevant and constitutes substantial evidence that the killing of Mr. Perez was premeditated and deliberate. *See id.* at 170, 321 S.E.2d at 843.

2. Self-Defense

[2] When there is some evidence of self-defense, "[t]he burden is upon the State to prove beyond a reasonable doubt that the defendant did not act in self-defense[.]" *State v. Herbin*, 298 N.C. 441, 445, 259 S.E.2d 263, 267 (1979). Thus, the test on a motion to dismiss is "whether the State has presented substantial evidence which, when taken in the light most favorable to the State, would be sufficient to convince a rational trier of fact that the defendant did *not* act in self-defense." *State v. Presson*, 229 N.C. App. 325, 329, 747 S.E.2d 651, 655 (2013) (emphasis added).

In addition to the evidence recounted above, the State presented the following evidence which tended to contradict Defendant's claim of self-defense: Mr. Perez was diabetic, had coronary heart disease, was a lung cancer survivor, and suffered from numerous physical disabilities, including nerve damage and atrophied hands that made it difficult for him to grasp objects. Doctors testified that it would be difficult for Mr. Perez to use a gun or grasp a knife, and that he was "relatively frail" and "moved slowly." The VA had approved a plan to equip Mr. Perez and Defendant's home with a wheelchair lift, ramps, a bathroom modification, and special doorknobs in order to accommodate Mr. Perez's disabilities. In contrast, Defendant was physically active, sang in a band, and worked as a house cleaner and in a law office doing filing. Defendant had superficial injuries inconsistent with her account of a violent struggle. Defendant's therapist testified that Defendant showed

him "knife wounds" on her arms that in fact looked like scratches, not cuts.

Further, when viewed in the light most favorable to the State, the evidence tends to show that even after Mr. Perez had been wounded twice by gunshots, Defendant stabbed him twelve (12) times. And Defendant suffered minimal injuries compared to the nature and severity of the injuries sustained by Mr. Perez. *See id.* at 330, 747 S.E.2d at 656.

In conclusion, regardless of whether Defendant may have presented evidence which tended to contradict the State's evidence on the issue of self-defense, we conclude that the State presented substantial evidence that Defendant did *not* act in self-defense. Accordingly, we conclude that the trial court did not err in denying Defendant's motion to dismiss the charge of first-degree murder.

B. Closing Argument

[3] Defendant's second set of arguments relates to statements made by the prosecutor during closing argument.

Counsel is generally allowed wide latitude in argument to the jury. *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984). Counsel for both sides is permitted to argue to the jury "the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case." *Id.* However, during a closing argument, an attorney may not "become abusive, inject his personal experiences, [or] express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant[.]" N.C. Gen. Stat. § 15A-1230(a) (2015).

Defendant first contends that the prosecutor was abusive in her closing argument when she stated that Defendant "can't keep her knees together or her mouth shut." Defendant moved for a mistrial immediately following the prosecutor's closing argument on the grounds that this statement was inappropriate and violated Defendant's due process rights. The trial court noted Defendant's objection for the record but denied the motion for mistrial.

We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995). The grant of a mistrial is a "drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987).

We conclude that the prosecutor's statement that Defendant "can't keep her knees together or her mouth shut" was improperly abusive. *See* N.C. Gen. Stat. § 15A-1230(a). However, we do not believe this comment alone – or even this comment coupled with the other comments by the prosecutor discussed below – made it impossible for Defendant to obtain a fair trial and impartial verdict, and thus did not require that the trial court impose the "drastic remedy" of granting Defendant's motion for mistrial.

Defendant also contends that during her closing argument, the prosecutor repeatedly made inappropriate comments that Defendant was a liar, had lied on the stand, was promiscuous, had previously had abortions, and currently abused drugs.

Control of counsel's arguments is left largely to the discretion of the trial court. *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995). "When no objections are made at trial . . . the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*." *Id.* Our review requires a two-step inquiry: "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2017).

In order to determine whether a prosecutor's remarks are grossly improper, "the remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *Id.* An argument is not improper "when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Small*, 328 N.C. 175, 184-85, 400 S.E.2d 413, 419 (1991).

An attorney may not express any "personal belief as to the truth or falsity of the evidence" during closing argument. N.C. Gen. Stat. § 15A-1230(a). Our Supreme Court has held that it is improper for an attorney to assert during argument to the jury that a witness is lying on the stand or is a liar. *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (1994) ("It is improper for the district attorney, and defense counsel as well, to assert in his argument that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. *State v. McKenna*, 289 N.C. 668, 686, 224 S.E.2d 537, 550 (1976)[.]"); *see also Huey*, ___ N.C. at ___, ___ S.E.2d at ___ ("A prosecutor is not permitted to insult a defendant or assert the defendant is a liar."). Our Supreme Court has recently held that it was improper for a prosecutor, when referring to the defendant, to state that "innocent men don't lie,"

and to assert that when the defendant "was given a chance to just tell [the jury] the truth, he decided he's going to tell you[, the jury,] whatever version he thought would get you to vote not guilty." *Huey*, ___ N.C. at ___, ___ S.E.2d at ___.

However, an attorney *may* "argue to the jury that they should not believe a witness[.]" *Id.* "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995).

Here, Defendant contends that the prosecutor made numerous inappropriate statements to the jury, including:

> This defendant talks and talks and out comes falsehood, deception, distortion, and fabrication. She stood before you and put her hand on the bible, and she swore to tell the truth, . . . [a]nd then she sat in that chair and testified, [] and *every time her lips moved another monstrous lie came out*.
>
> She has been untruthful to you.
>
> She was dishonest then, and she's been dishonest now.
>
> How could she think you could possibly believe any of the evil fairytale she has told you?

Although Defendant did admit on the stand that she had lied numerous times *in the past*, we are compelled by Supreme Court precedent to conclude that these statements, in which the prosecutor specifically stated that Defendant lied to the jury *while testifying at trial*, were clearly improper. *See Huey*, ___ N.C. at ___, ___ S.E.2d at ___; *Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 93, 520 S.E.2d 785, 785 (1999) (holding that counsel engaged in grossly improper jury argument where the argument included "at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars"); *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying."); *see also* R. Prof. Conduct N.C. St. B. 3.4(e) (providing that a lawyer *shall not* "state a personal opinion as to the . . . credibility of a witness"). The prosecutor also improperly referred to Defendant as a "narcissist." *See State v. Matthews*, 358 N.C. 102, 111, 591 S.E.2d 535, 541-42 (2004) (holding that it was improper for the prosecutor to engage in "name-calling").

However, our Supreme Court has noted that where there is overwhelming evidence against a defendant, statements that are improper

may not, in every case, amount to prejudice and reversible error. *Huey*, ___ N.C. at ___, ___ S.E.2d at ___ (citing *Sexton*, 336 N.C. at 363-64, 444 S.E.2d at 903). "To demonstrate prejudice, defendant has the burden to show a 'reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial.' " *Huey*, ___ N.C. at ___; ___ S.E.2d at ___; N.C. Gen. Stat. § 15A-1443(a)(2015).

In this case, considering the overwhelming evidence of Defendant's guilt, we hold that although some of the prosecutor's remarks were certainly improper, they did not render the trial and conviction fundamentally unfair. *See Huey*, ___ N.C. at ___, ___ S.E.2d at ___ (stating that in order for an appellate court to order a new trial, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process") (internal marks omitted); *see also State v. Garcell*, 363 N.C. 10, 61, 678 S.E.2d 618, 650 (2009). Therefore, the trial court did not err in failing to intervene *ex mero motu*. *See State v. Campbell*, 359 N.C. 644, 679, 617 S.E.2d 1, 23 (2005) (noting that, even if the prosecutor's comments in closing argument were improper, "the jury instructions informed the jury not to rely on the closing arguments as their guide in evaluating the evidence[,]" and "when viewed as a whole . . . the prosecutor's challenged arguments did not so infuse the proceeding with impropriety as to impede defendant's right to a fair trial").

As our Supreme Court has stated:

> The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. Yet, arguments, no matter how effective, must avoid base tactics such as . . . comments dominated by counsel's personal opinion; [and] . . . name-calling[.] . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made.

Huey, ___ N.C. at ___, ___ S.E.2d at ____ (internal marks and citation omitted).

C. Witness Testimony

[4] In her final argument, Defendant contends that the trial court erred when it allowed improper witness testimony. The decision to admit

or exclude evidence is within the inherent authority of the trial court, and is thus reviewed under the abuse of discretion standard. *See State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 808-09 (2015).

First, Defendant contends that the trial court should not have allowed evidence of a statement she made to police when they came to her residence to investigate Mr. Perez's death. Specifically, Defendant argues that her statement that she had already contacted an attorney was constitutionally protected. *See State v. Erickson*, 181 N.C. App. 479, 487, 640 S.E.2d 761, 768 (2007) (noting that it is improper for the prosecutor to elicit "testimony regarding the defendant's invocation of his constitutional rights"). On appeal, Defendant points to the prosecutor's question regarding this statement during cross-examination of Defendant; however, this evidence was also admitted without objection earlier in the trial during the testimony of a detective. Accordingly, Defendant failed to preserve this objection for appellate review. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 566 (1984) ("[W]here evidence is admitted over objection, and the same evidence has been previously admitted . . . without objection, the benefit of the objection is lost.").

Defendant also contends that the trial court abused its discretion in overruling defense counsel's objection to the prosecutor's question regarding whether Defendant had terminated two pregnancies. However, Defendant later admitted, without objection, that she had written a letter to a Catholic priest during her time in jail which included the phrase "I got pregnant twice and had two abortions." Therefore, Defendant has waived her right to challenge the admission of this evidence on appeal. *See State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 554-55 (1986) ("[W]hen evidence is admitted over objection but the same evidence is thereafter admitted without objection, the benefit of the objection ordinarily is lost."). During cross-examination, Defendant admitted that she had written the letter and that it contained the statement regarding the abortions. *See e.g.*, *id.*

Finally, Defendant contends that it was error for the trial court to allow testimony from her therapist and a detective about a statement made by her therapist that Defendant told him she had married Mr. Perez because he had cancer and would be dying soon. Even assuming that it was an abuse of discretion to admit this evidence, Defendant has failed to establish that she was prejudiced by its admission in light of other overwhelming evidence of Defendant's guilt of the crime of first-degree murder. *See* N.C. Gen. Stat. § 15A-1443(a) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not

been committed, a different result would have been reached at trial[.]"). Accordingly, this argument is overruled.

NO PREJUDICIAL ERROR.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I fully concur with the majority opinion, but write separately to address the prosecutor's statements regarding Defendant's "evil fairytale" and other conjured facts.

Pursuant to N.C. Gen. Stat. § 15A-1230, an attorney is not permitted to

> express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, . . . [but a]n attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2015).

While on the stand, Defendant testified as follows:

> I made up – I lied to [my daughter]. I lied to [my daughter]. I lied to [my daughter]. And I believe that I said that yesterday. I told [my daughter] whatever I needed to tell her to get her to be quiet. Yes, I lied to [my daughter].
>
> . . . .
>
> And I did lie to [my defense attorney]. I did not give him all the information either. . . . Yes, I did. I lied to him and told him that the gun was at the same place where Jose was.
>
> . . . .
>
> Yes. That was a lie. I told everybody that lie. [Answer to question concerning Jose's whereabouts after she killed him].
>
> . . . .

> No. I had lied and said I was going to a meeting, and I sat there in [his] living room while he was watching golf and -- I'm sorry.
>
> . . . .
>
> I lied to the police. I lied to my children. I lied to everybody.

In a letter written from jail, Defendant admitted, "I lied to everyone around me. I lied to my children . . . . I lied to my friends about money. . . . I lied to fellow inmates." Further, in summarizing the evidence against his client, defense counsel made the following statements in closing, "She did -- took some stupid actions to lie to people. She took some stupid actions to lie to people. . . . She's just lying."

What do you call someone who testifies that they have lied "to everybody"? It is difficult for me to conclude that an attorney should be precluded from asserting that a defendant has been untruthful when the defendant testifies she "lied to everybody" and her defense attorney acknowledges that truth.[1]

There will certainly be more murders. Just as certainly, there will be defendants who manufacture stories in an effort to conceal their involvement in criminal activity. And, while it is permissible to label those defendants as "killers," prosecutors are forbidden from asserting they are dishonest.

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1. Interestingly, defense counsel argued to the jury that the victim in this case was a liar, not only asserting that he was untruthful, but stating, "She knew what kind of lies [Jose] was telling," and "It wasn't -- it was the final straw to separate her from that relationship, not just to show you that Jose was lying about stuff but just where her mindset was."

STATE OF NORTH CAROLINA
v.
PATTY MEADOWS

No. COA16-1207

Filed 17 October 2017

1. Constitutional Law—effective assistance of counsel—eliciting damaging testimony—failure to object—no reasonable probability of different result

A defendant did not receive ineffective assistance of counsel in an opium trafficking case, based on allegedly eliciting damaging testimony and failing to object to other testimony, where there was no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different.

2. Sentencing—sentencing hearings—Rule 10(b)(1)

The Court of Appeals was bound to follow the Supreme Court's application of N.C. R. App. P. 10(a)(1) requiring a timely request, objection, or motion to preserve issues for appellate review during sentencing hearings post-*Canady*. The holdings in *Hargett* and its progeny that held that an error at sentencing was not considered an error at trial for the purpose of Rule 10(a)(1) were contrary to prior opinions of the Court of Appeals, contrary to both prior and subsequent holdings of our Supreme Court, and did not constitute binding precedent.

3. Appeal and Error—appealability—waiver—sentencing hearing—failure to object or request continuance—Rule 10(a)(1)

Defendant waived any argument in an opium trafficking case that a sentencing hearing should not have been conducted at a particular time, or in front of a particular judge, by failing to either object to the commencement of the hearing or request a continuance as required by N.C. R. App. P. 10(a)(1).

4. Appeal and Error—preservation of issues—sentencing argument—failure to object at trial—consecutive sentences

Defendant failed to preserve for appellate review in an opium trafficking case her sentencing argument, that imposition of "consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction" violated defendant's Eighth Amendment right, by failing to object at trial as required by N.C. R. App. P. 10(a)(1).

5. Appeal and Error—preservation of issues—sentencing argument—failure to object at trial—consecutive sentences—consolidation

Defendant failed to preserve for appellate review in an opium trafficking case her sentencing argument, that the trial court abused its discretion in sentencing her to two consecutive sentences, and only consolidating the third conviction for sentencing, by failing to object at trial as required by N.C. R. App. P. 10(a)(1).

Judge MURPHY concurring in result only.

Appeal by Defendant from judgments entered 7 April 2016 and judgment entered 8 April 2016 by Judge Gary M. Gavenus in Superior Court, Madison County, after a jury trial before Judge R. Gregory Horne on 4 and 5 April 2016. Heard in the Court of Appeals 25 May 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Michael E. Casterline for Defendant-Appellant.

McGEE, Chief Judge.

Patty Meadows ("Defendant") was convicted on 7 April 2016 of one count each of trafficking opium by sale, by delivery, and by possession. The events leading to Defendant's arrest and conviction occurred on 14 September 2011.

I. *Factual and Procedural Basis*

In early September 2011, multiple sources informed the Madison County Sheriff's Office that Defendant's husband, Troy Meadows ("Troy"), was selling large quantities of prescription pills. A confidential informant, Jeffrey Chandler ("Chandler") told officers that Troy would be obtaining pills on 14 September 2011, pursuant to a prescription, for the purposes of illegal re-sale. Chandler informed officers that he had obtained this information from Jason Shetley ("Shetley") who, in the past, had illegally purchased pills from Troy.

Sheriff's officers planned a controlled buy for 14 September 2011. The plan was for Chandler to ask Shetley to purchase pills from Troy, using bills provided by the Sheriff's Office, and thereby obtain probable cause to search Troy's and Defendant's house ("the Meadows home" or "the house") on Rollins Road. Officers gave Chandler $420.00 ("the

buy money") on 14 September 2011 for the purchase. The buy money had been photocopied so that individual serial numbers were recorded. Chandler contacted Shetley to set up the purchase. Shetley was to make the purchase with the buy money provided by Chandler, and purchase twenty-five oxycodone pills for himself and fifty for Chandler. At trial, Shetley testified he called Troy about 9:00 a.m. on 14 September 2011 to tell him he wanted to purchase seventy-five oxycodone pills. Chandler then met with Shetley and Shetley's girlfriend, Catherine Davis ("Davis"). Chandler used approximately $20.00 of the buy money to purchase gas for Shetley's car ("the car"). Chandler, Shetley, and Davis then drove to the Meadows home.

Madison County Sheriff's Detective Coy Phillips, now a captain ("Capt. Phillips"), was watching the house that morning. Shetley entered the Meadows home at approximately 9:45 a.m., while Chandler and Davis waited in Shetley's car. At trial, Shetley further testified that he never saw Troy that morning – that he "just pulled up, went and knocked on the door, and [Defendant] was in the kitchen and told me to come in. She had the pills out [on the table]. I bought the pills from her." According to Shetley, Defendant told him she had already counted out the seventy-five pills, and he then counted out twenty-five pills, which he put in a pill bottle he had brought with him. He then counted out an additional fifty pills, which he put in a plastic baggie provided by Defendant. Shetley testified that he gave Defendant payment, which she counted. Shetley then left the house.

About five minutes after Shetley entered the house, Capt. Phillips observed him exit the house and return to the car. Shetley, Chandler and Davis then drove away from the Meadows home. Capt. Phillips continued to watch the house until a deputy arrived "to secure [the house] because we were going to execute a search warrant at [the house]." Shortly after the car left the house, it was stopped by officers, including Madison County Chief Deputy Michael Garrison ("Chief Garrison"),[1] and the occupants were searched. Shetley testified that, when he saw police approaching, he threw his bottle of twenty-five pills out the car window, but that Chandler held onto the plastic baggie that contained the fifty pills. Officers recovered a plastic baggie containing fifty oxycodone pills from Chandler, and recovered a bottle containing twenty-five oxycodone pills from the side of the road in the vicinity of the car. Officers had maintained constant visual contact with Chandler from the time he was

1. Chief Garrison was serving as the Mars Hill Chief of Police at the time of Defendant's trial.

given the $420.00 until the time they stopped and searched the car and its occupants. One of the photocopied twenty dollar bills was found in Shetley's sock, but the remainder of the buy money was not recovered from the car or its occupants. Shetley and Davis were arrested, and taken to the Sheriff's Office.

Chief Garrison testified he secured the house immediately after arresting Shetley and Davis and, at that time, Defendant was the only person at the house. Chief Garrison left the house at approximately 10:00 a.m., while deputies remained to keep the house and Defendant secure. Troy and Defendant's daughter arrived sometime after 10:00 a.m., though the exact times they were at the house are unclear. Chief Garrison further testified he returned to the house just after 4:00 p.m. to execute a search warrant he had obtained, and that the house and its occupants were continuously monitored until the search of the house was completed, after 7:00 p.m. According to Chief Garrison, Troy "did show up there [at the house] and then we transported him back to the [S]heriff's [O]ffice." Troy was also arrested that day. Chief Garrison testified that "to the best of [his] recollection," Troy did not return to the house after being transported to the Sheriff's Office. Capt. Phillips testified that he interviewed Troy at the Sheriff's Office from 4:29 p.m. until 7:16 p.m., and then returned to the Meadows home. Capt. Phillips did not indicate in his testimony that he brought Troy with him when he returned to the Meadows home, and Defendant's counsel did not ask Capt. Phillips that question.

Chief Garrison testified that, after serving the search warrant, he "identified a large quantity of narcotics and medications on the dining room table." Items recovered included "other pill bottles, empty pill bottles, white pills and pink pills[,]" and plastic baggies similar to the one recovered from Chandler that contained the fifty pills Shetley had purchased for him. Chief Garrison testified that, after officers had searched the house for more than three hours in an unsuccessful attempt to locate the remainder of the buy money, he confronted Defendant directly. Chief Garrison testified that he told Defendant: "I knew my buy money was in the house and I wanted to get it." According to Chief Garrison, Defendant "told me it was in a pocket, a jacket pocket in the, I believe it was the bedroom closet." Chief Garrison testified that officers recovered $380.00 from "a blue jacket hanging in a closet" that was later identified as the remaining buy money.

Chief Garrison then identified State's exhibit 12 as an envelope containing the $380.00 of buy money recovered from the Meadows home. Chief Garrison read from the log sheet attached to State's exhibit 12,

and testified that the log sheet "has [the] suspect['s] name, which is Troy Meadows, the date and time recovered which is 9/14/11 at . . . 7:01 p.m. It has Detective Matt Davis was the recovering deputy. The description, it says, $380 U.S. currency recovered from back bedroom, blue jacket pocket."

Although both Chief Garrison and Capt. Phillips testified they believed Defendant was involved in the 14 September 2011 transaction, Defendant was not arrested until 22 July 2013.[2] Defendant testified at trial, contradicting the testimony of Chief Garrison and Shetley. Defendant testified she had no knowledge of the drug transaction, that she never saw Shetley that morning, and that she did not know where the $380.00 was hidden until Troy told her sometime after 6:30 p.m. The two containers of pills were sent to the State Bureau of Investigation ("S.B.I.") lab to be analyzed by Colin Andrews, who determined the pills were oxycodone, and described them in his report as "a pill bottle containing 25 pink tablets [and] a plastic bag containing 50 pink tablets." Defendant was found guilty of all three trafficking charges on 7 April 2016. Defendant appeals.

II. *Analysis*

A. Ineffective Assistance of Counsel

[1] Defendant argues she was denied effective assistance of counsel because her defense counsel "elicited damaging testimony from [Capt.] Phillips that Shetley was 'honest[,]' " and also failed to object to Chief Garrison's testimony that "[Defendant] was as guilty as Troy was." We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 247–48 (1985) (citations omitted). However,

> 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.

2. This testimony is the subject of one of Defendant's arguments on appeal.

Id. at 563, 324 S.E.2d at 248–49. Because we hold "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we reject Defendant's ineffective assistance of counsel ("IAC") arguments without making any determination concerning whether Defendant's counsel was actually deficient. *Id.* at 563, 324 S.E.2d at 249.

1. *Vouching for Shetley's Credibility*

Concerning Defendant's first argument, her counsel questioned Capt. Phillips concerning two interviews he conducted with Shetley after Shetley's arrest:

> Q. My question was, when you conducted that first interview [on 14 September 2011], did you feel, leaving that interview did you feel or form an opinion as to whether or not [Shetley] was being honest with you?
>
> A. Yes, sir, I did.
>
> Q. So you felt after that first interview he was telling you the truth?
>
> A. No, sir.
>
> . . . .
>
> Q. So at that time you had an idea, hey, this isn't, this doesn't make sense.
>
> A. Yes, sir.
>
> . . . .
>
> Q. Did you during that first interview ask [Shetley] about his drug use at the time?
>
> A. Yes, sir, I did.
>
> Q. And what was his response to, to whether or not he used drugs?
>
> A. He said he didn't use drugs.
>
> . . . .
>
> Q. And [Shetley] gave you another statement [on 16 September 2011], did he not?
>
> A. He did, yes, sir.

Q. Did he at that time admit or deny having a drug problem?

A. At this point he admitted it, yes, sir.

. . . .

Q. And again, [Shetley] admitted to you that he had a very bad drug problem.

A. Yes, sir, he stated he had a pill problem.

Q. And based on your knowledge and experience as a law enforcement officer, do people with drug problems typically break into other people's houses to supply their habit?

A. Sometimes.

Q. Did Mr. Shetley admit that to you?

A. Yes, sir.

. . . .

Q. And you filled out this Officers Investigation Report as lead detective.

A. Yes, sir.

Q. And part 10, you stated that . . . Davis was honest and cooperative.

A. Yes, sir.

Q. And that Troy . . . and . . . Shetley were also honest with Detective . . . Phillips.

A. Yes, sir.

Q. And you signed that form on 9/19.

A. Yes, sir.

. . . .

Q. And at that time the statements, the follow-up statements, at least with Shetley, and the other statements you got, you felt that the witnesses were honest and cooperative.

A. Yes, sir.

Based upon the testimony above, Defendant argues that her counsel's representation was deficient because he "elicited damaging testimony from [Capt.] Phillips that Shetley was 'honest.' " However, because we do not believe Defendant can show the necessary prejudice to sustain her IAC claim, as we will discuss in greater detail below, we do not need to consider whether Defendant's counsel's representation of Defendant was actually deficient. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248–49.

2. *Chief Garrison's Opinion of Defendant's Guilt*

Defendant next argues that her counsel committed IAC by failing to object when Chief Garrison testified: "I felt like [Defendant] should be charged at that time; she was as guilty as Troy was." We disagree.

Law enforcement officers may not express any opinion that they believe a defendant to be guilty of the crimes for which the defendant is on trial. *State v. Carrillo*, 164 N.C. App. 204, 211, 595 S.E.2d 219, 224 (2004). However, although the admission of the statement by Chief Garrison constituted error, as in *Carrillo*, we hold that Defendant fails to show that the error was so prejudicial, on the facts before us, as to require a new trial. *Id.*

Initially, during direct questioning by the State concerning why Defendant was not arrested on 14 September 2011, Chief Garrison testified to the following, without objection:

> Q. Chief Garrison, was there some – I'm going to follow up on a couple of [Defendant's counsel's] questions. Was there some discussion of [Defendant] being charged back in September of 2011?
>
> A. There was. *Initially I felt that [Defendant] had direct involvement in the drug transaction, and based on that that she should have been charged accordingly.* There was a discussion and based on that discussion we made a determination not to charge her at that time. Subsequently, uh, I'm trying to think, it was probably a little over a year and four months later we submitted the evidence to the SBI and the SBI labs came back as far as what the quantities and the product were as far as the pills. Determination was made at that time to pursue a grand jury indictment, which we did, and the grand jury found probable cause to have her indicted, and that's what brought her here today. (Emphasis added).

Defendant does not argue on appeal that failure to object to this testimony constituted IAC. Therefore, any such argument has been abandoned, and we must evaluate the prejudice of the contested testimony in light of this uncontested testimony. *See* N.C. R. App. P. 28(b)(6); *State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017).

Immediately following the above exchange, the State continued:

> Q So you [Chief Garrison] said that the conversation that you had [with other officers] back in September 2011 was not to never charge [Defendant], it was just not to charge her at the time?
>
> A. The conversation was I felt like [Defendant] should be charged at that time; she was as guilty as Troy was. However, after we had a discussion about it and we made a determination collectively not to pursue that at that time.

Defendant's counsel also failed to object to this testimony, which is not substantially different from the unchallenged prior testimony. Chief Garrison's prior testimony clearly indicated he believed, from the beginning, that Defendant was "direct[ly] involve[ed] in the drug transaction, and based on that that she should have been charged accordingly." Chief Garrison's later testimony — that he believed Defendant "was as guilty as Troy was[,]" — does not contribute significantly to any prejudice already suffered by Defendant from the unchallenged statement.

Further, we find that the evidence against Defendant was substantial. Comparing the facts before us with those in *Carrillo*, *supra*, we find the evidence against Defendant at least as compelling as that in *Carrillo*. In *Carrillo*, two officers testified, without objection, in ways that strongly indicated their opinion that the defendant was guilty of trafficking in cocaine. Although this Court held that admission of testimony indicating the officers believed the defendant was guilty constituted error, we concluded, in light of the following evidence, that the defendant failed to demonstrate the improper testimony was sufficiently prejudicial to warrant a new trial pursuant to either plain error analysis or IAC:

> Evidence at trial showed that the package was intercepted by the U.S. Customs agents and contained three ceramic turtles with a substantial amount of cocaine concealed inside. The package was mailed from a location in Mexico that U.S. Customs agents had identified as a mail origination point for cocaine sent to the United States. The package

> was addressed to defendant at his residence. Defendant accepted the package. It was found inside his residence minutes after he had taken possession of it. Broken pieces of similar turtles containing traces of cocaine were also found inside his apartment.

Carrillo, 164 N.C. App.at 210–11, 595 S.E.2d at 224. This Court held in *Carrillo* that the defendant had failed to prove plain error, then summarily overruled the defendant's argument that his counsel's failure to object to the officers' testimonies constituted IAC:

> If we were to conclude there was a reasonable probability that the outcome would have been different, this Court [would have to] consider whether counsel's actions were in fact deficient. As we have already determined, defendant has failed to show [plain error –] that a different outcome at trial would have occurred if defense counsel had objected to this testimony. This [argument] is overruled.

Id. at 211, 595 S.E.2d at 224.

In the present case, the relevant evidence presented at trial, discussed in part above, is sufficient to defeat Defendant's claim of IAC. Defendant testified she was in a back bedroom at the time Shetley entered the house because her back was bothering her and she could not move. In addition, Defendant initially testified that Troy was gone from the house from some time before 9:30 a.m. until he returned at approximately 11:30 a.m., and that Troy was accompanied by officers when he entered the house. She further testified she did not see or hear anyone in the house until Troy returned at 11:30 a.m. After Troy returned to the house, he was subsequently taken to the Sheriff's Office and arrested.

Defendant further testified that, though she knew the officers were searching for money, she had no knowledge whatsoever of any cash that might have been used in a drug transaction *until after 6:30 p.m.* Defendant testified that Officer Davis questioned her on her front porch, and "showed me four or five . . . pink . . . pills . . ., and . . . he said, does [Troy] sell his medicine every month? I said, I wouldn't worry, there's so many. And he said, does he take these? And I said, I've never seen those [pink pills] in my home[,]" that the oxycodone that Troy was prescribed were white pills. However, the pink pills recovered from Chandler and Shetley were determined to be oxycodone by the SBI, and additional pink pills were recovered from the dining table when the house was searched.

According to Defendant, after Troy was taken to the Sheriff's Office the first time, he was returned by Sheriff Buddy Harwood ("Sheriff Harwood") and Capt. Phillips at approximately 6:30 p.m. Defendant testified that she first learned about the hidden money during a conversation with Troy, at around 6:30 p.m., in which Sheriff Harwood participated. Defendant further testified that she never told Chief Garrison about the location of the money – that it was only Sheriff Harwood who was informed of the location of the $380.00. Defendant testified that Troy was present at the house when the money was recovered and that, once she and her daughter recovered the money, they handed it to Capt. Phillips.

However, after reviewing his report, Capt. Phillips testified that he began interviewing Troy at the Sheriff's Office at 4:29 p.m. on 14 September 2011, and did not conclude the interview *until 7:16 p.m.* It was only after concluding that interview with Troy at 7:16 p.m. that Capt. Phillips returned to the Meadows home. There was no testimony from anyone other than Defendant that Troy returned to the house after he was interviewed at the Sheriff's Office. The log sheet that accompanied an evidence bag that contained the $380.00, indicated that the money was recovered from the Meadows home *at 7:01 p.m.* by Detective Davis. According to those two documents, Defendant could not have discussed the whereabouts of the buy money with Troy at approximately 6:30 p.m., because Troy was at the Sheriff's Office in the middle of an approximately three-hour interview with Capt. Phillips. More importantly, Troy was still at the Sheriff's Office being interviewed by Capt. Phillips at the time the $380.00 was recovered from a jacket pocket in a back bedroom closet of the Meadows home.

According to Defendant's testimony, after Sheriff Harwood was informed where the money was located, Defendant "told [Sheriff Harwood] that [she would] tell my daughter where the money was at and she could go get it." Defendant testified that neither Sheriff Harwood nor Capt. Phillips made any effort to have officers escort her to retrieve the money. Defendant's own counsel asked Defendant: "So you're telling me that at some point in time you got off the couch and went in the back room with no officer watching you?" Defendant answered that was correct, that she and her daughter retrieved the money without escort of any kind. The $380.00 recovered was later confirmed to be the remainder of the buy money. That Defendant would be sent unescorted to retrieve the main evidence in the investigation defies logic, protocol as testified to by Chief Garrison, and what actually occurred as testified to by Chief Garrison. Chief Garrison testified that he "stood guard" with Defendant

during the search, and that Officer Davis was the officer who recovered the $380.00 from the jacket in the bedroom closet.

Defendant's own testimony cannot explain how the $380.00 in buy money could have been placed in a jacket pocket in a back room closet by anyone other than herself. All the evidence shows that Shetley entered the Meadows home with $400.00 of the buy money and left with only $20.00, which was recovered from Shetley when the car was stopped. Therefore, the $380.00 of buy money recovered from the Meadows home had to have been left in the home by Shetley between 9:45 a.m. and 9:50 a.m., at the same time he acquired the seventy-five pills of oxycodone, and at a time Defendant herself testified she was alone in the house. Shetley had no opportunity to give the $380.00 to Troy, and when Troy returned to the house before his arrest, he was accompanied by officers, and not allowed to freely roam the house. Assuming, *arguendo*, Troy did return to the house a second time, according to Capt. Phillips' report and testimony, it would have to have been after the buy money was already recovered.

On the facts before us, because we hold "that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we reject Defendant's argument and need not "determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. This argument is without merit.

B. Sentencing

Defendant argues four errors were committed at her sentencing hearing. Defendant argues the trial court erred in Defendant's sentencing because a judge — different from the judge who presided over the trial — issued the sentence and improperly "overruled" a prior order of the trial judge. Defendant also argues that the trial court "abused [its] discretion by imposing consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction," and that this sentence violated Defendant's Eighth Amendment right that her sentence be proportional to her crime. We disagree.

Defendant did not object to any of these alleged errors at her sentencing hearing. North Carolina Rule of Appellate Procedure Rule 10(a)(1) states:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

> ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(a)(1) (2015).[3] Despite her failure to object, Defendant makes no argument in her brief indicating why we should address the first two alleged errors – that a judge different from the judge who presided over the trial issued the sentence and improperly "overruled" a prior order of the trial judge. Concerning Defendant's remaining arguments – that her long sentence constituted an abuse of discretion and violated the Eighth Amendment – she contends: "An error at sentencing [including a constitutional claim] may be reviewed on appeal, absent an objection in the court below. *State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704–05 (2010)."

1. *Rule 10(a)(1) and State v. Canady*

[2] We assume, *arguendo*, that Defendant contends that all of her arguments are preserved without objection because they allegedly occurred at sentencing. *See Id.* Defendant is correct that this Court addressed the defendant's argument in *Pettigrew*, even though the defendant had not raised his objection at his sentencing hearing. This Court reasoned:

> The State argues that [the d]efendant has not preserved this issue for appellate review because [the d]efendant did not raise [his] constitutional issue at trial. However, in *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417 (2005), our Court held that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10[(a)](1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." Accordingly, [the d]efendant was not required to object at sentencing to preserve this issue on appeal.

Pettigrew, 204 N.C. App. at 258, 693 S.E.2d at 704–05 (citations omitted). *Curmon* cited *State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003), which in turn cited our Supreme Court's opinion in *State*

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3. Rule 10 was amended effective 1 October 2009, and certain provisions were changed and subsections moved. Prior to the 2009 amendment, the language cited above from subsection (a)(1) was located in subsection (b)(1). Therefore, all pre-amendment opinions refer to Rule 10(b)(1) when referring to what is now Rule 10(a)(1). In an attempt to achieve agreement between citations in this opinion, we will change (b) to (a) as needed, which will be indicated by brackets.

v. Canady, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). Our research shows that *Canady* is the genesis of a line of opinions from this Court that contend Rule 10(a)(1) does not apply in sentencing hearings.

However, this Court has also regularly held, post-*Canady*, that objection to alleged errors at sentencing *is required in order to preserve them for appellate review*. *See, e.g.*, *State v. Baldwin*, 240 N.C. App. 413, 421–22, 770 S.E.2d 167, 173–74 (2015); *State v. Phillips*, 227 N.C. App. 416, 422, 742 S.E.2d 338, 342–43 (2013); *State v. Facyson*, 227 N.C. App. 576, 582, 743 S.E.2d 252, 256 (2013); and *State v. Flaugher*, 214 N.C. App. 370, 388, 713 S.E.2d 576, 590 (2011). In *State v. Freeman*, this Court's holding directly contradicts the *Canady* analysis in *Pettigrew* and Defendant's Eighth Amendment argument in the present case:

> Defendant further argues that his sentence is grossly disproportionate to the severity of the crime and violates the Eighth Amendment prohibition against cruel and unusual punishment. Defendant did not object at trial, however, and "constitutional arguments will not be considered for the first time on appeal." . . . . Defendant has failed to preserve his Eighth Amendment argument, and we dismiss defendant's assignment of error.

State v. Freeman, 185 N.C. App. 408, 414, 648 S.E.2d 876, 881 (2007) (citations omitted); *see also State v. Lewis*, 231 N.C. App. 438, 444, 752 S.E.2d 216, 220 (2013). In light of this conflict between opinions of this Court concerning treatment of the failure to object to errors during sentencing hearings in the wake of *Canady*, we must attempt to determine the correct precedent to apply in the present case.[4] Because it is this Court's occasional application of certain wording in *Canady* that has resulted in a lack of uniformity in some of this Court's opinions, we first analyze *Canady*. In *Canady*, the defendant's sole argument was "that it was error for the [trial] court to rely on the statement of the prosecuting attorney in finding the aggravating factor." *Canady*, 330 N.C. at 399, 410 S.E.2d at 876. This was essentially an argument that there was insufficient evidence to support the sole aggravating factor found by the trial court. However, the defendant failed to object to this error at his sentencing hearing. *Id.* at 400, 410 S.E.2d at 877.

For reasons we will discuss in greater detail below, a majority of our Supreme Court held that the error had been properly preserved

4. In a dissent in *Freeman*, the dissenting judge acknowledged that she had applied Rule 10(a)(1) inconsistently in her prior opinions. *Freeman*, 185 N.C. App. at 420, 648 S.E.2d at 885.

for appellate review despite the defendant's lack of objection at the sentencing hearing. Justice Meyer dissented based upon, *inter alia*, his belief that, pursuant to Rule 10(a)(1), the defendant's failure to object at the sentencing hearing constituted a waiver of his right to appellate review: "What the majority fails to recognize, however, is that Rule 10[(a)](1) . . . limits this Court's appellate review to exceptions which have been *properly preserved* for review." *Canady*, 330 N.C. at 404, 410 S.E.2d at 879 (Justice Meyer dissenting). Justice Meyer cautioned: "The majority today discards our longstanding rules of appellate procedure." *Id.* at 406, 410 S.E.2d at 880.

The majority in *Canady* then addressed and dismissed the concerns of Justice Meyer on two different bases:

> Assuming Rule 10 requires an exception to be made to the finding of an aggravating factor, we hold the defendant has complied with the Rule. At the time of sentencing the judge said, "[f]or the record, the Court did take into consideration two previous felony convictions, possession of marijuana and LSD, and a charge of escape from the department of corrections." The defendant marked an exception to this statement and made it the subject of an assignment of error. This was sufficient to preserve the question for appellate review.
>
> Justice Meyer in his dissent relies on Rule 10[(a)](1) of the Rules of Appellate Procedure and argues that an objection to the finding of the aggravating factor should have been made at the time the factor was found.
>
> . . . .
>
> [Rule 10(a)(1)] does not have any application to this case. It is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. If we did not have this rule, a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work. That is not present in this case. *The defendant did not want the [trial] court to*

> *find the aggravating factor, and the [trial] court knew or should have known it. This is sufficient to support an [argument on appeal].*
>
> . . . .
>
> [W]e have held that Rule 10[(a)](1) does not apply to this case. We base this holding on our knowledge of the way our judicial system works. As we understand the dissent by Justice Meyer, he would require a party to object to any finding of fact in a judgment at the time the finding of fact is made. This would be a near impossibility in many cases in which the court renders a judgment at some time after the trial is concluded. We do not believe it was the intention of Rule 10[(a)](1) to impose such a requirement. We shall not require that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal.

Id. at 401–02, 410 S.E.2d at 877–78 (citations omitted). Though we see how the language used in *Canady* could lead to misapplication of its holding, in our reading, the holding appears to be fairly limited. First, the Court held that, if Rule 10 applied in that case, the defendant sufficiently complied with it. Second, and more relevant to the present case, the Court did not state that Rule 10(a)(1) never applied to sentencing hearings. The Court stated, "we have held that Rule 10[(a)](1) does not apply to *this case*." *Id.* at 402, 410 S.E.2d at 878 (emphasis added). This language does not indicate that the Court did not consider sentencing hearings to be a part of the trial – a fact that is further supported by the Court's explanation of the purpose of Rule 10(a)(1), which purpose is just as valid at a sentencing hearing as it is at the guilt/innocence phase of the trial. The Court explained:

> We do not believe it was the intention of Rule 10[(a)](1) to impose . . . a requirement . . . . that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal.

Id. at 402, 410 S.E.2d at 878. This holding merely states that Rule 10(a)(1) does not apply after the proceedings have concluded – including the

sentencing hearing – and the trial court is in the process of memorializing its judgment.[5]

However, this Court has read *Canady* much more broadly. The first opinion to cite *Canady* for the proposition that Rule 10(a)(1) does not apply to sentencing hearings was *Hargett*, in which this Court considered the defendant's double jeopardy argument even though he had failed to object at sentencing:

> Defendant failed to object to the sentencing at trial. N.C. Rule 10[(a)](1) requires an objection at trial for preservation of an issue on appeal. Our Supreme Court has held that *an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10[(a)](1)* of the North Carolina Rules of Appellate Procedure. *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991).

Hargett, 157 N.C. App. at 92, 577 S.E.2d at 705 (emphasis added). Following the precedent set in *Hargett*, *Canady* has continued to be interpreted by this Court, intermittently, as including a blanket holding that any error at sentencing is preserved for appellate review even absent objection because Rule 10(a)(1) does not apply at sentencing. *See State v. McNair*, __ N.C. App. __, 797 S.E.2d 712 (2017) (unpublished); *State v. Dove*, __ N.C. App. __, 790 S.E.2d 755 (2016) (unpublished); *State v. Allah*, 231 N.C. App. 88, 97, 750 S.E.2d 903, 910 (2013) (citation omitted) ("Admittedly, N.C. R. App. P. 10(a)(1) provides that, as a general proposition, a party must have raised an issue before the trial court before presenting it to this Court for appellate review. However, according to well-established North Carolina law, N.C. R. App. P. 10(a)(1) does not apply to sentencing-related issues.").

We do not believe *Hargett* correctly states the holding in *Canady*; at a minimum, *Canady* does not include language similar to that ascribed to it in *Hargett*. The next opinion to cite *Canady* summarized the *Canady* holding in a manner more in line with the particular facts of *Canady*, and suggested that the defendant had failed to preserve his argument for appellate review by failing to object at sentencing:

> We note that the defendant *cannot* argue insufficient evidence [to support amount of restitution ordered] when

5. We also note that when *Canady* was decided, it was the judge acting as the trial court, and not the trier of fact, who decided whether to find an aggravating factor.

> there was no objection at trial, and no other way for the court to be alerted to defendant's position that the determination was wrong. *See State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991) (court allowed argument on appeal that aggravating factor was in error even without objection *when defendant had argued for the minimum sentence, thus alerting the judge that he didn't want the aggravating factor*).

State v. Dickens, 161 N.C. App. 742, 590 S.E.2d 24, 2003 WL 22952108, at *3 (2003) (unpublished) (emphasis added). This Court applied a more limited holding from *Canady* in subsequent opinions as well:

> While it is true that defendant must normally make specific objections to preserve issues on appeal, our Supreme Court has stated "We shall not require that *after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors* in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal." *State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). The *Canady* Court further held that when a defendant argues for sentencing in the mitigated range, no further objection is required to preserve the issue on appeal when the trial judge sentences her in the aggravated range. *Id.* In the case at bar, defendant argued for a sentence in the mitigated range, but was sentenced from the aggravated range. She properly preserved her right to appeal the trial court's determination of aggravating and mitigating factors.

State v. Byrd, 164 N.C. App. 522, 526, 596 S.E.2d 860, 862–63 (2004) (emphasis added); *see also State v. Borders*, 164 N.C. App. 120, 124, 594 S.E.2d 813, 816 (2004) (citation omitted) (*Canady* held that preserving review of the trial court's finding of non-statutory aggravating factors for appellate review by objecting "is unnecessary because it is clear that a defendant does 'not want the [trial] court to find [an] aggravating factor and the [trial] court kn[ows] or should . . . know[ ] it' "). This Court has also applied Rule 10(a)(1) requirements without mentioning *Canady*. *See State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014); *State v. Martin*, 222 N.C. App. 213, 218-19, 729 S.E.2d 717, 722 (2012); *Freeman*, 185 N.C. App. at 413-14, 648 S.E.2d at 881. Finally, in *State v. Pimental*, 165 N.C. App. 547, 600 S.E.2d 898, 2004 WL 1622290, at *2 (2004) (unpublished), this Court actually cited *Hargett* and *Canady*

in support of its holding that the State could not challenge sentencing issues that it had failed to object to at trial.

We acknowledge that in *State v. Culross*, this Court, in an unpublished opinion, rejected a request to review the line of cases applying the *Hargett* interpretation of *Canady*, holding that we were bound by this Court's interpretation in *Hargett*:

> [T]he State contends that the rule applied in *Owens*[6] [which cites *Hargett*], i.e. that a Defendant need not preserve errors during sentencing by objection or motion, is based on this Court's misinterpretation of our Supreme Court's opinion in *Canady*, *supra*. The State's argument is misplaced, however. Whether a misinterpretation or not, this Court has "repeatedly applied *Canady* to reject contentions that a challenge to a sentence on appeal is precluded by a failure to object below." "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Further, "[w]hile we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel . . . the panel is bound by that prior decision until it is overturned by a higher court."

State v. Culross, 217 N.C. App. 400, 720 S.E.2d 30, 2011 WL 6046692, at *2 (2011) (citations omitted) (unpublished). While *Culross* correctly states the law, it is an incomplete statement of the law.

First, precisely because of *In re Civil Penalty*, when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve the conflict. As indicated above, *Hargett* is the earliest opinion of this Court that we can locate holding that Rule 10(a)(1) does not apply in sentencing hearings. *However*, we find multiple prior opinions of this Court, filed between *Canady* – which was filed on 6 December 1991 – and *Hargett* – which was filed on 1 April 2003 – that *declined to review alleged errors at sentencing when the defendant had failed to object as required by*

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6. *State v. Owens*, 205 N.C. App. 260, 266, 695 S.E.2d 823, 828 (2010), addressing a double jeopardy argument despite the defendant's failure to object during sentencing based on *Hargett*.

Rule 10 (a)(1). *See, e.g.*, *State v. Love*, 156 N.C. App. 309, 317–18, 576 S.E.2d 709, 714 (2003); *State v. Williams*, 149 N.C. App. 795, 799, 561 S.E.2d 925, 927 (2002); *State v. Hilbert*, 145 N.C. App. 440, 445, 549 S.E.2d 882, 885 (2001); *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 398–99 (1997); *State v. Evans*, 125 N.C. App. 301, 304, 480 S.E.2d 435, 436–37 (1997) ("[The d]efendant lastly contends that the trial court abused its discretion by finding certain mitigating factors in one judgment but failing to do so in the other judgments. However, a party must present to the trial court a timely request, objection or motion in order to preserve a question for appellate review. N.C. R. App. P. 10[(a)](1)."). This Court, in *Hargett* and in subsequent opinions relying on *Hargett's* interpretation of *Canady*, was without authority to "overrule" prior cases of this Court, filed after *Canady*, that consistently held Rule 10(a)(1) applied during sentencing hearings. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Second, and more definitively, any conflict between this Court and our Supreme Court must be resolved in favor of our Supreme Court. Although this Court has cited *Canady* at least forty times, many of which involve that opinion's analysis of Rule 10, our Supreme Court has only cited *Canady* three times, and two of those citations did not involve Rule 10 whatsoever. The single Supreme Court opinion citing *Canady* concerning Rule 10 is a civil case, which cites *Canady* for the general proposition that the purpose of Rule 10(a)(1) is to preclude appeal from issues that were not first brought to the attention of the trial court. *Reep v. Beck*, 360 N.C. 34, 36–37, 619 S.E.2d 497, 499–500 (2005).

Contrary to the *Hargett* line of cases from this Court, our Supreme Court has continuously enforced the requirements of Rule 10(a)(1) with respect to sentencing hearings post-*Canady*, and has never applied *Canady* in order to circumvent Rule 10(a)(1) in sentencing hearings. For example, in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), our Supreme Court held that multiple alleged errors at sentencing had not been preserved for appellate review as required by Rule 10(a)(1). First, our Supreme Court refused to review two defendants' arguments that their sentencing hearings should not have been joined because the defendants had not objected at trial. The Court discussed one of the defendant's failure to object in the following manner:

> [Defendant] Tilmon never actually renewed his prior motion to sever, nor did he object to joinder of the cases for sentencing. Therefore, the trial court never ruled on this issue. Tilmon's purported efforts, during the sentencing phase, to revive his previous motion to sever were insufficient to satisfy N.C. R. App. P. 10 to preserve appellate review of this issue.

Id. at 460–61, 533 S.E.2d at 231;[7] *Id.* at 463, 533 S.E.2d at 232; *Id.* at 464, 533 S.E.2d at 233; *Id.* at 465, 533 S.E.2d at 234; *Id.* at 481, 533 S.E.2d at 243; *see also*, *e.g.*, *State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005); *State v. Roache*, 358 N.C. 243, 326, 595 S.E.2d 381, 433 (2004); *State v. Walters*, 357 N.C. 68, 91, 588 S.E.2d 344, 358 (2003); *State v. Davis*, 353 N.C. 1, 20, 539 S.E.2d 243, 257 (2000) (citation omitted) (the "defendant failed to make an objection at [the sentencing hearing] on constitutional grounds. This failure to preserve the issue results in waiver. N.C. R. App. P. 10(b)(1)"); *State v. Smith*, 352 N.C. 531, 557–58, 532 S.E.2d 773, 790 (2000); *State v. McNeil*, 350 N.C. 657, 681, 518 S.E.2d 486, 501 (1999); *State v. Thomas*, 350 N.C. 315, 363, 514 S.E.2d 486, 515 (1999); *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998).

This Court has declined to follow *Hargett* based upon that opinion's conflict with opinions of our Supreme Court in at least two prior occasions. In *State v. Williams*, in declining to address a double jeopardy issue to which the defendant had failed to object at sentencing, this Court recognized:

> *Hargett* . . . is inconsistent with numerous Supreme Court cases holding that a double jeopardy argument cannot be raised for the first time on appeal. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because [c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal."). Because we are bound to follow the Supreme Court, we hold that defendant's argument is not preserved.

State v. Williams, 215 N.C. App. 412, 425, 715 S.E.2d 553, 561 (2011) (citations omitted); *see also Flaugher*, 214 N.C. App. at 388, 713 S.E.2d at 590 (*Hargett* is inconsistent with Supreme Court cases holding that a defendant cannot raise a sentencing-based constitutional argument for the first time on appeal – because the defendant failed to raise double jeopardy issue at sentencing, issue was not preserved for appellate review). "Because we are bound to follow the Supreme Court," our Supreme Court's unabated application of Rule 10(a)(1) to sentencing

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7. We note that our Supreme Court cited this section of *Golphin* in *Reep*, 360 N.C. at 37, 619 S.E.2d at 500, in the same analysis in which it cited *Canady*, further bolstering the argument that our Supreme Court has never interpreted *Canady* in the same manner as *Hargett*.

hearings post-*Canady* must control over opinions of this Court holding otherwise. *Williams*, 215 N.C. App. at 425, 715 S.E.2d at 561.[8]

2. *Failure to Continue Sentencing*

[3] Defendant's first two arguments – that the trial court erred in Defendant's sentencing because a judge different from the one who presided over the trial issued the sentence, and the sentencing judge improperly "overruled" a prior order of the trial judge – are essentially arguments that the trial court erred in failing to continue sentencing until the original trial court judge was available to conduct the sentencing hearing. We do not address Defendant's arguments because they have not been preserved for appellate review.

When Defendant presented for sentencing, her counsel indicated Defendant was ready and prepared to proceed. Defendant did not request a continuance, nor did she make any objection to the commencement of sentencing. When the trial court asked at the conclusion of sentencing if Defendant's counsel had any questions, Defendant's counsel responded: "None from the defense." Our Supreme Court rejected a similar argument in *State v. Call*, in which the "defendant contend[ed] the trial court committed reversible error by failing to exercise its discretion when it declined to continue defendant's capital sentencing proceeding." *State v. Call*, 353 N.C. 400, 415, 545 S.E.2d 190, 200 (2001). Our Supreme Court refused to review the defendant's argument because

> [t]he record . . . demonstrates that defendant neither requested a continuance nor objected to the trial court's response to the prosecutor's suggested course of action.[9] Thus, the trial court was never called upon by defendant to exercise its discretion, and defendant has failed to preserve this issue for appellate review. See N.C. R.

8. We note that Supreme Court opinions filed subsequent to *Canady* call into question even the more limited reading of its holding. *State v. Thompson*, 359 N.C. 77, 107, 604 S.E.2d 850, 871 (2004) (failure to object to two of seven aggravating factors resulted in those two aggravating factors not being preserved for appellate review pursuant to Rule 10(a)(1)); *State v. Bell*, 359 N.C. 1, 30–31, 603 S.E.2d 93, 113–14 (2004) (failure to object to submission of certain aggravating circumstances at sentencing violated Rule 10(a)(1) and issue was not preserved for appellate review); *State v. Tirado*, 358 N.C. 551, 598–99, 599 S.E.2d 515, 546 (2004) (citations omitted) (the defendant "did not object, as required by Rule 10[(a)](1) of the Rules of Appellate Procedure, to the trial court's submission of any of these three aggravating circumstances, either alone or in combination with one another. Under these circumstances, we review for plain error").

9. The prosecutor had suggested a continuance.

> App. P. 10[(a)](1); *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000). Accordingly, this [argument] is rejected.

Call, 353 N.C. at 415-16, 545 S.E.2d at 200-01.

We hold that Defendant has waived any argument that the sentencing hearing should not have been conducted at that particular time, or in front of that particular judge, by failing to either object to the commencement of the hearing, or request a continuance thereof. *Id.* at 415-16, 545 S.E.2d at 200-01. This argument is without merit.

3. *Eighth Amendment*

[4] Defendant argues that imposition of "consecutive sentences of 70 to 93 months on a 72-year-old first offender for a single drug transaction" violated Defendant's Eighth Amendment right that her sentence to be proportional to her crime. Defendant argues that her failure to object to her sentence at the sentencing hearing did not serve to waive her right to appellate review based upon the *Hargett* line of cases interpreting *Canady*.

We have determined that the *Hargett* line of cases are in conflict with controlling precedent, and cannot serve to mitigate Defendant's failure to object at trial as required by Rule 10(a)(1). Therefore, Defendant has waived appellate review of the alleged constitutional violation by failing to object at sentencing. *Davis*, 353 N.C. at 20, 539 S.E.2d at 257; *Flippen*, 349 N.C. at 276, 506 S.E.2d at 710 ("Defendant further waived review of any constitutional issue by failing to raise a constitutional issue at the sentencing proceeding."); *Freeman*, 185 N.C. App. at 413-14, 648 S.E.2d at 881 (Eighth Amendment argument that sentence was grossly disproportionate to the crime was abandoned because the defendant failed to object at trial).

4. *Abuse of Discretion*

[5] Defendant argues that the trial court abused its discretion in sentencing her to two consecutive sentences, and only consolidating the third conviction for sentencing. Defendant argues that this issue was preserved, even absent objection, pursuant to *Hargett* and its progeny. To the extent Defendant failed to preserve this issue pursuant to Rule 10(a)(1), it has been waived.

Assuming, *arguendo*, this issue was preserved at trial, we reject Defendant's argument. At sentencing, Defendant argued for consolidated sentences in the mitigated range. The mandated sentence for trafficking

in more than four but less than fourteen grams of opium is a minimum of seventy months and a maximum of ninety-three months. N.C. Gen. Stat. § 90-95(h)(4)(a.) (2015). The trial court may only deviate from N.C.G.S. § 90-95(h)(4)(a.) if the defendant to be sentenced has provided law enforcement "substantial assistance" in identifying, arresting or convicting others who have participated in the crime for which the defendant is convicted. N.C.G.S. § 90-95(h)(5). Defendant was given the seventy months minimum, ninety-three months maximum sentence required by statute for each of her three trafficking convictions. However, although Defendant requested that each sentence run concurrently, the trial court ordered that two of Defendant's sentences run concurrently, but that those two sentences run consecutive to the third conviction.

> "When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A–1354(a) (2009). The trial court has the discretion to determine whether to impose concurrent or consecutive sentences.

State v. Nunez, 204 N.C. App. 164, 169–70, 693 S.E.2d 223, 227 (2010). A sentence within the provided statutory range will be presumed correct unless " 'the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence[.]' " *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citations omitted). In the present case, the trial court sentenced Defendant to a minimum of 140 months, which is seventy months less than the 210 months allowed by statute. Defendant has failed to show that the sentence imposed constituted an abuse of discretion. This argument is without merit.

III. *Conclusion*

We hold that (1) Defendant was not denied effective assistance of counsel because any errors made by Defendant's counsel did not result in prejudice sufficient to sustain an IAC claim; (2) the holdings in *Hargett* and its progeny that "[o]ur Supreme Court [in *Canady*] has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10[(a)](1)[,]" *Hargett*, 157 N.C. App. at 92, 577 S.E.2d at 705, are contrary to prior opinions of this Court, and contrary to both prior and subsequent holdings of our Supreme Court, and do not constitute binding precedent; (3) Defendant has failed to preserve her sentencing arguments for appellate review as required by Rule 10(a)(1);

and (4) Defendant's argument that the trial court abused its discretion fails, even assuming it was preserved for appellate review.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY concurs in the result only.

STATE OF NORTH CAROLINA
v.
DARIAN JARELLE MOSLEY

No. COA17-345

Filed 17 October 2017

Sentencing—second-degree murder—Class B1 or B2 offense—depraved-heart malice

The trial court erred in a second-degree murder case by sentencing defendant as a Class B1 offender where the jury's general verdict of guilty to second-degree murder was ambiguous and there was evidence of depraved-heart malice to support a Class B2 offense based on defendant's reckless use of a rifle (a deadly weapon).

Appeal by defendant from judgment entered 24 May 2016 by Judge R. Gregory Horne in McDowell County Superior Court. Heard in the Court of Appeals 21 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

ARROWOOD, Judge.

Darian Jarelle Mosley ("defendant") appeals from judgment entered upon his conviction for second degree murder. For the following reasons, we vacate and remand to the trial court for resentencing.

I. Background

On 20 May 2013, a McDowell County Grand Jury indicted defendant on one charge of first degree murder. The case was called for a jury trial in McDowell County Superior Court on 16 May 2016, the Honorable R. Gregory Horne, Judge, presiding.

The evidence presented at trial tended to show the following facts: Defendant and the victim were in a relationship. In the early morning hours of 16 April 2013, defendant and the victim had an argument, during the course of which the victim was fatally shot in the abdomen by a .22 rifle held by defendant.

Defendant did not deny that he shot the victim, but stated it was an accident. Defendant testified that he left the victim's residence following the initial dispute, but returned shortly thereafter to gather his belongings, specifically his clothes and his rifle. Defendant testified that as he was leaving with his belongings, he stopped in the bedroom doorway to talk to the victim, who was in the bedroom. Defendant had a plastic bag of clothes in his right hand and the rifle in his left hand with his finger around the trigger. Defendant also testified that "[the victim] reached towards the gun, and [he] took it away from her, and that's when the gun went off."

On cross-examination, defendant further testified that the victim wanted him to put this belongings down and as he pushed the victim away, she grabbed the barrel of the rifle and it went off. Defendant knew how to fire the rifle, but never had any safety training. Defendant stated that he always carried the rifle around with his finger on the trigger and that he never used the safety. Defendant also testified he did not know the rifle was loaded.

At the conclusion of the evidence, the trial court instructed the jury on first degree murder and the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter in accordance with N.C.P.I--Crim. 206.13, the pattern instruction for first degree murder where a deadly weapon is used, not involving self-defense, covering all lesser included homicide offenses. Included in the instructions for first degree murder, the trial court instructed the jury on the definitions of express malice and deadly weapon implied malice. The trial court did not give the additional definition of malice included in N.C.P.I--Crim. 206.30A when it instructed on second degree murder, only stating that malice was required. On 24 May 2016, the jury returned a general verdict finding defendant guilty of second degree murder. The trial judge entered judgment sentencing defendant to 240 to 300 months

imprisonment for second degree murder, a term within the presumptive range of punishment for a Class B1 felony. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred in sentencing him for second degree murder as a Class B1 offense because "[t]he jury's verdict of second-degree murder failed to support the trial court's imposition of a Class B1 sentence and supported only a sentence for a Class B2 offense." Thus, defendant asserts this Court must remand for resentencing. Alternatively, defendant argues that if this Court denies relief under his first argument, this Court should order a new trial because the trial court plainly erred in omitting an "inherently dangerous acts" definition of malice from the second degree murder instructions. We reach only the first issue on appeal, which is similar to an issue recently addressed by this Court in *State v. Lail*, __ N.C. App. __, 795 S.E.2d 401 (2016), *disc. review denied*, __ N.C. __, 796 S.E.2d 927 (2017).[1] "We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *Id.* at __, 795 S.E.2d at 408.

In *Lail*, the defendant appealed from a judgment sentencing him as a B1 felon for second degree murder. Specifically,

> [the d]efendant conted[ed] the trial court improperly sentenced him as a B1 felon based on the jury's general verdict, since the evidence presented may have supported a finding that he acted with depraved-heart malice. Therefore, [the] defendant argue[d], the jury's verdict failing to specify whether depraved-heart malice theory supported its conviction did not authorize the trial judge to sentence him as a B1 felon but requires that he be resentenced as a B2 felon.

Id. at __, 795 S.E.2d at 408. Before addressing the defendant's argument, this Court explained the relevant law on malice as it relates to second degree murder as follows:

> Malice is an essential element of second-degree murder. *See, e.g.*, *State v. Thomas*, 325 N.C. 583, 604, 386 S.E.2d 555, 567 (1989). North Carolina recognizes at least three malice theories:

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1. We note that this Court issued its opinion in *Lail* after the trial court entered judgment in the present case. Thus, the trial court did not have the benefit of *Lail's* guidance.

> (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."
>
> *State v. Coble*, 351 N.C. 448, 450-51, 527 S.E.2d 45, 47 (2000) (quoting *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982)). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000) (citing *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000)).

Id. at __, 795 S.E.2d at 407. The Court further explained that while "depraved-heart malice" had been frequently used to support second degree murder convictions in drunk driving cases, it was not limited to such situations. *Id.* at __, 795 S.E.2d at 407.

Prior to 2012, all second degree murders were classified as Class B2 felonies. In 2012, our General Assembly amended N.C. Gen. Stat. § 14-17 to classify all second degree murders as Class B1 felonies except for in two specific exceptions, in which second degree murder remains a Class B2 felony. *See* 2012 N.C. Sess. Laws ch. 165, § 1. The exception at issue here is found in N.C. Gen. Stat. § 14-17(b)(1), which states:

> The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

N.C. Gen. Stat. § 14-17(b)(1) (2015). This exception is the previous common law definition of depraved-heart malice. *See Coble*, 351 N.C. at 450-51, 527 S.E.2d at 47.

In *Lail*, the Court rejected the defendant's contention finding that

> [n]o evidence presented would have supported a finding that [the] defendant acted with B2 depraved-heart malice. The evidence presented supported only B1 theories of malice and the jury was instructed only on those theories. Therefore, although the jury was not instructed to answer under what malice theory it convicted defendant of

> second-degree murder, it [was] readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder.

__ N.C. App. at __, 795 S.E.2d at 410. Pertinent to this case, however, this Court noted that

> a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed. In such a situation, courts cannot speculate as to which malice theory the jury used to support its conviction of second-degree murder. *See State v. Goodman*, 298 N.C. 1, 16, 257 S.E.2d 569, 580 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment.").

Id. at __, 795 S.E.2d at 411.

In the present case, the jury unanimously convicted defendant of second degree murder. The jury verdict, however, was silent on whether the second degree murder was a Class B1 or a Class B2 offense. Defendant's first argument on appeal is that the jury's general verdict of guilty of second degree murder is ambiguous for sentencing purposes because there was evidence in this case of depraved-heart malice to support a verdict of guilty of a Class B2 second degree murder. We agree.

As this Court made clear in *Lail*, our Supreme Court has held that "the reckless use of a deadly weapon constituted a depraved-heart malice theory supporting a murder conviction." *Id.* at __, 795 S.E.2d at 409 (citing *State v. Lilliston*, 141 N.C. 857, 859, 54 S.E. 427, 427 (1906) (upholding murder conviction under depraved-heart malice theory where the defendant in the crowded reception room of a railroad station engaged in a shootout, causing the death of an innocent bystander)).

In the case *sub judice*, unlike in *Lail*, there was evidence of defendant's reckless use of a rifle, a deadly weapon. Specifically, defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle – finger on the trigger and no safety. Defendant testified that in this instance, the gun

went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety on the rifle and testimony from a firearm expert that "[y]ou would never teach anyone to have their finger on the trigger until they are ready to fire." Moreover, the State argued to the jury that defendant's actions amounted to more than criminal negligence, claiming that defendant's handling of the rifle amounted to "gross recklessness or carelessness as to amount to the heedless indifference to the safety and rights of others."

In response to defendant's argument that the evidence supported a depraved-heart theory of malice and a Class B2 second degree murder, the State points to other evidence presented in the case from which the State claims the trial judge could have correctly concluded that the Class B1 felony sentence was proper. That evidence, however, is not in question. There is no doubt that there is evidence of malice supporting a Class B1 second degree murder. The issue presently before this Court is whether there is also evidence from which the jury could have found depraved-heart malice to convict defendant of a Class B2 second degree murder. We hold there is such evidence in this case.

Because there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered in this case was ambiguous. When a verdict is ambiguous, neither we nor the trial court is free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant. *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986); *see also State v. Williams*, 235 N.C. 429, 430, 70 S.E.2d 1, 2 (1952) ("Any ambiguity in a verdict will be construed in favor of the defendant."). Given the ambiguity in the second degree murder verdict in this case, we vacate defendant's sentence and remand the matter for resentencing for second degree murder as a Class B2 felony offense.

In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.–Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict of second degree murder, as set forth in N.C.P.I.–Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

III. Conclusion

For the reasons discussed above, we hold the trial court erred in sentencing defendant for second degree murder as a Class B1 offense. Thus, we vacate the judgment and remand the matter for resentencing for second degree murder as a Class B2 felony offense.

VACATED AND REMANDED.

Judges HUNTER, JR., and DILLON concur.

KIM TIGANI, PLAINTIFF
v.
GREGORY TIGANI, DEFENDANT

No. COA17-82

Filed 17 October 2017

Contempt—civil contempt—failure to pay attorney fees—sufficiency of evidence

The trial court erred by finding defendant in civil contempt of court for his failure to abide by the terms of an order directing him to pay $20,096.68 to his wife's attorney in a domestic litigation case where the order was not supported by any evidence introduced at the hearing.

Appeal by defendant from order entered 15 August 2016 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 23 August 2017.

Plumides, Romano, Johnson and Cacheris, PC, by Richard B. Johnson, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

ZACHARY, Judge.

Gregory Tigani (defendant) appeals from an order finding him in civil contempt of court for his failure to abide by the terms of an order of the trial court directing defendant to pay $20,096.68 in attorney's fees

to the attorney hired by Kim Tigani (plaintiff) in the course of domestic litigation between the parties. On appeal, defendant argues that the trial court erred by finding defendant in contempt of court for his failure to abide by the order to pay attorney's fees to plaintiff's counsel and by ordering that defendant be incarcerated until he purged himself of his contempt. Defendant contends that the court's findings were not supported by competent evidence. After careful review of defendant's arguments, in light of the record on appeal and the applicable law, we conclude that defendant's arguments have merit and that the contempt order should be reversed.

Factual and Procedural Background

Plaintiff and defendant were married in 1986, separated in 2006, and executed a separation agreement in 2007. In 2011, plaintiff filed a complaint alleging that defendant had breached the terms of the separation agreement and seeking specific performance and attorney's fees. Defendant filed an answer and counterclaims. In 2015, the matter was tried before a jury, which found that both parties had breached the separation agreement, that plaintiff was entitled to damages of $62,000, and that defendant was entitled to nominal damages of $1.00. On 2 October 2015, the trial court entered orders that awarded plaintiff $62,000 in damages and denied plaintiff's request for specific performance.

The present appeal arises from the court's order, also entered 2 October 2015, awarding plaintiff's attorney's fees. The trial court ordered defendant to pay plaintiff's counsel, Mr. Richard Johnson, a total of $20,096.68 in attorney's fees, with $10,048.34 due no later than 1 November 2015, and the remainder payable no later than 1 March 2016. On 25 November 2015, plaintiff's counsel filed a verified motion asking the court to hold defendant in contempt of court for failure to make the payment that was due by 1 November 2015. The first sentence of plaintiff's motion, entitled "Motion For Contempt," stated that plaintiff was "moving the Court for an Order to Show Cause directed to Defendant[.]" Plaintiff set out the relevant facts and asked the trial court to issue "an Order directing Defendant to appear and show cause" why he should not be held in contempt. Plaintiff also requested issuance of "an Order finding Defendant in contempt of this Court and committing Defendant to custody until such time as he fully complies" with the order to pay attorney's fees. Plaintiff served defendant's counsel with her Notice of Hearing indicating that the "matters for hearing" were a "SHOW CAUSE," among other matters. Defendant moved for a continuance, which was denied. The trial court conducted a hearing on the motion on 25 July 2016. Neither defendant nor his counsel attended

the hearing. After hearing from plaintiff's counsel, the trial court ruled that defendant was in civil contempt of court for his failure to abide by the terms of the court's order.

On 15 August 2016, the court entered an order finding defendant "in contempt of court for his failure to comply with" the order to pay attorney's fees, and ordering that defendant be incarcerated in the Union County jail until he paid the full amount of attorney's fees. On the same day that the order was entered, defendant filed a motion under N.C. Gen. Stat. § 1A-1, Rule 60, asking the court to set aside the contempt order. On 25 August 2016, defendant's appellate counsel filed a petition for writ of *supersedeas* and a motion for a temporary stay with this Court, which were both denied the same day. On 26 August 2016, before the court had ruled on defendant's Rule 60 motion, defendant entered notice of appeal to this Court. Also on 26 August 2016, plaintiff's counsel asked the trial court to issue an order for defendant's arrest. Because defendant had given notice of appeal, the court ruled that it was divested of jurisdiction and denied the request that it order defendant's arrest.

Standard of Review

It is well-established that "[t]he standard of review we follow in a contempt proceeding is 'limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.' " *Miller v. Miller*, 153 N.C. App. 40, 50, 568 S.E.2d 914, 920 (2002) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142 (2009) (internal quotation marks omitted). However, "[i]f, as here, the finding that the failure to pay was willful is not supported by the record, the decree committing defendant to imprisonment for contempt must be set aside." *Henderson v. Henderson*, 307 N.C. 401, 409, 298 S.E.2d 345, 351 (1983).

Civil Contempt: Legal Principles

The purpose of a proceeding for civil contempt "is not to punish, but to coerce the defendant to comply with the order." *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984) (citing *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980)). N.C. Gen. Stat. § 5A-21(a) (2015) provides that:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

"A person who is found in civil contempt may be imprisoned as long as the civil contempt continues[.]" N.C. Gen. Stat. § 5A-21(b). However, "a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying[.]" *McBride v. McBride*, 334 N.C. 124, 130, 431 S.E.2d 14, 18 (1993) (citation omitted). Thus:

> . . . [I]n order to find a party in civil contempt, the court must find that the party acted willfully in failing to comply with the order at issue. "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." Therefore, in order to address the requirement of willfulness, "the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default." . . . Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, "the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount.

Clark v. Gragg, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-59 (2005) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002), and *Bennett v. Bennett*, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974)).

N.C. Gen. Stat. § 5A-23(a) (2015) provides that a proceeding for civil contempt may be initiated "by the order of a judicial official directing the alleged contemnor to appear . . . and show cause why he should not

be held in civil contempt," or "by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears . . . and shows cause why he should not be held in contempt." Under either of these circumstances, the alleged contemnor has the burden of proof. In addition, pursuant to N.C. Gen. Stat. § 5A-23(a1), "[p]roceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. . . . The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." "[W]hen an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, N.C. Gen. Stat. § 5A-23(a1) [(2015)], because there has not been a judicial finding of probable cause." *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 205 (2012) (citing *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004)).

In the present case, the nature of plaintiff's motion is not entirely clear. The motion is captioned "Motion for Contempt." However, the first sentence of the motion states that plaintiff is "moving the Court for an Order to Show Cause," and in her prayer for relief plaintiff asks the trial court to issue both a show cause order and an order finding defendant in contempt of court. In addition, the Notice of Hearing indicates that the matter for hearing was a "SHOW CAUSE." Based on the language of the motion and the notice of hearing, defendant might have believed that the hearing conducted on 25 July 2016 could have resulted in nothing more than issuance of a show cause order, to be heard at some future date. However, defendant has not argued on appeal that he lacked notice that the court might enter an order finding him in contempt. Accordingly, we do not address the issue of whether plaintiff's motion, which includes elements of both a motion seeking to have a party held in contempt and a motion merely seeking issuance of a show cause order, properly provided defendant with notice that he might be held in civil contempt of court.

Discussion

Defendant appeals from an order finding him in civil contempt of court for failure to abide by the terms of the court's order to pay attorney's fees to plaintiff's counsel. The trial court's order states, in relevant part, the following:

> . . . [A]fter reviewing the Court file and the exhibits introduced into evidence and hearing the arguments of counsel; the Court enters the following findings of fact, conclusions of law, and decree: . . .

> 1. By an order for Attorney's Fees entered herein on October 4, 2015, by Judge Joseph Williams, Defendant was ordered to pay $20,096.68 in attorney's fees with $10,048.34 due on or before November 1, 2015 and the remain[der] due on or before March 1, 2016.
>
> 2. Defendant has willfully and deliberately violated said Order by:
>
> a. Failing and refusing to pay any of the attorney's fees since the Order was entered.
>
> 3. Defendant is in contempt of Court for his failure to comply with the above Order as he has not paid any attorney's fees.
>
> 4. Defendant's failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements.

Based upon its findings of fact, the Court concluded in pertinent part that:

. . .

> 2. Defendant is in contempt of Court for his failure to comply with the above Order as he has not paid the attorney's fees as previously ordered.
>
> 3. Defendant's failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements.

Based upon its findings and conclusions, the trial court entered an order stating in relevant part that:

. . .

> 2. Defendant shall be placed in the custody of the Union County Sheriff's Department until he pays the previously ordered attorney's fees of $20,096.68.
>
> 3. That sentence is suspended until August 15, 2016, provided Defendant purges his contempt by:
>
> a. Paying the full amount of attorney's fees owed, $20,096.68, on or before August 15, 2016.

As discussed above, a party may be held in civil contempt of a court order if (1) the order remains in force; (2) the purpose of the order may be served by compliance with the order; (3) the party's noncompliance is willful; and (4) the party is able to comply with the order. In this case, defendant does not dispute that he was ordered to pay $20,096.68 in attorney's fees or that he had not complied with the order at the time of the hearing. Defendant contends, however, that the trial court's finding that his "failure to comply with the previous Order entered herein is willful and deliberate and he has the means and ability to comply with the Order as evidenced by his bank statements" was not supported by any record evidence. Upon review of the record, we agree.

At the hearing on plaintiff's "Motion For Contempt," no witnesses testified and no exhibits were offered into evidence. The transcript of the proceeding indicates that plaintiff's counsel proffered for the trial court's review documents that he described as defendant's "bank statements" encompassing a mixture of business and personal records from the period between November 2015 and March 2016. The bank records were not introduced into evidence or authenticated by any witness, and are not part of the record on appeal. In addition, assuming the accuracy of plaintiff's counsel's description of the bank records, the records did not reflect defendant's financial circumstances on 25 July 2016, which is the relevant time for purposes of determining defendant's *present* ability to pay. Nor did plaintiff's counsel offer testimony from any witness.

An order finding a party in contempt of court and ordering him incarcerated until he complies must be supported by competent evidence:

> To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. . . . . The record before this court is unclear as to what evidence if any was taken to show defendant's present ability or lack of present ability to pay the arrearage. Therefore, the judgment is vacated and the action remanded to the district court for further proceedings not inconsistent with this opinion.

McMiller v. McMiller, 77 N.C. App. 808, 809-10, 336 S.E.2d 134, 135-136 (1985). In the present case, the record contains no witness testimony or exhibits that were introduced into evidence. As a result, there is no

competent evidence on the issue of defendant's financial circumstances in July 2016, or on his ability to pay the amount of attorney's fees that he owed. We conclude that the trial court's conclusion that defendant had the present ability to comply with the order directing him to pay plaintiff's attorney's fees was unsupported by any record evidence.

In urging us to reach a contrary conclusion, plaintiff notes that this Court has previously held that a court's finding that the contemnor had the "present means to comply" was "minimally" sufficient to satisfy the requirements for a valid order finding a party in contempt. In cases such as those cited by plaintiff, we held that the court's order, although lacking in specific detail, was sufficient to uphold a contempt order when the order was supported by record evidence. For example, in *Maxwell v. Maxwell*, 212 N.C. App. 614, 713 S.E.2d 489 (2011), this Court discussed an earlier case, *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986):

> In *Adkins*, the trial court found that the defendant had the present means to comply with a court order and purge himself of a finding of contempt. On appeal, this Court reviewed the record evidence and held that the unspecific finding of a present means to comply was sufficient in light of competent evidence presented in support of the findings. Similarly, in the present action, though the trial court's finding as to Plaintiff's ability [to comply] with the contempt order is unspecific, there was competent evidence in the record to support the trial court's finding of fact. Accordingly, Plaintiff's argument on appeal is without merit.

Maxwell, 212 N.C. App. at 619-20, 713 S.E.2d at 493 (emphasis added). In the present case, unlike those cited by plaintiff, the trial court's finding was unsupported by any record evidence.

Plaintiff also argues that, by failing to appear at the hearing on plaintiff's counsel's contempt motion, plaintiff waived the right to object to the presentation of his bank statements to the trial court. However, defendant does not argue that it was error for the trial court to review the documents proffered by plaintiff's counsel, but that the trial court's findings and conclusions are not supported by record evidence. Plaintiff has not cited any cases in which an order of the trial court was upheld despite the absence of any documentary or testimonial evidence. Moreover, the "appellate courts can judicially know only what appears of record." *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) (citation omitted).

For the reasons discussed above, we conclude that the trial court erred by finding defendant in civil contempt of court for his failure to abide by the terms of the order directing him to pay attorney's fees, given that the order was not supported by any evidence introduced at the hearing. Accordingly, the contempt order must be reversed and remanded.

REVERSED AND REMANDED.

Judges CALABRIA and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 OCTOBER 2017)

ARAGON v. LEGACY IMPS., INC. No. 17-339	Wake (15CVS13843)	Affirmed
AVIS RENT A CAR SYS., LLC v. ANDREWS No. 16-1054	Cabarrus (15CVD918)	Affirmed in part, reversed and remanded in part
BOLDON v. BOLDON No. 17-170	Catawba (15CVD2135)	Affirmed
BOONE v. HAYES-BOONE No. 17-312	Iredell (06CVD3173)	Affirmed
BREWER v. FIRST STOP CORE & BATTERY, LLC No. 17-424	N.C. Industrial Commission (14-779562)	Affirmed
DRURY v. DRURY No. 17-273	Henderson (11CVD2201)	Affirmed
LASECKI v. LASECKI No. 17-544	Iredell (13CVD1797)	Vacated and Remanded
LOPEZ v. LOPEZ No. 17-10	Harnett (15CVD1966)	Affirmed
MARTIN v. ORANGE WATER & SEWER AUTH. No. 17-242	N.C. Industrial Commission (14-723669)	Affirmed
MOORE v. MOORE No. 16-1160	Mecklenburg (14CVD23093)	Affirmed in part; vacated and remanded in part
STATE v. BELL No. 17-361	Henderson (16CRS190-191)	No Error
STATE v. BOBICH No. 17-145	Surry (13CRS53028)	Reversed
STATE v. BRADSHAW No. 17-196	Sampson (13CRS50880-81)	No Error
STATE v. DAVIS No. 17-109	Forsyth (14CRS58904) (14CRS58906)	No Error

STATE v. FAULK No. 17-429	Columbus (14CRS576) (14CRS579)	No Error
STATE v. HURLEY No. 16-1202	Pender (15CRS1298-99)	AFFIRMED IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.
STATE v. McKOY No. 17-107	Harnett (13CRS50614) (13CRS50616)	AFFIRMED IN PART; DISMISSED IN PART.
STATE v. ROSE No. 17-190	Durham (12CRS63056)	No plain error in part, no error in part, reversed and remanded in part.
STATE v. SING No. 17-296	Mecklenburg (12CRS239307-308)	No Error
STATE v. TAYLOR No. 16-1291	Forsyth (13CRS58608)	No prejudicial error in part, no plain error in part, no error in part.
STATE v. WHITE No. 16-945	Graham (13CRS50226)	No Error