257 N.C. App.—No. 4 Pages 542-954

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 5, 2019

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[1]
HUNTER MURPHY[2]
JOHN S. ARROWOOD[3]
ALLEGRA K. COLLINS[4]
TOBIAS S. HAMPSON[5]
REUBEN F. YOUNG[6]
CHRISTOPHER BROOK[7]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[8]
J. DOUGLAS McCULLOUGH[9]
WENDY M. ENOCHS[10]
ANN MARIE CALABRIA[11]
RICHARD A. ELMORE[12]
MARK DAVIS[13]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016. [9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016. [11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis[14]
Jaye E. Bingham-Hinch[15]

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[14]Retired 31 August 2018. [15]Began 13 August 2018.

COURT OF APPEALS

CASES REPORTED

Filed 6 February 2018

Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist. 542
Ballard v. Shelley 561
Butler v. Scotland Cty. Bd. of Educ. 570
Cherry Cmty. Org. v. City of Charlotte 579
Ford Motor Credit Co. LLC v. McBride 590
Honeycutt v. Weaver 599
In re Appeal of Lowe's Home Ctrs., LLC 610
In re D.E.M. 618
In re Ivey 622
In re M.J.S.M. 633
Martin v. Pope 641
N.C. State Bar v. Ely 651
Norman v. N.C. Dep't of Admin. 673
Plasman v. Decca Furn. (USA), Inc. 684
Raymond v. Raymond 700
Smith Jamison Constr. v. APAC-Atl., Inc. 714
Spoor v. Barth 721
State v. Bridges 732
State v. Campbell 739
State v. Coley 780
State v. Cromartie 790
State v. Golder 803
State v. Gomola 816
State v. McCaster 824
State v. Mumma 829
State v. Peed 842
State v. Phachoumphone 848
State v. Schumann 866
State v. Singletary 881
State v. Terrell 884
State v. Vetter 915
State v. Wilkerson 927
Whitehurst v. E. Carolina Univ. 938

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Branch Banking & Tr. Co. v. Surane 951
Cook v. Cook 951
Faircloth v. Faircloth 951
Henderson v. Henderson 951
Hopkins v. Thomas 951
In re B.M. 951
In re C.C. 951
In re G.D.O. 951
In re K.W. 951
In re S.K.D.M. 951
In re Smith 951
Jacobson v. Padgett 951
Jenkins v. Easter Seals UCP of N.C. & Va., Inc. 951
Keena v. Cedar St. Invs., LLC 951
Kelly v. Polk Cty. N.C. 952
Lee v. Cty. of Cumberland 952
Linker v. Linker 952
Messer v. Pollack 952
Parsons v. Parsons 952
SMS Constr., Inc. v. Wittels 952
State v. Andrews 952
State v. Artis 952
State v. Brown 952
State v. Davis 952
State v. Dorsey 952
State v. Ferrell 952
State v. Forney 952
State v. Gates 952
State v. Goins 953
State v. Herrera 953
State v. Jacobs 953
State v. Johnson 953
State v. Lilly 953
State v. Lloyd 953
State v. Martinez 953
State v. Mazariegos 953
State v. McAllister 953
State v. Mitchell 953
State v. Riggins 953
State v. Upright 953
State v. White 953
State v. White 954

State v. Whitehead 954
State v. Wilson 954
State v. Womack 954
Thomson v. Holling 954
Vines v. McKoy 954

HEADNOTE INDEX

ADOPTION

Revocation—time limit—original or copy of written consent—The time for a biological parent to revoke a consent to adoption of her child does not begin to run until the parent is provided an original or copy of a written consent signed by her. Construing the language of N.C.G.S. § 48-3-605 in pari materia with the revocation requirements in N.C.G.S. § 48-3-608, the content requirements of N.C.G.S. § 48-3-606, and the underlying purposes of the adoption regime set forth in N.G.G.S. § 48-1-100, demonstrates the intent of the legislature that a biological parent consenting to adoption receive, as a matter of fact, an original or copy of the signed consent in order for it to be effectuated. **In re Ivey, 622.**

APPEAL AND ERROR

Argument not considered—conviction vacated based on other argument— Having vacated defendant's larceny conviction based on a fatal variance between the evidence and the indictment, the Court of Appeals did not need to address defendant's argument regarding a disjunctive jury instruction. **State v. Campbell, 739.**

Attorneys—motion to disqualify denied—no abuse of discretion—The trial court did not abuse its discretion by denying defendant's motion to disqualify plaintiffs' counsel where plaintiffs' attorney had represented defendant's ex-wife in an unrelated family law proceeding. The orders from that proceeding were public records, and there was no evidence that plaintiffs' counsel was aware of any information about defendant that would require disqualification. **Martin v. Pope, 641.**

Interlocutory orders and appeals—dismissal based on governmental immunity—The trial court's dismissal of plaintiffs' tort claims against defendant county, based on governmental immunity, was immediately appealable to the Court of Appeals. **Ballard v. Shelley, 561.**

Interlocutory orders and appeals—issues in other claims—risk of inconsistent verdicts—The trial court's dismissal of a constitutional claim against defendant county was immediately appealable to the Court of Appeals due to the risk of inconsistent verdicts. The claim turned on issues that had to be determined as part of other claims pending before the trial court (the permit and building code approval for a fence). **Ballard v. Shelley, 561.**

Interlocutory orders and appeals—redundant claim—substantial rights— The Court of Appeals dismissed plaintiffs' interlocutory appeal from the dismissal of their declaratory judgment claims against defendant county, based on lack of appellate jurisdiction. The dismissal of a redundant claim that mirrored two other remaining claims did not implicate substantial rights. **Ballard v. Shelley, 561.**

JNOV—directed verdict motion—not renewed at the close of all evidence— Defendant did not preserve for appellate review the denial of his motion for JNOV when he did not move for a directed verdict at the close of all the evidence. **Martin v. Pope, 641.**

Mootness—willful violation of probation—future adverse consequences— Where the trial court entered an order finding defendant in willful violation of his probation, defendant's appeal challenging the trial court's jurisdiction to consider whether he violated his probation was not moot even though he already had served the entire sentence assigned for revocation. Defendant would be subject to adverse consequences in the future based on the trial court's order, such as an aggravating factor in a future criminal proceeding. **State v. Peed, 842.**

Notice of appeal after verdict but before entry of judgment—writ of certiorari—Where defendant gave oral notice of appeal in open court after the jury returned its verdict but before the entry of judgment by the trial court, his right to appeal was lost based on his failure to comply with Rule of Appellate Procedure 4(a). In its discretion, the Court of Appeals granted defendant's petition for writ of certiorari and considered the merits of his argument. **State v. Coley, 780.**

Notice of appeal—jurisdiction—A wife's brief was treated as a petition for certiorari in an equitable distribution action where timeliness was not raised by the parties and there was confusion over the nature of the underlying proceedings and whether the time for filing an appeal had been tolled. **Raymond v. Raymond, 700.**

Notice of appeal—timeliness—A notice of appeal from a 5 May 2016 order was timely in an equitable distribution case even though it was filed more than 30 days after the entry of the order, where the record did not include a certificate of service and the husband did not move to dismiss the appeal. The trial court would not assume that the husband served the 5 May order on the wife within three days, and her time did not begin to run until she received it. **Raymond v. Raymond, 700.**

Preservation of issues—cross-appeal—argument included in appellee's brief—Plaintiffs' cross-appeal regarding attorney fees was deemed abandoned where they did not file an appellants' brief but included their argument in their appellee's brief. There was prejudice in that defendant was forced to respond in a 3,750-word reply brief while addressing plaintiffs' other claims on appeal, rather than in a 8,750-word appellee's brief. **Martin v. Pope, 641.**

Preservation of issues—judge's response to jury question—invited error— The invited error doctrine barred appellate review of the trial court's answer to a jury question during deliberations where defendant initially consented to the answer and objected only after the jury resumed deliberations. **Martin v. Pope, 641.**

Preservation of issues—waiver—no ruling below—Defendant waived appellate review of whether the trial court erred by failing to allow defendant to join necessary parties where defendant did not obtain a trial court ruling on the issue. **Ford Motor Credit Co. LLC v. McBride, 590.**

Rule of Appellate Procedure 2—discretionary review—conviction unsupported by evidence—On remand from the Supreme Court, the Court of Appeals exercised its discretionary authority under Rule of Appellate Procedure 2 to consider defendant's argument concerning the sufficiency of the evidence to support his larceny conviction. The Court of Appeals explained a number of reasons for allowing discretionary review: The Supreme Court had previously suggested that fatal variances of the type in this case are sufficiently serious to justify review under Rule 2; allowing a conviction unsupported by evidence to stand would result in manifest injustice; and the exercise of discretionary authority under Rule 2 should be uniform and consistent from case to case. **State v. Campbell, 739.**

APPEAL AND ERROR—Continued

Waiver of appellate review—no motion to dismiss—Defendant waived appellate review of his argument that the evidence of aiding and abetting was insufficient to sustain his convictions stemming from the falsification of court records because he failed to make the appropriate motion to dismiss at trial. **State v. Golder, 803.**

Waiver—narrow objection at trial—broadened on appeal—Where defendant made a narrow objection at trial to the sufficiency of the evidence of obtaining property by false pretenses (that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment), he could not broaden his argument on appeal to say that the evidence was insufficient because he did not obtain anything of value. He waived the new theory by not arguing it before the trial court. **State v. Golder, 803.**

ARBITRATION AND MEDIATION

Motion to compel by non-signatory—The doctrine of equitable estoppel did not require that plaintiff Jamison be compelled to arbitrate claims against a third party, Yates, who was not a signatory to a contract which contained an arbitration clause. Jamison was not attempting to assert against Yates claims premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause, but instead claims arising from legal duties imposed by North Carolina statutory or common law. **Smith Jamison Constr. v. APAC-Atl., Inc., 714.**

ATTORNEYS

Disciplinary order—adjudicatory portion—administrative suspension—violation of Rules of Professional Conduct—Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c)—The Disciplinary Hearing Commission of the N.C. State Bar did not err by making certain challenged findings of fact to support its conclusions that defendant violated the N.C. Rules of Professional Conduct 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) in the adjudicatory portion of the disciplinary order based on defendant's actions in holding herself out as a licensed attorney despite an administrative suspension, continued operation of a company despite an administrative suspension, solicitation of professional employment for pecuniary gain via electronic communications, and holding another unlicensed individual out as an attorney offering legal services on behalf of the company. **N.C. State Bar v. Ely, 651.**

Disciplinary order—dispositional phase—act with the potential to cause harm—acts of dishonesty, misrepresentation, deceit, or fabrication—multiple offenses—refusal to recognize wrongful nature of conduct—The Disciplinary Hearing Commission of the N.C. State Bar did not err by making its findings and conclusions during the dispositional phase enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar that defendant intended to commit an act with the potential to cause harm; committed acts of dishonesty, misrepresentation, deceit, or fabrication; committed multiple offenses; and refused to recognize the wrongful nature of her conduct. **N.C. State Bar v. Ely, 651.**

Disciplinary order—five-year suspension—multiple instances of improper conduct—The Disciplinary Hearing Commission of the N.C. State Bar did not err by suspending defendant's license for five years where it sufficiently linked defendant's multiple instances of improper conduct to the potential for significant harm to the public and determined that a lesser sanction would fail to adequately address the severity of her misconduct. Defendant had an opportunity to reduce her suspension

to two years if she complied with the requirements of her administrative suspension. **N.C. State Bar v. Ely, 651.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Misdemeanor breaking or entering—motion to dismiss—lack of consent—access to garage but not interior residence—The trial court did not err by denying defendant's motion to dismiss a charge of misdemeanor breaking or entering where the State presented substantial evidence that defendant lacked consent to enter the residence. Defendant's ex-girlfriend testified that defendant had permission to access only the garage in order to collect his belongings; defendant never possessed a key to the home; defendant was not given the new code to the security system after their break-up; the ex-girlfriend activated the alarm system when she saw him in her driveway; and defendant had to kick in a door to gain entry into the residence. **State v. Vetter, 915.**

CIVIL PROCEDURE

15(a) motion to amend complaint—denied on futility grounds—barred by statute of limitations—The trial court did not abuse its discretion by denying on futility grounds plaintiff's Rule 15(a) motion to amend his 2015 complaint to add derivative claims against defendants for fraud and unfair and deceptive trade practices. Plaintiff's 2012 complaint never alleged those claims, so adding them to his 2015 complaint would be effectively barred by the statute of limitations. **Spoor v. Barth, 721.**

Dismissal—Rule of Civil Procedure 12(b)(6)—In a case involving the ownership and operation of a furniture company, the trial court did not err by dismissing plaintiffs' claims under N.C.G.S. § 1A-1, Rule 12(b)(6), as an alternate to dismissal under Rule 8, where none of plaintiffs' challenges to dismissal under Rule 12(b)(6) had merit. **Plasman v. Decca Furn. (USA), Inc., 684.**

Motion for summary judgment—timeliness of service—waiver of objection—Plaintiff in a contract dispute waived any objection to the timeliness of service of defendant's motion for summary judgment (which was served 7 days before the hearing rather than the minimum of 10 days) by attending and participating in the hearing, without making any objection. **Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., 542.**

Motion to dismiss—statement of claim—Rule of Civil Procedure 8—In a case involving the ownership and operation of a furniture company, the trial court did not abuse its discretion by dismissing a complaint for repeated violations of N.C.G.S. 1A-1, Rule 8 where plaintiffs' claims were vague, misleading, or incorrect as to people or entities, the alleged conduct, the legal basis, and in some instances the specific claim or claims being alleged. Plaintiffs were on notice that defendants were seeking dismissal based on Rule 8 violations, and the trial court's order contained sufficient findings and conclusions, though not labeled as such, demonstrating that it had considered lesser sanctions before deciding to dismiss for violations of Rule 8. **Plasman v. Decca Furn. (USA), Inc., 684.**

Relation-back provision of Rule 41(a)(1)—applies only to claims that were included in voluntarily dismissed complaint—Where plaintiff asserted a single derivative claim against defendant Barth Jr. for breach of fiduciary duty in his 2012

complaint, Rule of Civil Procedure 41(a)(1)'s relation-back provision did not apply to plaintiff's 2015 derivative claims against defendant Barth Sr. or to a 2015 derivative claim for breach of contract against defendant Barth Jr., and the trial court properly dismissed those claims pursuant to Rule 12(b)(6) as barred by the statute of limitations. Plaintiff's 2012 derivative claim, which realleged the allegations of the previous paragraphs of the 2012 complaint, did not incorporate all the individual claims he asserted in that complaint. But the trial court did err by dismissing plaintiff's 2015 derivative breach of fiduciary duty claim against defendant Barth Jr., because that claim was brought in plaintiff's 2012 complaint and thus Rule 41(a)(1)'s relation-back provision applied to that claim. **Spoor v. Barth, 721.**

Rule 59 motion—standard of review on appeal—The Court of Appeals reviewed the trial court's denial of plaintiff's motion for a new trial under an abuse of discretion standard rather than de novo, and concluded that the trial court did not abuse its discretion. The trial court made a reasoned decision that was not manifestly arbitrary or a substantial miscarriage of justice. **Martin v. Pope, 641.**

Summary judgment—affidavit in support of motion—opposing party presented only bare allegations—In a case involving a contract dispute over sewer services, the trial court did not err by concluding there were no issues of material fact as to the reasonableness of the rate increase imposed by defendant sanitary district. In support of its motion for summary judgment, defendant submitted an affidavit of its general manager, explaining the criteria by which defendant set its rates, while plaintiff failed to produce any evidence outside bare allegations to establish a genuine issue for trial. **Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., 542.**

CONSTITUTIONAL LAW

Double jeopardy—lesser-included offenses from same facts—Entry of judgment on defendant's convictions for common law robbery and the lesser-included offenses of non-felonious larceny and simple assault, which arose out of the same facts as the robbery, violated defendant's right to be free from double jeopardy. Defendant received the lowest possible sentence in the mitigated range, so the Court of Appeals did not remand for resentencing but did arrest judgment on his convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences. **State v. Cromartie, 790.**

Procedural due process—reconsideration of fence permit—sufficiently pled claim—In a case arising from a neighborhood dispute about a fence, plaintiff property owners sufficiently stated a valid procedural due process claim where their complaint alleged that defendant county reconsidered previously approved permit and code determinations without notifying plaintiffs or allowing them an opportunity to contest the decision. **Ballard v. Shelley, 561.**

Right to counsel—forfeiture by conduct—failure to hire counsel—repeated delays—pro se representation—The trial court did not err in a drug trafficking case by requiring defendant to proceed pro se where defendant forfeited his right to counsel by failing to hire counsel for years, resulting in repeated delays in the case proceeding to trial. The trial court followed the parameters set forth under N.C.G.S. § 15A-1242 in determining that defendant unequivocally elected to proceed pro se. **State v. Schumann, 866.**

CONSTITUTIONAL LAW—Continued

Right to speedy trial—Barker factors—full evidentiary hearing required— The trial court's prior speedy trial ruling in a robbery and murder case based on a previous remand was vacated, and defendant's motion for a speedy trial in a case that was delayed for nearly four years was again remanded for a full evidentiary hearing on the factors in *Barker v. Wingo*, 407 U.S. 514 (1972). **State v. Wilkerson, 927.**

CRIMES, OTHER

Unlicensed bail bonding—discussing cases with court clerk—false entries of motions to set aside bond forfeitures—The State presented sufficient evidence to support defendant's conviction for unlicensed bail bonding in violation of N.C.G.S. § 58-71-40. Defendant admitted at trial that he was not a licensed bondsman, and a former clerk of the Wake County Clerk's Office testified that defendant sent him a list of defendant's clients' names and case information and paid him to enter false information into the electronic court files to create the illusion that motions to set aside bond forfeitures had been filed. **State v. Golder, 803.**

CRIMINAL LAW

Clerical error—judgment—incorrect crime—Where the trial court's judgment erroneously stated that defendant was convicted of misdemeanor larceny rather than misdemeanor breaking or entering, the Court of Appeals remanded the case for correction of the clerical error. **State v. Vetter, 915.**

First-degree murder—aggressor doctrine—control—no visible injuries—text message—The trial court did not commit plain error in a first-degree murder case by instructing the jury on the aggressor doctrine where there was sufficient evidence presented at trial that defendant sent multiple text messages to a friend saying he was going to kill his wife, gained control of a knife and started stabbing his wife, and had no visible injuries aside from a few scratches. **State v. Mumma, 829.**

Prosecutor's argument—failure to intervene ex mero motu—prosecutor's personal opinion—inconsistencies in defendant's testimony—The trial court did not err in a first-degree murder case by declining to intervene ex mero motu during the State's closing argument, where defendant contended on appeal that the prosecutor injected his personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. The challenged portions of the prosecutor's argument, when taken in context of his entire argument, drew reasonable inferences based on defendant's inconsistent statements. Further, the prosecutor's statement that he would "respectfully disagree" if the jury found that defendant acted in self-defense was not so grossly improper as to render the trial and conviction fundamentally unfair. **State v. Mumma, 829.**

Prosecutor's argument—prior inconsistent statements—The trial court did not abuse its discretion in a first-degree sex offense with a child case by not intervening ex mero motu during the State's closing argument where defendant failed to demonstrate how the prosecutor's recitation of prior out-of-court statements by the victim and a witness that were inconsistent with their trial testimony rendered the proceedings fundamentally unfair, given the trial court's later instruction limiting the jury from considering prior inconsistent statements as substantive evidence and the other overwhelming evidence of defendant's guilt. **State v. Phachoumphone, 848.**

DECLARATORY JUDGMENTS

Standing—rezoning—failure to show special damages—The Court of Appeals dismissed plaintiff nonprofit's appeal in a rezoning case where it did not show it had standing to maintain a declaratory judgment action by failing to forecast evidence that it sustained special damages that were distinct from the rest of the community. **Cherry Cmty. Org. v. City of Charlotte, 579.**

DIVORCE

Separation agreement—modifications—summary judgment—The trial court erred by granting summary judgment for the husband in a divorce action where the parties signed a separation agreement, the parties agreed to a change, the husband modified and signed the revised agreement, and the wife never signed or acknowledged the modified agreement. There was no evidence in the record that the wife and husband ever signed and notarized the same separation agreement; the revision was not the correction of a typographical error. **Raymond v. Raymond, 700.**

DRUGS

Possession of methamphetamine—identity of substance—defendant's out-of-court admission—In defendant's trial for possession of methamphetamine, the State satisfied its burden of proof for the element that defendant in fact possessed a controlled substance, even though it offered no empirical evidence of the substance's chemical composition. A police officer testified at trial, without objection, that defendant admitted to him that "she had a baggy of meth hidden in her bra," and the State admitted the crystal-like substance found in defendant's bra as an exhibit. **State v. Bridges, 732.**

Possession with intent to sell or deliver marijuana—11.5 grams packaged in 2 sandwich bags, digital scale, and loose sandwich bags—issue for jury—The evidence in defendant's trial for possession with intent to sell or deliver marijuana—which established that defendant's vehicle contained 11.5 grams of marijuana packaged in two sandwich bags, a digital scale, and 23 other loose sandwich bags—was sufficient for the trial court to deny defendant's motion to dismiss and submit the issue to the jury. **State v. Coley, 780.**

EMPLOYER AND EMPLOYEE

Discrimination—quid pro quo harassment—Summary judgment was correctly granted for defendant on a claim for quid pro quo sexual harassment where plaintiff did not demonstrate a causal connection between her rejection of the advances and her dismissal, for which defendant offered legitimate, non-discriminatory reasons that were not refuted. **Norman v. N.C. Dep't of Admin., 673.**

Discrimination—termination—discharge—opposition to unlawful practice—summary judgment—The trial court did not err by granting summary judgment for defendant in a claim for retaliation for reporting unlawful conduct. Plaintiff did not engage in the protected conduct prior to the moment when an adverse employment action was taken against her. **Norman v. N.C. Dep't of Admin., 673.**

Harassment and retaliation—summary judgment—The trial court did not err by granting summary judgment for defendant on a hostile working environment claim where plaintiff was aware of her employer's sexual harassment policy but failed to take advantage of corrective opportunities provided by her employer and there was

no evidence that plaintiff was threatened with retaliation. Plaintiff could not impute the alleged misconduct to defendant, an essential element of her hostile work environment claim. **Norman v. N.C. Dep't of Admin., 673.**

EVIDENCE

Hearsay—explaining subsequent conduct—identity and motive—Where the trial court admitted an officer's testimony, for the purpose of explaining the officer's subsequent conduct, concerning defendant's alleged assault of his girlfriend, and then later instructed the jury that the testimony could be considered evidence of motive and identity, the error in admitting the testimony as evidence of defendant's identity and motive was harmless. In light of the ample evidence to convict defendant, there was not a reasonable possibility of a different outcome. **State v. Cromartie, 790.**

Inflammatory photographs—decedent's body—harmless error if any—The trial court did not err in a first-degree murder case by sending alleged inflammatory photographs of decedent wife's body to the jury deliberation room over defendant's objection. Defendant failed to establish that he was prejudiced in light of the overwhelming evidence of his guilt, including at least 170 or more photographic exhibits admitted into evidence without objection, a pathologist's testimony that the victim was struck in a defensive posture, and defendant's text messages to his friend stating that he was going to kill his wife. **State v. Mumma, 829.**

HOMICIDE

Involuntary manslaughter—failure to give instruction—self-defense—defense of others—unlawful act—The trial court erred in an involuntary manslaughter case by declining to include a jury instruction on self-defense/defense of others because it deprived the jury of the ability to decide whether defendant's participation in an altercation was lawful. **State v. Gomola, 816.**

IMMUNITY

Governmental—waiver—excess insurance policy—In a case arising from a neighborhood dispute about a fence, the trial court properly dismissed plaintiffs' common law tort claims against defendant county pursuant to Rule of Civil Procedure 12(b)(1). The terms of defendant county's excess insurance policy did not waive governmental immunity. **Ballard v. Shelley, 561.**

INDECENT LIBERTIES

With child—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of indecent liberties with a child where the State presented substantial evidence that defendant digitally penetrated the child. The same act may support convictions and sentences for both first-degree sex offense and indecent liberties. **State v. Phachoumphone, 848.**

INDICTMENT AND INFORMATION

Couched in language of statute—unlicensed bail bonding—exact manner of violation—The indictment charging defendant with unlicensed bail bonding in

violation of N.C.G.S. § 58-71-40 was couched in the language of the statute and therefore was sufficient to confer jurisdiction upon the trial court. There was no requirement that the indictment specify the exact manner in which defendant violated section 58-71-40. **State v. Golder, 803.**

Resisting a public officer—"by running away on foot"—There was no fatal variance between the indictment charging defendant with resisting a public officer—which specified that defendant resisted "by running away on foot"—and the evidence at trial, which tended to show that defendant fled on a stolen moped from pursuing officers, went behind a Dollar General Store, and was found approximately 15 to 20 feet from the moped when an officer regained sight of him. **State v. Cromartie, 790.**

LARCENY

Indictment alleged two owners of stolen property—evidence of only one owner—fatal variance—On remand from the Supreme Court, the Court of Appeals adopted the analysis from its previous opinion on the issue of whether the trial court erred by failing to dismiss defendant's larceny charge due to a fatal variance between the indictment and the evidence on the ownership of the stolen property. Because the larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church" and the evidence showed that the stolen property belonged only to the church, the Court of Appeals vacated defendant's larceny conviction. **State v. Campbell, 739.**

Insufficient evidence—opportunity to take property—Having vacated defendant's larceny conviction, the Court of Appeals, in the interest of judicial economy, considered defendant's remaining arguments and concluded in the alternative that the evidence was insufficient to support the larceny conviction. At most, the State's evidence showed that he was present in the church and had the opportunity to take the stolen property. **State v. Campbell, 739.**

PARTIES

Motion to add—denied—no abuse of discretion—There was no abuse of discretion in the trial court's denial of defendant's motion to add parties where the rulings on these issues were the result of reasoned decisions. The trial court ruled that adding a third-party defendant would be futile because it would not impact the claims and prejudicial because the motion was made too close to the scheduled start of the trial. **Martin v. Pope, 641.**

PLEADINGS

Failure to state a claim—sale of defective car—Defendants' allegations in counterclaims in an action arising from the sale of a defective car, when taken as true, were sufficient to withstand plaintiff's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), claims for breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of express warranty, and revocation of acceptance of the non-conforming vehicle. **Ford Motor Credit Co. LLC v. McBride, 590.**

PLEADINGS—Continued

Summary judgment—verified pleading—sale of defective car—The trial court erred by entering summary judgment for plaintiff in an action arising from the sale of a defective car where plaintiff argued that defendants failed to present any evidence to oppose its affidavit, but defendants' verified motions, answer, and counterclaims constituted an affidavit for purposes of summary judgment. **Ford Motor Credit Co. LLC v. McBride, 590.**

PROBATION AND PAROLE

Improper probation extension—substance abuse program—The trial court erred by revoking defendant's probation where the violation occurred during an improper 12-month extension to give defendant time to complete a substance abuse program. N.C.G.S. § 15A-1342(a) and N.C.G.S. § 15A-1343.2(d), which allow extensions for completion of medical or psychiatric treatment, do not authorize extensions for completion of substance abuse programs. **State v. Peed, 842.**

Probation revocation—lack of jurisdiction—notice of hearing—violation report—The trial court lacked jurisdiction to revoke defendant's probation without proper prior statutory notice of a hearing and a statement of the violations alleged, pursuant to N.C.G.S. § 15A-1345(e). **State v. McCaster, 824.**

PUBLIC OFFICERS AND EMPLOYEES

Discipline—demotion instead of dismissal—An Administrative Law Judge had the authority to determine that demotion rather than dismissal was an appropriate action under 25 NCAC 1J.0604(a) where just cause for dismissal did not exist (the officer allowed potential witnesses to leave a crime scene). **Whitehurst v. E. Carolina Univ., 938.**

State employee—-university police officer—dismissal—just cause—A university police officer's failure to file a non-criminal information report constituted unacceptable personal conduct in that he acted in violation of a known or written work rule, but, considering the discipline imposed in other cases involving similar violations, this did not provide just cause for the officer's dismissal. **Whitehurst v. E. Carolina Univ., 938.**

State employee—university police officer—improper conduct at scene—The conduct of a university police officer at the scene of an arrest did not provide just cause for his dismissal where he received a report of an assault, and when he arrived at a the scene several people were sitting on the person arrested, they reported to the officer that that the defendant had hit a girl in a bar, no one informed the officer that defendant himself had been assaulted, and the officer allowed witnesses to leave the scene without properly investigating. The severity of his conduct was substantially mitigated by his misunderstanding of the situation. **Whitehurst v. E. Carolina Univ., 938.**

SCHOOLS AND EDUCATION

Appeal from school board to superior court—controlling statute—It was appropriate to apply N.C.G.S. § 150B-46 where a dismissed teacher appealed his dismissal by the school board to the superior court since the statute under which the teacher appealed, N.C.G.S. § 115C-325.8, did not specifically address the contents

or service of a petition for judicial review of a school board's decision. **Butler v. Scotland Cty. Bd. of Educ., 570.**

Dismissal of teacher—appeal from school board to superior court—content of petition—An appeal by a dismissed teacher from the school board to superior court was properly dismissed under N.C.G.S. § 150B-46 where the petition failed to state any specific exceptions to the Board's decision or the the relief sought, and the teacher failed to comply with the requirements of service in that he served a copy of his petition on the attorney for the board rather than personally serving the board with the time limit. **Butler v. Scotland Cty. Bd. of Educ., 570.**

SEARCH AND SEIZURE

Motion to suppress—probable cause—search warrant—tainted evidence from unlawful search—The trial court's ruling on defendant's suppression motion was reversed and remanded to the trial court to determine whether probable cause existed to issue a search warrant after excising from a detective's warrant application the tainted evidence arising from his unlawful search as required by *State v. McKinney*, 361 N.C. 53 (2006). **State v. Terrell, 884.**

Photographs—private search—warrantless search—thumb drive not a single container—The trial court erred by concluding a private citizen's prior viewing of defendant's thumb drive frustrated defendant's expectation of privacy in its entire contents and authorized a police detective to conduct a warrantless search through all of its digital data. The Court of Appeals declined to extend the container analogy applied to a videotape search in *State v. Robinson*, 187 N.C. App. 795 (2007), and held a thumb drive should not be viewed as a single container for Fourth Amendment purposes. **State v. Terrell, 884.**

Private-search doctrine—warrantless search—thumb drive—sufficiency of findings of fact—virtual certainty only contraband—The trial court erred by concluding that a detective's warrantless search of defendant's thumb drive did not violate his Fourth Amendment rights. Although the trial court did not make adequate findings of fact concerning the exact scope of a private citizen's and a detective's searches through the thumb drive, its findings established that the detective did not conduct the search with the requisite level of "virtual certainty" that the thumb drive contained only contraband or that his inspection would not reveal anything more than he already learned from the private citizen. **State v. Terrell, 884.**

SENTENCING

Resentencing—sex offenses—jurisdiction—date mandate transmitted from appellate division—The trial court had jurisdiction to resentence defendant for multiple convictions for sex offenses on the same day that the mandate from the appellate division was transmitted, as provided under Rule 32 of the N.C. Rules of Appellate Procedure. The Court of Appeals rejected defendant's argument that the mandate issues only when the lower court actually receives it. **State v. Singletary, 881.**

SEWAGE

Rate increase—alleged violation of N.C.G.S. § 130A-64(a)—unsubstantiated allegations—In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary

district on plaintiff's claim alleging that defendant violated N.C.G.S. § 130A-64(a) by imposing an unreasonable rate increase as the result of the mismanagement of a project. Plaintiff failed to respond with any factual evidence to defendant's prima facie evidence of the reasonableness of the rate increase. **Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., 542.**

Wastewater services agreement—base rate increase—contract dispute—meaning of "online and operational"—In a case involving a contract dispute over sewer services, the Court of Appeals rejected plaintiff homeowner association's argument that the trial court improperly interpreted the language in the wastewater services agreement between the parties, which required that the base rate not be raised until the area sewer system was "online and operational"—and thereby erroneously granted summary judgment for defendant sanitary district. Whether the area sewer system had received a final permit from the N.C. Department of Environmental and Natural Resources did not, in the ordinary meaning of the term, control whether the system was "online and operational." **Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., 542.**

SEXUAL OFFENSES

First-degree sex offense with a child—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of first-degree sex offense with a child based on insufficient evidence of penetration where the child testified to the penetration and the State presented overwhelming corroborative evidence that defendant digitally penetrated her. The Court of Appeals dismissed defendant's additional challenge based on the State's alleged failure to present evidence that he digitally penetrated the victim within the time frame specified in the indictment, because defendant failed to argue this ground at trial. **State v. Phachoumphone, 848.**

First-degree sex offense with child—indecent liberties—procedural requirements for child testimony—Although the trial court erred in a first-degree sex offense with a child case by failing to follow N.C.G.S. § 15A-1225.1's procedural requirements when authorizing the child victim's testimony to be taken remotely, defendant failed to demonstrate how the procedural errors prejudiced him. **State v. Phachoumphone, 848.**

STATUTES OF LIMITATION AND REPOSE

Conversion—transfer of land by attorney-in-fact—Plaintiff did not cite any legal authority or set forth a cohesive argument for a conversion claim as an independent cause of action with its own statute of limitations where he relied entirely on his breach of fiduciary duty and constructive fraud claims in asserting a 10-year statute of limitations in his claims arising from the division of his mother's assets. His claims arising from the conveyance of real property were barred by the applicable statute of limitations, and his action for conversion of chattels and goods was not brought within the applicable three-year statute of limitations. **Honeycutt v. Weaver, 599.**

Distribution of deceased's assets—statute of limitations—Plaintiff did not bring claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations in an action between a brother and a sister arising from the sister's transfer of real estate to herself under

her mother's power of attorney. The doctrine of adverse possession was not relevant, and any such claim would be subject to the 7-year statute of limitations under N.C.G.S. § 1-38. The statute of limitations was not stayed by plaintiff's petition claiming that the sister had renounced her right to be executor because the claims were not related to the mother's will but to the conveyance of real property while the sister was acting as attorney-in-fact. **Honeycutt v. Weaver, 599.**

TAXATION

Ad valorem assessment—erroneous—The decision of the N.C. Tax Commission concerning Forsyth County's ad valorem tax assessment of Lowe's Home Centers' real property was reversed and remanded where the County relied only on the cost approach to valuation and should have considered the income and comparable sales approaches to establish a true value; there was a substantial difference in value whichever assessment the County used; and the County abandoned the presumption of correctness afforded its initial assessment by abandoning that assessment in favor of the higher value given by its expert. The burden on the taxpayer was one of production of evidence that the County's valuation was arbitrary, not of persuasion. **In re Appeal of Lowe's Home Ctrs., LLC, 610.**

TERMINATION OF PARENTAL RIGHTS

Neglect—probable repetition—There was sufficient support for terminating a mother's parental rights where a social worker's testimony, along with the trial court's findings about the mother's lack of significant progress on her case plan, provided sufficient support for the finding that there would be a probable repetition of neglect if the child was returned to her care. While the mother was correct that she did not completely fail to work on her case plan, that work was only sporadic and inadequate. **In re M.J.S.M., 633.**

No-merit brief—termination affirmed—The termination of a father's parental rights was affirmed where his counsel filed a no-merit brief and the termination order included sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed. The trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests. **In re M.J.S.M., 633.**

Willful abandonment—findings not sufficient—An order terminating respondent's parental rights was vacated and remanded where the father's parental rights were terminated for willfully abandoning his child but the findings did not specifically address the six-month period immediately before the filing of the petition, were not adequate to support the ultimate finding that the father's conduct was willful, did not address the efforts the father could have been expected to make while incarcerated, and improperly mixed factual findings with conclusions of law. **In re D.E.M., 618.**

TRESPASS

Domestic criminal trespass—motion to dismiss—sufficiency of evidence— The Court of Appeals rejected defendant's arguments that the trial court erred by denying his motion to dismiss a charge of domestic criminal trespass. First, his

ex-girlfriend's conduct was sufficient to allow the jury to conclude that defendant was forbidden from entering the interior of the residence; second, defendant's limited permission to enter the garage did not render him incapable of trespassing on a separate area of the premises; third, the ex-girlfriend did not have to be present in her home at the time of the trespass for the premises to be "occupied" pursuant to the statute. **State v. Vetter, 915.**

UNFAIR TRADE PRACTICES

Sanitary district—quasi-municipal corporation—no cause of action—In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary district on plaintiff's claim for unfair and deceptive trade practices. As a quasi-municipal corporation, defendant sanitary district could not be sued for unfair and deceptive trade practices. **Badin Shores Resort Owners Ass'n, Inc. v. Handy Sanitary Dist., 542.**

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.

BADIN SHORES RESORT OWNERS ASSOCIATION, INC., A/K/A BADIN SHORES RESORT HOMEOWNERS ASSOCIATION, PLAINTIFF
v.
HANDY SANITARY DISTRICT, DEFENDANT

No. COA17-718

Filed 6 February 2018

1. Civil Procedure—motion for summary judgment—timeliness of service—waiver of objection

Plaintiff in a contract dispute waived any objection to the timeliness of service of defendant's motion for summary judgment (which was served 7 days before the hearing rather than the minimum of 10 days) by attending and participating in the hearing, without making any objection.

2. Civil Procedure—summary judgment—affidavit in support of motion—opposing party presented only bare allegations

In a case involving a contract dispute over sewer services, the trial court did not err by concluding there were no issues of material fact as to the reasonableness of the rate increase imposed by defendant sanitary district. In support of its motion for summary judgment, defendant submitted an affidavit of its general manager, explaining the criteria by which defendant set its rates, while plaintiff failed to produce any evidence outside bare allegations to establish a genuine issue for trial.

3. Sewage—wastewater services agreement—base rate increase—contract dispute—meaning of "online and operational"

In a case involving a contract dispute over sewer services, the Court of Appeals rejected plaintiff homeowner association's argument that the trial court improperly interpreted the language in the wastewater services agreement between the parties, which required that the base rate not be raised until the area sewer system was "online and operational"—and thereby erroneously granted summary judgment for defendant sanitary district. Whether the area sewer system had received a final permit from the N.C. Department of Environmental and Natural Resources did not, in the ordinary meaning of the term, control whether the system was "online and operational."

4. Sewage—rate increase—alleged violation of N.C.G.S. § 130A-64(a) —unsubstantiated allegations

In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary district on plaintiff's claim alleging that defendant violated N.C.G.S. § 130A-64(a) by imposing an unreasonable rate increase as the result of the mismanagement of a project. Plaintiff failed to respond with any factual evidence to defendant's prima facie evidence of the reasonableness of the rate increase.

5. Unfair Trade Practices—sanitary district—quasi-municipal corporation—no cause of action

In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary district on plaintiff's claim for unfair and deceptive trade practices. As a quasi-municipal corporation, defendant sanitary district could not be sued for unfair and deceptive trade practices.

Appeal by plaintiff from order entered 26 January 2017 by Judge Edwin G. Wilson, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 29 November 2017.

Higgins Benjamin PLLC, by Gilbert J. Andia, Jr., for plaintiff-appellant.

Megerian & Wells, by Jonathan L. Megerian and Franklin E. Wells, Jr., for defendant-appellee.

ZACHARY, Judge.

Plaintiff Badin Shores Resort Owners Association, Inc., also known as Badin Shores Resort Homeowners Association ("BSR"), is a nonprofit corporation representing the interests of homeowners in the planned unit development known as Badin Shores Resort. Defendant Handy Sanitary District ("Handy") is a sanitary district created pursuant to N.C. Gen. Stat. § 130A-47 (2016) that provides water and sewer utility services in various locations in North Carolina, including Montgomery County, where BSR is located. The present appeal arises from a dispute regarding the terms of a contract executed by the parties in 2009. BSR appeals from the trial court's entry of summary judgment in favor of Handy and its dismissal of BSR's complaint against Handy. On appeal, BSR argues that Handy's summary judgment motion was not properly

before the court, and that the trial court erred by granting summary judgment in favor of Handy. After careful review, we conclude that BSR is not entitled to relief and that the trial court's order should be affirmed.

Factual and Procedural Background

In 2009, BSR operated its own wastewater collection system, treatment plant, and associated spray field. On 12 March 2009, the parties signed a Wastewater Services Agreement (hereafter "the Contract") that provided for Handy to assume responsibility for BSR's wastewater services. Article II of the Contract stated that "Handy shall provide full wastewater service to BSR under this Agreement beginning no later [than] 90 days after the Badin Lake Area Sewer System [(hereafter "the BLSP")] is granted a full permit by DENR [(North Carolina Department of Environment and Natural Resources)] and is fully operational." Article V provided that BSR would be charged a fee of $30.00 per occupied lot. Article VI stated that Handy could adjust the rate charged to BSR "from time to time by action of the Handy Board of Directors, in the ordinary course of Handy's business" but that the base rate charged to BSR would not be increased "before the [BLSP] is online and operational."

On 22 July 2010, Handy filed suit against BSR, alleging "that [BSR] had refused [Handy's] multiple attempts to provide the contracted-for services and requested that the court issue an injunction ordering [BSR] to allow [Handy] to provide wastewater services under the contract." *Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n*, 225 N.C. App. 296, 297, 737 S.E.2d 795, 797-98 (2013). Handy also alleged that it was in the process of developing the BLSP, and that the agreed-upon charge of $30.00 per occupied lot was an important part of the consideration for Handy's agreement to the Contract. "[BSR] filed a motion to dismiss, answer, and counterclaim in response. [BSR] raised multiple affirmative defenses, including that Article II of the Agreement contained an unfulfilled condition precedent, namely that the North Carolina Department of Environment and Natural Resources ("DENR") had to issue a permit allowing operation of [BSR's] sewer system prior to operation of the system." *Id.* at 297, 737 S.E.2d at 798. "On 9 March 2011, the Superior Court entered a consent order requiring [BSR] to permit [Handy] to enter its land and connect [BSR's] properties to [Handy's] sewer system, [and to] maintain the current system[.] . . . The consent order 'resolve[d] all pending claims between the parties with prejudice.' " *Id.* at 298, 737 S.E.2d at 798.

On 20 January 2012, BSR filed a motion asking that the trial court order Handy to appear and show cause why it should not be held in

contempt of court for its violation of the terms of the Contract incorporated into the consent order, as well as other terms of the consent order, entered on 9 March 2011. BSR alleged that, although Handy had assumed operation of BSR's wastewater system, it refused to provide maintenance services to components of the wastewater system. "The Superior Court, Montgomery County, entered an order to show cause on 23 January 2012, to which [Handy] responded with a counter motion to show cause, alleging in part that because DENR has not yet issued a permit, it was not required to provide services to [BSR]. . . . [B]y order entered 25 April 2012, [the trial court] made findings of fact, concluded that Article II of the Agreement concerning the DENR permit was not a condition precedent, and ordered [Handy] and [BSR] to perform all of their contractual duties." *Id.*

Handy appealed to this Court from that order, arguing that the trial court erred by ruling that Article II of the parties' contract was not a condition precedent. This Court noted that " '[w]here the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. The trial court's determination of original intent is a question of fact. On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence.' " *Id.* at 299, 737 S.E.2d at 798 (quoting *Hemric v. Groce*, 169 N.C. App. 69, 75-76, 609 S.E.2d 276, 282 (2005)). The opinion in *Handy Sanitary* then set out the following unchallenged findings of fact from the trial court's order:

> 3. On or about March 9, 2011, the Parties entered into a Consent Order in which the contract executed the 12th day of March, 2009 (hereinafter "The Contract") by the Parties was incorporated into the Consent Order and all of the terms of the contract, were reaffirmed, except as expressly modified in the Consent Order.
>
> 4. The Contract entered into by the Parties states: . . .
>
> B. Article II. Connection/Activation Date. Handy shall provide full wastewater service to [Badin Shores] under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by the North Carolina Department of Environment and Natural Resources (DENR) and is fully operational.
>
> . . .

> E. Article IX (B). Handy will operate the existing collection system and will maintain, make repairs, and install replacements to that system as from time to time may be necessary. . . .
>
> (a) Handy will operate the [Badin Shores] Wastewater System until the connection is made to Handy's Wastewater Collection System. Handy will operate under the [Badin Shores] permit if permitted to do so by DENR.
>
> . . .
>
> 9. The Contract when taken as a whole and in connection with the Consent Order entered to [sic] and executed by the parties and filed with the Court [on] March 9, 2011 is clear and unambiguous as it relates to the requirements of Handy to assume the obligation of operating, maintaining, repairing, and when and if necessary, replacing the existing [Wastewater] Collection System within [Badin Shores].
>
> 10. The Court after reviewing pages from the Fifth Edition of Black's Law Dictionary for the words assume, maintain, maintenance, obligate, obligation, operate, repair, and replace find[s] those words to be clear and unambiguous and that the Contract requires that Handy perform those services pursuant to the terms of the Contract and the Consent Order for the benefit of [Badin Shores] which services are to include all costs for electricity needed to operate, maintain, and or [sic] replace the [Badin Shores] collection system. . . .

Id. at 299-300, 737 S.E.2d at 799. On the basis of these and other findings, the court concluded in relevant part that:

> 3. The Wastewater] Services Agreement entered into between the Parties on or about March 12, 2009 and the Consent Order entered by the Court on or about March 9, 2011 are clear and unambiguous and Handy is required to perform it's [sic] obligations as set forth in the [Wastewater] Services Agreement and Consent Order without further delay. . . .
>
> 4. Paragraph II CONNECTION/ACTIVATION DATE of the Wastewater Services Agreement as set forth hereinabove is not a condition precedent and the Badin Lake Area Sewer System does not need to be fully operational

> and the Plaintiff does not need to be granted a full permit by the North Carolina Department of Environment and Natural Resources before the contractual right arises for [Handy] to provide full wastewater service to [BSR].

Id. at 300-01, 737 S.E.2d at 799-800.

In sum, following the parties' execution of the initial contract, legal proceedings were conducted in which (1) BSR argued unsuccessfully that it was not permitted or obligated to allow Handy to provide wastewater services until the BLSP was "fully operational" and had been granted "a full permit by DENR," and (2) Handy argued unsuccessfully that, although it was providing wastewater services to BSR for a monthly fee of $30.00 per occupied lot, it was not obligated to provide maintenance services to BSR's wastewater system until the BLSP was "fully operational" and had been granted "a full permit by DENR." In both instances, the trial court ruled that the terms of the Contract did not establish as a condition precedent to the challenged obligation that Handy have received a final "full permit" by DENR. In *Handy Sanitary*, we observed that "[a]lthough [Handy's] position before the trial court in the contempt hearing and on appeal is the exact opposite of its position in the complaint, [BSR] apparently raised neither estoppel nor judicial admissions below, as the trial court made no mention of either in its order." *Id.* at 301, 737 S.E.2d at 800. This Court held that the consent order had established that Article II's reference to the BLSP's being "fully operational" and having a "full permit" from DENR was not a condition precedent to the parties' obligations under the Contract:

> The relevant language from the Agreement states that "Handy shall provide full wastewater service to BSR under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by . . . (DENR) and is fully operational." . . . In [Handy's] complaint, it requested immediate access to [BSR's] lots in order to begin performance. . . . If [BSR] had been correct that it was a condition precedent, [Handy] would not have been entitled to specific performance as it had requested. Thus, the issue of whether Article II was a condition precedent was a central part of the controversy. . . . By requiring immediate performance of the contractual duties by both parties, the consent order necessarily disposed of any potential condition precedent.

Id. at 302-03, 737 S.E.2d at 800 (citations omitted).

On 20 November 2015, BSR filed suit against Handy, seeking damages for claims arising out of Handy's increase of the monthly rate per occupied lot for provision of wastewater services. BSR's complaint cited the language in Article VI, stating that the per lot rate paid by BSR "may be adjusted from time to time" but that the "base rate charged to BSR will not increase in any event before the Badin Lake Area Sewer System is online and operational." BSR alleged that the "BLSP is not online and operational as those terms were understood in the [contract]." BSR sought damages for breach of contract, violation of the requirements of N.C. Gen. Stat. § 130A-64, and unfair and deceptive trade practices. BSR also sought a declaratory judgment establishing its rights under the parties' contract.

On 28 December 2015, BSR filed a "Motion to Interplead Funds in Dispute," in which it asked to "be entitled to pay the amount in dispute . . . into an interest bearing trust account . . . until the Court may resolve the dispute regarding the increase." **(19-22)** Following a hearing conducted on 19 January 2016, the trial court entered an order on 21 March 2016 denying BSR's motion and making "mixed findings of fact and conclusions of law," including the following:

> 2. [BSR] filed a motion for interpleader in this case pursuant to Rule 22 of the North Carolina Rules of Civil Procedure, alleging, among other things, that [Handy's] proposed rate increase is violative of the parties' contract[.]
>
> . . .
>
> 3. At the request of the Court, counsel for both parties conducted a conference telephone call with Michael Leggett, the Environmental Engineer with the NCDENR Division of Water Resources. Counsel reported to the Court by email that Mr. Leggett stated that [the BLSP] received its initial permit in 2009, which set out the scope of the full Project. The first certification, for the force main and pump stations, was issued in the summer of 2011. Eight additional partial certifications have been issued for the Badin Lake sewer system and those certified portions are operational. Mr. Leggett agreed with counsel for Handy that <u>the system described in the permit is capable of performing its intended function</u>; however, only partial certifications have been issued to date.

(emphasis added).

On 3 February 2016, Handy filed an answer in which it asserted various defenses and moved to dismiss BSR's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2016) for failure to state a claim upon which relief could be granted. Handy then filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2016) on 21 October 2016. On 3 January 2017, BSR filed a motion seeking summary judgment on its claim for a declaratory judgment. In support of its summary judgment motion, BSR submitted documents produced during discovery, including the parties' responses to interrogatories and requests for production of documents. On 10 January 2017, Handy filed a motion seeking summary judgment in its favor on all of BSR's claims.

On 17 January 2017, a hearing was conducted on BSR's motion for summary judgment on its declaratory judgment claim, and on Handy's motions for summary judgment on all claims and for dismissal of BSR's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and 12(c). On 26 January 2017, the trial court entered an order granting summary judgment for Handy and dismissing BSR's complaint. BSR noted an appeal to this Court.

Standard of Review

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016), summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). In addition:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotation marks and citations omitted).

"[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the [non-moving] party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (internal quotation omitted). Thus, "when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party . . . must . . . forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (citations omitted). *See also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2016):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Timeliness of Defendant's Motion for Summary Judgment

[1] BSR argues first that with respect to BSR's claims for breach of contract, violation of the provisions of N.C. Gen. Stat. § 130A-64, and unfair and deceptive trade practices, Handy's summary judgment motion was "not properly before the trial court." BSR correctly notes that N.C. Gen. Stat. § 1A-1, Rule 56(c) provides that a summary judgment "motion shall be served at least 10 days before the time fixed for the hearing" and that, in the present case, Handy's summary judgment motion was served seven days before the hearing, rather than ten days. We conclude, for several reasons, that BSR is not entitled to relief on this basis.

It is well-established that "[a] party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it." *Collins v. Highway*

Commission, 237 N.C. 277, 283, 74 S.E.2d 709, 714-15 (1953) (citation omitted). In the present case, BSR attended the hearing and participated in it, without requesting a continuance, objecting, or arguing that BSR needed more time to prepare. In fact, after informing the court that Handy's motion was served seven days prior to the hearing rather than the ten days that is required by statute, BSR's counsel immediately added, "I don't think this is important necessarily." BSR's participation in the hearing is similar to the facts of cases such as *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978), in which this Court held that:

> At the hearing on the motions to dismiss, plaintiff stipulated to the use of documents outside the pleadings, [and] participated in oral arguments. . . . Plaintiff did not make a timely objection to the hearing on 15 September 1977. Plaintiff did not request a continuance. Plaintiff did not request additional time to produce evidence pursuant to Rule 56(f). On the contrary, plaintiff participated in the hearing through counsel. The 10-day notice required by Rule 56 can be waived by a party. The notice required by this rule is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law. By attending the hearing of the motion on 15 September 1977 and participating in it and failing to request a continuance or additional time to produce evidence, plaintiff waived any procedural notice required.

Raintree, 38 N.C. App. at 667-668, 248 S.E.2d at 907 (citation omitted). We conclude that BSR waived any objection to the timeliness of the service of Handy's summary judgment motion.

Moreover, it is axiomatic that in order to " 'obtain relief on appeal, an appellant must not only show error, but . . . must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action.' " *Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1, 14, 712 S.E.2d 257, 266 (2011) (quoting *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996)). Thus, a party is not entitled to relief where the party "makes no argument, showing, or claim that [the party] was prejudiced in any way by" an error. *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 196, 511 S.E.2d 31, 34 (1999). In addition, Rule 61 provides that:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything

> done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C. Gen. Stat. § 1A-1, Rule 61 (2016).

Furthermore, the hearing was conducted in order to rule on Handy's motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), which provides in relevant part that:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, <u>the motion shall be treated as one for summary judgment</u> and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (emphasis added).

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2016).

In this case, matters outside the pleadings were presented to the trial court, which required the court to treat Handy's motion under Rule 12(c) as a summary judgment motion.

At the hearing, BSR did not request a continuance, object, or ask for more time to prepare. In addition, BSR does not argue that it was prejudiced by the fact that the hearing on Handy's summary judgment motion was conducted seven days after service, rather than the statutorily required ten days. We conclude that (1) the trial court appropriately treated Handy's motion under Rule 12(c) as a motion for summary judgment; (2) BSR waived any objection to the fact that Handy's motion was served seven days before the hearing, rather than ten days before; and (3) BSR has failed to establish that it suffered any prejudice. As a result, BSR is not entitled to relief on the basis of this argument.

<u>Breach of Contract</u>

BSR argues that the trial court erred by granting summary judgment for Handy on its claim for breach of contract. BSR alleges that the evidence before the trial court created a genuine issue of material fact as to the reasonableness of the rate hike, and that the trial court erred as a matter of law in its interpretation of the contractual requirement that the rate not be raised until the BLSP was "online and operational." We conclude that these arguments lack merit.

Reasonableness of Rate Hikes

[2] BSR argues that the trial court erred by granting summary judgment for Handy, on the grounds that the evidence raised genuine issues of material fact as to whether the rate increase imposed by Handy was reasonable. We disagree.

Preliminarily, we review certain features of sanitary districts. N.C. Gen. Stat. § 130A-47(a) (2016) provides that "[f]or the purpose of preserving and promoting the public health and welfare, the Commission may create sanitary districts without regard for county, township or municipal lines." (N.C. Gen. Stat. § 130A-2(1a) (2016) defines "Commission" as "the Commission for Public Health."). Pursuant to N.C. Gen. Stat. § 130A-50(b) (2016), the "sanitary district board shall be composed of either three or five members as the county commissioners in their discretion shall determine." This statute also provides that the sanitary district board members shall serve terms of either two or four years, must reside in the sanitary district, and are "elected at each biennial election." N.C. Gen. Stat. § 130A-64 (2016) authorizes a sanitary district board to impose service charges for wastewater treatment:

> A sanitary district board shall apply service charges and rates based upon the exact benefits derived. These service charges and rates shall be sufficient to provide funds for the maintenance, adequate depreciation and operation of the work of the district. If reasonable, the service charges and rates may include an amount sufficient to pay the principal and interest maturing on the outstanding bonds and, to the extent not otherwise provided for, bond anticipation notes of the district. Any surplus from operating revenues shall be set aside as a separate fund to be applied to the payment of interest on or to the retirement of bonds or bond anticipation notes. The sanitary district board may modify and adjust these service charges and rates.

It is an "accepted principle . . . that courts may not interfere in a given case with the exercise of discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Halifax Paper Co. v. Roanoke Rapids Sanitary Dist.*, 232 N.C. 421, 430, 61 S.E.2d 378, 385 (1950) (internal quotation marks omitted).

In support of its motion for summary judgment, Handy submitted the affidavit of Darrell Hinnant, Handy's general manager, in which Mr. Hinnant averred in relevant part that:

> 2. . . . [Handy] is a quasi-municipal corporation, and its Board is "a body politic and corporate," N.C.G.S. 130A-55.
>
> 3. The governing board of the [Handy] Sanitary District sets water and sewerage rates in accordance with statute, and the fixing of said rates is a legislative action on the part of the board. . . .
>
> 4. Handy has operated a water distribution system in parts of Davidson, Montgomery, and Randolph counties since the 1970s. It has, within the past 15 years, undertaken to provide wastewater services as well, and has developed the . . . (BLSP) to provide wastewater services in areas surrounding Badin Lake. . . .
>
> 5. . . . As part of the BLSP, Handy and BSR entered into a contract for the supply of sewer system services by the [Handy] Sanitary District to [BSR]. . . . Handy initially charged BSR a bulk rate . . . [of] $30 per occupied lot within BSR. Unlike other users of the sewage system provided by [Handy, BSR] was never charged, and is not now being charged with any usage amount per gallon over the bulk rate charged.
>
> 6. Handy, in accordance with paragraph VI of the contract, notified BSR that the monthly rate charged for sewerage service to each lot in [BSR's] development would increase from the original contract rate of $30 to $58.00. This increase in rates is the same as the increase throughout the sanitary district and is a reflection of the costs of operating the sewerage system, including the debt service for the project.
>
> 7. [Handy] sets its rates for sewage by calculating the amount necessary to charge each user in order to pay for the service; that is, the rate is set by the board, at a public hearing, in the amount necessary for the sanitary district to pay for the cost of furnishing sewer service to all its customers. In 2015, the Handy Sanitary District board initially believed that a rate of $66 per month would be necessary to cover the expenses of the Sanitary District's sewerage

> service. . . . In June 2015, however, it became apparent that the loan that the Handy Sanitary District had obtained from the State of North Carolina to pay for the completion of the sewer project could be repaid without an interest charge. With that reduction in expenses for the Sanitary District, the adopted rate per customer became $58.00 per month in place of the $66.00 originally proposed. This rate, which is in place today, was again calculated in an amount sufficient to pay the expenses of the sanitary district. The calculations supporting the setting of that rate appear in [Handy's] responses to requests for production labeled 8-2.
>
> 8. The base rate charged [BSR] for sewerage service is identical to that charged for every other customer receiving such service, with the exception that [BSR] does not pay any usage rate over the base rate charged. That is, [BSR] is charged a slightly more favorable rate than any other customer of [Handy].
>
> 9. Handy Sanitary District's sewage service would not be able to continue to operate if rates charged were lower than the $58 rate currently in place.

Mr. Hinnant's affidavit established that, as Handy's general manager, he was an appropriate spokesperson for Handy. The affidavit explained the criteria by which Handy set the current per lot rate for sewer service. We conclude that Mr. Hinnant's affidavit constituted *prima facie* evidence that the rate set by Handy was reasonable. "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. It is thus well-established that:

> "[A]s a general rule, upon a motion for summary judgment, supported by affidavits, 'an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' "

Pacheco, 157 N.C. App. at 448, 579 S.E.2d at 507 (quoting *Spinks v. Taylor*, 303 N.C. 256, 263, 278 S.E.2d 501, 505 (1981) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and

efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

On appeal, BSR argues that the parties produced conflicting evidence raising a genuine issue of material fact regarding the reasonableness of Handy's rate increase. In support of this contention, BSR directs our attention to the fact that in its complaint and in its responses to Handy's interrogatories, BSR alleged that the rate set by Handy was unreasonable. BSR has not identified any evidence that it presented in support of its contentions. BSR instead simply contends that the allegations in its verified complaint constitute competent evidence on the issue of the reasonableness of Handy's rate increase.

It is true that a " 'verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Spinks*, 303 N.C. at 264, 278 S.E.2d at 505-06 (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). In addition, "verified responses . . . [to] Interrogatories and Requests for Admission . . . are also appropriate for the court's consideration in ruling on summary judgment." *In re Dispute over the Sum of $375,757.47*, 240 N.C. App. 505, 511, 771 S.E.2d 800, 805 (2015) (citation omitted). However, the facts of the present case do not support BSR's contention that the allegations in its complaint or its answers to interrogatories should be treated as statements in an affidavit. BSR alleged in its complaint "upon information and belief" that the rate increase imposed by Handy was the result of Handy's "mismanagement of the BLSP project." In its response to Handy's interrogatory, BSR similarly asserted that the increase was not based upon increased costs incurred by Handy, was not within "one and one-half percent (1.5%) of the median household income," and that the increase was the result of Handy's "mismanagement of the [BLSP.]" BSR did not, however, support its allegations with evidence pertaining to any of these contentions, and thus failed to establish that these assertions were "made on personal knowledge," that they stated "facts as would be admissible in evidence," or that BSR would be "competent to testify to the matters stated therein." *Id.* For the reasons discussed above, we conclude that the trial court did not err by concluding that there were no genuine issues of material fact regarding the reasonableness of Handy's rate hike.

"Online and Operational"

[3] BSR also argues that the trial court erred by granting summary judgment for Handy, on the grounds that the court failed to properly interpret

the language in the Contract. Specifically, BSR challenges the court's interpretation of the contractual provision in Article VI stating that BSR would initially be charged a monthly rate of $30.00 per occupied lot, that Handy may change the rate "from time to time . . . in the ordinary course of Handy's business," but that Handy would not increase the per lot rate "before the [BLSP] is online and operational." BSR contends that the BLSP will not be "online and operational" until it has received a final permit from DENR. We conclude that this argument lacks merit.

"In construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Harris v. Latta*, 298 N.C. 555, 558, 259 S.E.2d 239, 241 (1979) (internal quotation marks and citations omitted). The meaning of operational is "[e]ngaged in operation; able to function." BLACK'S LAW DICTIONARY 1124 (8th ed. 2004).

The record establishes that the parties executed the Contract in March, 2009. As discussed above, in 2011 the parties entered into a consent judgment, pursuant to which Handy began to provide wastewater services to BSR. Four years later, in June, 2015, Handy informed BSR's customers that the monthly per lot rate was being raised. At that point, certifications had been issued by DENR for the individual sections of the BLSP. BSR does not dispute that Handy serves between 900 and 1000 customers in BSR, and more than 2350 customers in the BLSP. BSR also concedes that Handy did not raise its rates until the State required Handy to begin repaying the construction loan that enabled Handy to build the BLSP, which was several years after Handy began providing wastewater services to BSR. In addition, the affidavit of Handy's general manager avers in relevant part that:

> 10. The NCDENR Division of Water Services issued the [BLSP] its initial permit in 2009. This permit set out the full scope of the project. The first certification, for the force main and pump stations, was issued in the summer of 2011. Eight additional partial certifications have been issued for the [BLSP], and those certified portions are now in operation. [Handy] has been collecting and treating sewage from [BSR] for more than five years now, and its sewerage system is online [and] fully operational.

Thus, at the time that Handy implemented a rate hike, the construction was substantially complete and the BLSP was operating to provide wastewater services to BSR. And, as discussed above, in its order denying

BSR's motion for interpleader, the court found that the environmental engineer for DENR "agreed with counsel for Handy that the system described in the permit is capable of performing its intended function." We conclude that Handy did not raise its base rate until after the BLSP was "online and operational" in the ordinary meaning of the term.

In urging us to reach a different conclusion, BSR contends that the BLSP cannot be considered to be "operational" until it has received a final certification from DENR. BSR "recognizes that the plain meaning of the words 'online' and 'operational' might provide some support for [Handy's] position." BSR argues, however, that the context of the Contract suggests that the parties intended a specialized meaning, under which Handy's receipt of a full permit from DENR, rather than its completion of the BLSP and provision of wastewater services to more than 2300 customers, determines when the BLSP is "operational."

BSR asserts that "the term 'operational' cannot be equivalent to the mere 'connection' of [BSR] to the [BLSP]" and that "[i]f only connection was required, the parties would have expressed that requirement[.]" BSR then argues that, if the Contract had been interpreted so that the BLSP were deemed to be "operational" immediately upon the connection of BSR's customers to Handy's wastewater service, Handy might then have attempted improperly to raise the per lot rate prior to completion of the BLSP. BSR devotes much of this argument to challenging the idea that Handy could have raised its rates as soon as BSR's customers were connected to Handy. It is undisputed, however, that Handy *did not* attempt to raise the per lot rate immediately upon connection. Because Handy never asserted a right to raise the per lot rate based merely upon connection to its system, we find it unnecessary to consider whether Handy could reasonably have taken such a position in the past.

BSR also argues that the position taken by Handy in *Handy Sanitary* was inconsistent with an interpretation of the Contract that would have allowed Handy to raise the per lot rate upon connection. *Handy Sanitary* did not address the meaning of "online and operational." Moreover, as discussed above, Handy did not impose a rate increase upon connection, which diminishes the legal relevance of this argument.

Furthermore, we observe that there are two undisputed circumstances that support both BSR's contention that it would have been improper for Handy to raise its per lot rate in 2011, as well as Handy's decision to impose a rate increase in 2015. First, Handy did not raise the per lot rate until construction was completed and the State required Handy to repay its construction loan. This is an external, "real world"

circumstance that created an additional expense for Handy and supports its need to increase rates. Secondly, in 2011, Handy connected to the 900 - 1000 customers in BSR. The mathematical calculation of a rate increase imposed at that time would have involved dividing the additional expense by some 900 customers. In contrast, by the time Handy actually sought a rate increase, it was serving more than 2350 customers, which allowed Handy to distribute the increased cost among a greater number of customers, thus reducing the necessary per lot increase. These two circumstances -- the additional expense of repaying the construction loan, and the increased number of customers -- bear a substantive relationship to Handy's need to increase its per lot rate. In contrast, Handy's receipt of its final permit from DENR has no apparent relationship to Handy's expenses or its need to raise rates.

We conclude that at the time Handy raised its per lot rate, the BLSP was "online and operational" in the ordinary meaning of those words. We further conclude that the trial court did not err by rejecting BSR's proposed interpretation of the Contract, and that BSR is not entitled to relief on the basis of this argument.

BSR's Claim for Violation of N.C. Gen. Stat. § 130A-64

[4] BSR also brought a claim against Handy for violation of N.C. Gen. Stat. § 130A-64(a) (2016), which provides in relevant part that a "sanitary district board shall apply service charges and rates based upon the exact benefits derived. These service charges and rates shall be sufficient to provide funds for the maintenance, adequate depreciation and operation of the work of the district. . . . The sanitary district board may modify and adjust these service charges and rates."

In its complaint, BSR alleged "upon information and belief" that Handy's rate increase was not reasonable, having been required by Handy's "mismanagement" of the BLSP project. For the reasons discussed in connection with BSR's claim for breach of contract, we conclude that Handy produced *prima facie* evidence that the rate increase was reasonable, and that BSR failed to respond with factual evidence, as opposed to unsubstantiated allegations, that the rate increase was unreasonable. We conclude that the trial court did not err by granting summary judgment for Handy on this claim.

BSR's Claim for Unfair and Deceptive Trade Practices

[5] BSR argues next that the trial court erred by granting summary judgment for Handy on BSR's claim for unfair and deceptive trade practices. Much of BSR's argument on this issue is devoted to its contention that

the court erred by considering Handy's motion for summary judgment, on the grounds that it was not served ten days prior to the hearing. For the reasons discussed above, we reject this argument.

BSR then argues that a sanitary district is not entitled to sovereign immunity, and notes that, pursuant to N.C. Gen. Stat. § 130A-55 (2016), a "sanitary district board shall be a body politic and corporate and may sue and be sued in matters relating to the sanitary district." BSR thus frames the issue as being whether a sanitary district is entitled to immunity from all lawsuits against it.

However, the question presented by Handy's summary judgment motion was not whether a sanitary district was generally immune from suit, but whether it could properly be sued for unfair and deceptive trade practices. In this regard, we observe that "[sanitary] districts have been defined as quasi-municipal corporations." *State ex rel. East Lenoir Sanitary Dist. v. Lenoir*, 249 N.C. 96, 100, 105 S.E.2d 411, 414 (1958) (citing *Halifax Paper Co. v. Roanoke Rapids Sanitary Dist.*, 232 N.C. 421, 61 S.E.2d 378 (1950)). "We have previously held that 'the consumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist.' " *Rea Constr. Co. v. City of Charlotte*, 121 N.C. App. 369, 370, 465 S.E.2d 342, 343 (1995) (quoting *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985)). We conclude that, regardless of whether a sanitary district is entitled to sovereign immunity, as a quasi-municipal corporation it cannot be sued for unfair and deceptive trade practices.

Moreover, "[i]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1. . . . '[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages.' " *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). In this case, BSR's complaint alleges "upon information and belief" that Handy misrepresented the expected total cost of the BLSP. BSR did not support this contention with any evidence before the trial court, and does not argue on appeal that Handy's alleged breach of contract was accompanied by "substantial aggravating circumstances." We conclude that the trial court did not err by granting summary judgment for Handy on BSR's claim for unfair and deceptive trade practices.

Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment for defendant and that its order should be affirmed.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

JERRY W. BALLARD AND BRENDA K. BALLARD, PLAINTIFFS

v.

MARK E. SHELLEY AND VIRGINIA J. SHELLEY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

v.

ASHEFORD GREEN PROPERTY OWNERS' ASSOCIATION, INC. ET AL., THIRD-PARTY DEFENDANTS AND FOURTH-PARTY PLAINTIFFS

v.

CABARRUS COUNTY, FOURTH-PARTY DEFENDANT

No. COA17-61

Filed 6 February 2018

1. Appeal and Error—interlocutory orders and appeals—dismissal based on governmental immunity

The trial court's dismissal of plaintiffs' tort claims against defendant county, based on governmental immunity, was immediately appealable to the Court of Appeals.

2. Immunity—governmental—waiver—excess insurance policy

In a case arising from a neighborhood dispute about a fence, the trial court properly dismissed plaintiffs' common law tort claims against defendant county pursuant to Rule of Civil Procedure 12(b)(1). The terms of defendant county's excess insurance policy did not waive governmental immunity.

3. Appeal and Error—interlocutory orders and appeals—redundant claim—substantial rights

The Court of Appeals dismissed plaintiffs' interlocutory appeal from the dismissal of their declaratory judgment claims against defendant county, based on lack of appellate jurisdiction. The

dismissal of a redundant claim that mirrored two other remaining claims did not implicate substantial rights.

4. Appeal and Error—interlocutory orders and appeals—issues in other claims—risk of inconsistent verdicts

The trial court's dismissal of a constitutional claim against defendant county was immediately appealable to the Court of Appeals due to the risk of inconsistent verdicts. The claim turned on issues that had to be determined as part of other claims pending before the trial court (the permit and building code approval for a fence).

5. Constitutional Law—procedural due process—reconsideration of fence permit—sufficiently pled claim

In a case arising from a neighborhood dispute about a fence, plaintiff property owners sufficiently stated a valid procedural due process claim where their complaint alleged that defendant county reconsidered previously approved permit and code determinations without notifying plaintiffs or allowing them an opportunity to contest the decision.

Appeal by third-party plaintiffs from order entered 5 July 2016 by Judge C.W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2017.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer and Kip David Nelson, for third-party plaintiffs-appellants Mark and Virginia Shelley.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop, and Cabarrus County Attorney Richard M. Koch for fourth-party defendant-appellee Cabarrus County.

DIETZ, Judge.

This case began as a neighborhood dispute about a fence that Mark and Virginia Shelley built in their backyard. Some of the Shelleys' neighbors believed this fence, which obstructed the view from their own property, was a retaining wall that violated county building code or permitting requirements. The case evolved over time into a complicated lawsuit involving various claims, counterclaims, and crossclaims by the Shelleys, their neighbors, their homeowners' association, and Cabarrus County.

This interlocutory appeal concerns the dismissal of the Shelleys' crossclaims against Cabarrus County. As explained below, we affirm the dismissal of the Shelleys' common law tort claims based on governmental

immunity, dismiss the Shelleys' appeal from the dismissal of their declaratory judgment claim for lack of appellate jurisdiction, and reverse the dismissal of their procedural due process claim and remand for further proceedings on that claim.

Facts and Procedural History

In 2009, Mark and Virginia Shelley obtained permits from Cabarrus County to build a fence to enclose their backyard pool. As construction on the fence progressed, a dispute arose between the Shelleys and some of their neighbors, who believed the fence was a retaining wall subject to stricter permitting and building code requirements.

After several unsuccessful efforts to get Cabarrus County to condemn the fence for building code violations, Jerry and Brenda Ballard—two of the Shelleys' neighbors—sued the Shelleys and the Asheford Green Property Owners' Association, alleging that the fence violated various neighborhood covenants. The Shelleys filed an answer, asserting defenses and counterclaims.

The Property Owners' Association later filed claims against Cabarrus County, alleging that the Shelleys' fence did not comply with county permitting and building code requirements, and seeking a writ of mandamus and injunction to compel Cabarrus County to enforce the building code. Cabarrus County then filed a crossclaim against the Shelleys seeking an order requiring them to comply with the building code or tear down the fence.

The Shelleys then asserted crossclaims against Cabarrus County including various common law tort claims, a due process claim, and a declaratory judgment claim. The county moved to dismiss the Shelleys' crossclaims on the grounds of governmental immunity and failure to state a claim on which relief can be granted.

After a hearing, the trial court dismissed the Shelleys' tort claims based on governmental immunity, finding that the county had not waived its immunity by its purchase of excess liability insurance. The trial court dismissed the Shelleys' declaratory judgment and constitutional claims for failure to state a claim under Rule 12(b)(6). The Shelleys timely appealed these interlocutory rulings.

Analysis

I. Dismissal of the tort claims

The Shelleys first challenge the dismissal of their tort claims based on governmental immunity.

[1] We begin by addressing our jurisdiction over this issue on appeal. Generally speaking, governmental immunity, as a form of sovereign immunity, is not merely an affirmative defense to claims; it is a "complete immunity from being sued in court." *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 147, 645 S.E.2d 91, 92 (2007). In other words, this immunity not only prevents courts from entering judgments against our state government, but also protects the government from being haled into court in the first instance. *Id.*

As a result, when the State or its subdivisions move to dismiss a tort claim based on immunity and the trial court *denies* the motion, that denial unquestionably affects a substantial right. This is so because, if the governmental agency were forced to litigate the case to judgment before appealing the immunity ruling, it could deprive the government of its right not to have to appear in court and defend the case at all.

The same is not true when the trial court *grants* a motion to dismiss a tort claim based on sovereign or governmental immunity. In that circumstance, the losing party is in the same position as any other litigant whose claim was dismissed for lack of jurisdiction or for failure to state a claim on which relief can be granted. One might assume, therefore, that an appeal from an order *granting* a motion to dismiss based on sovereign or governmental immunity would not automatically affect a substantial right, simply because the ruling involved immunity.

But, as is often the case with our jurisprudence, what one might reasonably assume is not what our case law holds. In a series of cases that we are unable to distinguish from this one, our Court has held that the *grant* of a motion to dismiss based on sovereign or governmental immunity is immediately appealable. *See Greene v. Barrick*, 198 N.C. App. 647, 649–50, 680 S.E.2d 727, 729–30 (2009); *Odom v. Lane*, 161 N.C. App. 534, 535, 588 S.E.2d 548, 549 (2003). Because one panel of this Court cannot overrule another, we are bound to hold that the Shelleys' interlocutory appeal on this issue is permissible. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). If the holdings in *Greene*, *Odom*, and similar cases warrant reconsideration, it must come from this Court sitting en banc, or from our Supreme Court.

[2] We thus turn to the merits of the Shelleys' claim. Counties and other municipalities, as governmental agencies, enjoy the protections of governmental immunity. *Magana*, 183 N.C. App. at 147, 645 S.E.2d at 92. This sovereign immunity applies unless the county "consents to suit or waives its right to sovereign immunity." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014).

A county may waive its immunity by purchasing liability insurance covering a particular risk. N.C. Gen. Stat. § 153A-435(a). But that waiver applies only "to the extent of insurance coverage." *Id.* In other words, "immunity is waived only to the extent that the [county] is indemnified by the insurance contract from liability for the acts alleged." *Hinson*, 232 N.C. App. at 210, 753 S.E.2d at 827. If the liability policy, by its plain terms, does not provide coverage for the alleged acts, then the policy does not waive governmental immunity. *Id.* When this Court examines policy provisions allegedly waiving governmental immunity, we must strictly construe the provision against waiver. *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

A series of cases from this Court have examined how this waiver rule applies to an insurance policy like the one in this case, that provides *excess* liability coverage above the municipality's own self-insured retention. These cases uniformly have held that excess policies do not waive immunity when they are not triggered until the municipality first pays the entire amount of the self-insured retention.

As this Court reasoned in *Magana*, if a municipality "has statutory immunity from liability for tort claims, it cannot be required to pay any part of the . . . self-insured amount and, therefore, the excess policy will provide no indemnification." 183 N.C. App. at 149, 645 S.E.2d at 93. In other words, because the county "is immune from negligence claims up to [the self-insured amount], it will never have a legal obligation to pay this self-insured amount and, thus, has not waived its immunity through the purchase of this excess liability insurance policy." *Hinson*, 232 N.C. App. at 212, 753 S.E.2d at 828.

This case is indistinguishable from *Magana* and *Hinson*. The county moved to dismiss under Rule 12(b)(1) of the Rules of Civil Procedure and submitted evidence to support its motion. Among those submissions, the county produced an affidavit from its risk manager attaching the relevant terms of the county's excess liability policies. Those policies include a self-insured retention amount of $350,000 that must be paid by the county before coverage is triggered, and contain the following policy language:

> [W]e agree to indemnify the Insured for ultimate net loss in excess of the retained limit *which the Insured becomes legally obligated to pay* because of bodily injury, personal injury, advertising injury, or property damage which occurs during this policy period and to which this insurance applies. Our indemnification obligation *shall not*

> *arise until the Insured itself has paid in full the entire amount of its retained limit*. The retained limit must be paid by the Insured, and may not be paid or satisfied, in whole or in part, by any other source of payment, including but not limited to other insurance, or negated, in whole or in part, by any form of immunity to judgment or liability. No other obligation or liability to pay sums or perform acts or services is covered. The Insured's obligation to pay *shall have been determined by judgment against the Insured after a contested suit or by written agreement*, *which has received our prior approval*, between the Insured(s) and the claimant(s) or the claimant's legal representative.

(Emphasis added.)

We agree with the county that this language demonstrates that the excess policy does not waive its immunity with respect to the common law tort claims at issue here. The policy language states that the insurer's obligation to pay is not triggered until a judgment is entered against the county or the county agrees to pay the claim, with the insurer's approval. The Shelleys have not shown that either of these triggering events has occurred.

The Shelleys argue that they were afforded no discovery into the terms of the policy, and that the trial court relied entirely on the risk manager's affidavit and the policy provisions attached to it, without "giving the Shelleys the opportunity to fully develop the record." But the Shelleys do not cite any evidence in the record that they *asked* for the opportunity to conduct discovery on this issue. We cannot fault the trial court for deciding this issue based on an uncontested affidavit received without objection from the Shelleys.

Accordingly, on the record before this Court, and applying the settled rule from *Hinson* and *Magana*, the terms of this excess insurance policy do not waive the county's governmental immunity. The trial court therefore properly dismissed the Shelley's common law tort claims under Rule 12(b)(1) of the Rules of Civil Procedure based on the county's assertion of immunity.

II. Dismissal of the declaratory judgment claim

[3] The Shelleys next argue that the trial court erred in dismissing their declaratory judgment claim against the county for failure to state a claim under Rule 12(b)(6).

The trial court did not dismiss this claim based on governmental immunity. Thus, we must separately address whether we have jurisdiction to address this interlocutory ruling on appeal. *See Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013); *Bynum v. Wilson County*, 228 N.C. App. 1, 6, 746 S.E.2d 296, 300 (2013), *rev'd in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014).

The Shelleys argue that their declaratory judgment claim is immediately appealable under the substantial rights doctrine because of the risk of inconsistent verdicts. But the Shelleys concede in their appellate brief that this declaratory judgment claim is "a reciprocal claim mirroring two other claims" asserted against them in the action below, both of which remain to be litigated. The dismissal of this sort of redundant declaratory judgment claim does not implicate substantial rights. Accordingly, we lack jurisdiction to address this portion of the appeal.

III. Dismissal of the constitutional claim

Finally, the Shelleys argue that the trial court erred in dismissing their constitutional claim against the county.

[4] As with the declaratory judgment claim, the constitutional claim was not dismissed based on governmental immunity, and we must therefore determine whether some other basis exists for exercising appellate jurisdiction. *Richmond County Bd. of Educ.*, 225 N.C. App. at 586, 739 S.E.2d at 568.

The Shelleys argue that their constitutional claim involves issues of fact intertwined with other claims and defenses that remain in the case. They contend that, without an immediate appeal, there is a risk "of inconsistent factual determinations by two different juries." We agree. The Shelleys' constitutional claim, which we describe in more detail below, turns on facts concerning the permit and building code approval of the Shelleys' fence. Those fact issues also must be determined as part of other claims pending below. Accordingly, there is a sufficient risk of inconsistent verdicts to invoke our appellate jurisdiction under the substantial rights doctrine. *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

[5] We thus turn to the merits of the Shelleys' constitutional claim. The trial court dismissed that claim under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim on which relief could be granted. "This Court reviews the grant of a Rule 12(b)(6) motion to dismiss de novo." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, __ N.C. App. __, __, 796 S.E.2d 120, 123 (2017). "We examine whether the

allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* "Dismissal is only appropriate if it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim." *Id.*

We note at the outset that, in contrast to the other claims asserted by the Shelleys, their constitutional claim is quite vague. In the portion of the crossclaim describing this particular cause of action, the only specific factual allegation is that the county's actions "constitute a violation of the Shelleys' rights and effectively are an attempt to deprive the Shelleys of their property without due process of law." That brief statement provides little insight into what specific governmental acts violated the Shelleys' due process rights. But our Supreme Court has emphasized that "North Carolina is a notice pleading jurisdiction" and courts should not "deny a party his day in court because of his imprecision with the pen." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

When we view the allegations in the crossclaim as a whole, including other allegations that appear earlier in the crossclaim and that are incorporated by reference into the constitutional claim, we can discern a properly pleaded due process claim. In essence, the Shelleys allege that the county approved their fence and found that it complied with applicable building code and permit requirements. Then, after the time to administratively challenge those code and permitting determinations expired, and under pressure from other county residents, the county "fabricated" code or permit violations and used these new violations to challenge the construction of the fence. The Shelleys further allege that the county pursued these new code or permit violations outside the normal administrative and judicial review process and without providing the Shelleys with notice and an opportunity to be heard.

These allegations, taken as true, are sufficient to state a valid constitutional claim. To state a claim for violation of procedural due process rights, the complainant must allege (1) that "the State has interfered with a liberty or property interest" and (2) that the State did not use "a constitutionally sufficient procedure to interfere with the liberty or property interest." *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308, 750 S.E.2d 46, 48–49 (2013). A "constitutionally sufficient procedure" requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 308–09, 750 S.E.2d at 49.

The allegations in the Shelleys' crossclaim, as summarized above, allege a valid procedural due process claim under this standard. In

short, the Shelleys allege that the county reconsidered previously approved (and final) permit and code determinations without notifying the Shelleys or permitting them an opportunity to contest the decision through available legal means.

Of course, our holding that the allegations in the complaint, taken as true, state a valid procedural due process claim does not mean that the Shelleys are likely to succeed on that claim. In its appellate brief, the county asserts that the Shelleys misstate the applicable permitting and administrative review processes, and that the Shelleys had ample notice and many opportunities to be heard, including through both the administrative process and the claims and defenses available in this action.

We cannot address these arguments at the motion to dismiss stage. Indeed, at this stage, the Court cannot even examine the county's building code and permitting requirements. *See Jackson/Hill Aviation, Inc.*, __ N.C. App. at __, 796 S.E.2d at 123 ("[O]ur Supreme Court repeatedly has held that courts cannot take judicial notice of the provisions of municipal ordinances."). Simply put, at the motion to dismiss stage, this Court is limited to reviewing the allegations contained within "the four corners of the complaint." *Id.* If, as the county contends in its appellate briefing, the Shelleys' allegations are plainly false, the county can make that showing in an appropriate motion for summary judgment.

Conclusion

For the reasons discussed above, we affirm the trial court's dismissal of the Shelleys' common law tort claims; we dismiss the Shelleys' appeal with respect to their declaratory judgment claim for lack of appellate jurisdiction; and we reverse the trial court's dismissal of the Shelley's procedural due process claim and remand for further proceedings on that claim.

AFFIRMED IN PART; DISMISSED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge BERGER concur.

ANTHONY BUTLER, Petitioner
v.
SCOTLAND COUNTY BOARD OF EDUCATION, Respondent

No. COA17-501

Filed 6 February 2018

1. Schools and Education—appeal from school board to superior court—controlling statute

It was appropriate to apply N.C.G.S. § 150B-46 where a dismissed teacher appealed his dismissal by the school board to the superior court since the statute under which the teacher appealed, N.C.G.S. § 115C-325.8, did not specifically address the contents or service of a petition for judicial review of a school board's decision.

2. Schools and Education—dismissal of teacher—appeal from school board to superior court—content of petition

An appeal by a dismissed teacher from the school board to superior court was properly dismissed under N.C.G.S. § 150B-46 where the petition failed to state any specific exceptions to the Board's decision or the the relief sought, and the teacher failed to comply with the requirements of service in that he served a copy of his petition on the attorney for the board rather than personally serving the board with the time limit.

Appeal by petitioner from order entered 23 January 2017 by Judge Tanya T. Wallace in Scotland County Superior Court. Heard in the Court of Appeals 5 October 2017.

Van Camp, Meacham & Newman, PLLC, by Amanda L. Tomblyn and Thomas M. Van Camp, for petitioner-appellant.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Lindsay Vance Smith, for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson and Elizabeth L. Troutman, and Allison B. Schafer, for amicus curiae North Carolina School Boards Association.

DAVIS, Judge.

This appeal requires us to revisit the issue of which provisions from North Carolina's Administrative Procedure Act ("APA") should be used to fill gaps existing in statutes authorizing appeals to superior court from decisions by a local school board. Anthony Butler appeals from the trial court's order dismissing his petition for judicial review in which he sought to challenge the termination of his employment as a teacher by the Scotland County Board of Education (the "Board"). Because we conclude that Butler's petition failed to comply with several essential requirements under N.C. Gen. Stat. § 150B-46, we affirm.

Factual and Procedural Background

In 2016, Butler was a career teacher employed at Scotland County High School. On 9 May 2016, the Superintendent of Scotland County Schools notified him that he was being placed on suspension without pay and that his dismissal had been recommended to the Board. On 9 June 2016, the Board held a hearing and entered an order terminating his contract of employment.

On 7 July 2016, Butler filed a document captioned "Notice of Appeal and Petition for Judicial Review" in Scotland County Superior Court. Butler served the petition by mailing a copy to the attorney who had represented the Board in the administrative proceeding. On 3 August 2016, the Board filed a motion to dismiss in which it asserted that a number of errors existed in the petition and that Butler had failed to properly serve the petition upon the Board.

A hearing was held on the Board's motion to dismiss on 28 November 2016 before the Honorable Tanya T. Wallace. On 23 January 2017, the trial court entered an order granting the Board's motion. Butler filed a timely notice of appeal to this Court.

Analysis

[1] It is well established that "[o]n appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board." *Davis v. Macon Cty. Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594 (2006) (citation omitted), *disc. review denied*, 360 N.C. 645, 638 S.E.2d 465 (2006). "The proper standard of review depends upon the nature of the asserted error." *Id.* (citation omitted). Because Butler's appeal to this Court concerns the purely legal issues of whether his petition for judicial review was legally sufficient and whether he properly served the petition on the Board, we review *de novo* the trial court's order dismissing his appeal. *See In re Taylor*, 242 N.C. App. 30, 34, 774 S.E.2d 863, 866 (2015).

Butler's petition stated as follows:

> NOW COMES Petitioner, Anthony Butler, by and through his undersigned counsel, and pursuant to N.C. Gen. Stat. § 115C-325.8, et. seq., N.C. Gen. Stat. § 150B-43, et. seq., N.C. Gen. Stat. § 150B-45, et. seq., and N.C. Gen. Stat. § 7A-250(a), et. seq., and hereby gives Notice of Appeal to the Superior Court of Scotland County, North Carolina from the Order of Dismissal by the Scotland County Board of Education, dated June 9, 2016. Petitioner respectfully requests that the Court enter an appropriate Order requiring the Respondent to promptly transmit and deliver to this Court a complete copy of the administrative record compiled in this matter, including any and all transcripts, exhibits, evidence, or other similar matters, pursuant to N.C. Gen. Stat. § 115C-325.8(b).

Chapter 115C of the North Carolina General Statutes governs appeals from various types of decisions made by local school boards. The particular statute within Chapter 115C relied upon by Butler in challenging his dismissal was N.C. Gen. Stat. § 115C-325.8, which states as follows:

> (a) A teacher who (i) has been dismissed, demoted, or reduced to employment on a part-time basis for disciplinary reasons during the term of the contract as provided in G.S. 115C-325.4, or has received a disciplinary suspension without pay as provided in G.S. 115C-325.5, and (ii) requested and participated in a hearing before the local board of education, shall have a further right of appeal from the final decision of the local board of education to the superior court of the State on one or more of the following grounds that the decision:
>
> > (1) Is in violation of constitutional provisions.
> >
> > (2) Is in excess of the statutory authority or jurisdiction of the board.
> >
> > (3) Was made upon unlawful procedure.
> >
> > (4) Is affected by other error of law.
> >
> > (5) Is unsupported by substantial evidence in view of the entire record as submitted.
> >
> > (6) Is arbitrary or capricious.

> (b) An appeal pursuant to this section must be filed within 30 days of notification of the final decision of the local board of education and shall be decided on the administrative record. The superior court shall have authority to affirm or reverse the local board's decision or remand the matter to the local board of education. The superior court shall not have authority to award monetary damages or to direct the local board of education to enter into an employment contract of more than one year, ending June 30.

N.C. Gen. Stat. § 115C-325.8 (2017).

Because N.C. Gen. Stat. § 115C-325.8 does not specifically address the contents of a petition for judicial review of a school board's decision or the manner in which it must be served, the Board contends that N.C. Gen. Stat. § 150B-46 — a statute within the APA — governs these issues. N.C. Gen. Stat. § 150B-46 states, in pertinent part, as follows:

> The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. . . .

N.C. Gen. Stat. § 150B-46 (2017).

It is undisputed that Butler's petition failed to comply with N.C. Gen. Stat. § 150B-46 in several respects. First, the petition did not contain any specific exceptions to the Board's decision or state what relief was being sought by Butler. Second, Butler failed to personally serve the Board within ten days of the filing of the petition by means of either personal service or certified mail. Thus, the question before us is whether N.C. Gen. Stat. § 150B-46 applied to Butler's appeal to superior court.

As an initial matter, it is clear that "local school boards and local school administrative units are local governmental units, and, as such, are not 'agencies' for the purpose of the APA." *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014) (citation omitted). However, although school board appeals are exempted from the scope of the APA as a general proposition, our appellate courts have nevertheless repeatedly "borrowed" certain provisions of the APA to fill gaps existing in the

judicial review provisions of Chapter 115C. Thus, it is helpful to review the pertinent case law from our appellate courts on this subject.

In *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977), a career teacher was suspended pursuant to N.C. Gen. Stat. § 115-142(f). The Wake County Board of Education subsequently entered an order dismissing the teacher, and he appealed to superior court. *Id.* at 408, 233 S.E.2d at 540. The court reversed the Board's decision. *Id.* On appeal, our Supreme Court addressed the question of what standard of review applied to appeals to superior court from local school board decisions. The Court held that "the whole record rule" as set out in N.C. Gen. Stat. § 150A-51 — a provision of the APA — was the applicable standard of review in such appeals. *Id.* at 410, 233 S.E.2d at 541.

The Supreme Court reiterated the holding of *Thompson* in *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 283 S.E.2d 495 (1981). In *Overton*, a school board dismissed the plaintiff from his position as a middle school physical education teacher. He appealed the dismissal to superior court, which determined that the board's decision was not supported by substantial evidence in the record. *Id.* at 316, 283 S.E.2d at 498.

In reviewing his appeal, the Supreme Court once again considered the issue of what standard of review applied to school board appeals.

> We first determine the appropriate standard of judicial review. Plaintiff appealed the Board's action to the superior court pursuant to the provisions of G.S. 115-142(n) (1978). That statute, however, provides no standards for review. We find no standards for judicial review for an appeal of a school board decision to the courts set forth in Chapter 115 of our General Statutes. Moreover, we note that G.S. 150A-2(1) expressly excepts county and city boards of education from the coverage of the Administrative Procedure Act (APA), Chapter 150A, N.C. General Statutes. However, this Court held in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), that the standards for judicial review set forth in G.S. 150A-51 are applicable to appeals from school boards to the courts. Since no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions, we reiterate that holding and apply the standards of review set forth in G.S. 150A-51 . . . .

Id. at 316-17, 283 S.E.2d at 498.

Since *Overton*, our appellate courts have routinely applied the standard of review set out in the APA to appeals from school board decisions. *See*, *e.g.*, *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 235, 559 S.E.2d 774, 781 (2002) (applying standards set out in N.C. Gen. Stat. § 150B-51 (citation omitted)); *Davis*, 178 N.C. App. at 651, 632 S.E.2d at 594 ("N.C. Gen. Stat. § 150B-51(b) governs judicial review of school board actions . . . ." (citation omitted)); *Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 9-10, 407 S.E.2d 879, 884 (1991) ("[O]ur Supreme Court has . . . held that the standards for judicial review set forth in N.C. Gen. Stat. § 150A-51 (now section 150B-51) apply to appeals from school boards." (citation omitted)), *aff'd per curiam*, 331 N.C. 380, 416 S.E.2d 3 (1992).

We have also, however, utilized *other* APA provisions in school board appeals on issues as to which Chapter 115C was silent. For example, in *Coomer v. Lee County Board of Education*, 220 N.C. App. 155, 723 S.E.2d 802, *appeal dismissed and disc. review denied*, 366 N.C. 238, 731 S.E.2d 428 (2012), the petitioner appealed to superior court pursuant to N.C. Gen. Stat. § 115C-45 from a school board's decision to terminate her employment as a bus driver. The superior court dismissed her appeal as untimely based on the requirement in N.C. Gen. Stat. § 150B-45 imposing a thirty-day time limit on appeals from agency decisions. *Id.* at 156-57, 723 S.E.2d at 803. In affirming the court's dismissal of her appeal, we stated as follows:

> . . . Section 115C-45(c) does not contain a time limit, so the superior court looked to the time limit set out in Article 4 of the Administrative Procedure Act (APA). Under the APA, a person seeking judicial review of a final decision under Article 4 of the APA "must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2011). Although local boards of education are generally excluded from the requirements of the APA, *see* N.C. Gen. Stat. §§ 115C-2, 150B-2(1a) (2011), our appellate courts have consistently applied the standards for judicial review set out in § 150A-51 to appeals from school boards to the courts, *e.g.*, *Overton v. Board of Education*, 304 N.C. 312, 316-17, 283 S.E.2d 495, 498 (1981). As the Supreme Court explained in *Overton*, because "no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions," the courts "apply the standards of review set forth in G.S. 150A-51[.]" *Id.*

> Similarly, here, no other statute provides guidance for the judicial review of school board decisions, so the superior court, following *Overton*, properly looked to Article 4 of the APA to determine the correct time limit for appealing from school boards to the courts. . . .

Id. at 157, 723 S.E.2d at 803-04 (internal citation omitted).

Indeed, we specifically noted the applicability of N.C. Gen. Stat. § 150B-46 to an appeal under Chapter 115C in *Tobe-Williams v. New Hanover County Board of Education*, 234 N.C. App. 453, 759 S.E.2d 680 (2014). That case involved a local school board's decision not to renew the contract of an assistant principal. She appealed to superior court, and the court reversed the board's decision and reinstated her. On appeal to this Court, the school board argued that the trial court had erred by failing to dismiss the assistant principal's petition for judicial review based on lack of personal jurisdiction. *Id.* at 460, 759 S.E.2d at 687. Based on *Overton*, we determined that "[t]he Board's decision not to renew an assistant principal's employment contract is subject to judicial review in accordance with Article 4 of the North Carolina Administrative Procedure Act . . . ." *Id.* at 459, 759 S.E.2d at 686 (citation omitted). We then stated the following:

> The Board first argues that the trial court erred in failing to dismiss the petition for lack of personal jurisdiction. The APA provides that "the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2013). Additionally, "[w]ithin 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." N.C. Gen. Stat. § 150B-46 (2013).
>
> Here, Ms. Tobe-Williams filed her petition on 9 August 2012, but the Board was not served by personal service or by certified mail until 5 September 2012, more than 10 days later. Service was, therefore, defective.

Id. at 460-61, 759 S.E.2d at 687.[1]

---

1. However, because the board had failed to raise the issue of personal jurisdiction in superior court, we ultimately determined that the issue had been waived. *Id.* at 461, 759 S.E.2d at 687.

In *Ragland v. Nash-Rocky Mount Board of Education*, __ N.C. App. __, 787 S.E.2d 422, *appeal dismissed and disc. review denied*, __ N.C. __, 793 S.E.2d 237 (2016), the petitioner was a part-time teacher who was terminated by the school board. After filing a petition for judicial review of the school board's decision pursuant to N.C. Gen. Stat. § 115C-325.8, the petitioner filed three motions — a motion for entry of default, a motion for default judgment, and a motion for summary judgment — based on his contention that the school board had failed to file an appropriate responsive pleading to his petition for judicial review. *Id.* at __, 787 S.E.2d at 429-30. The superior court denied the motions, and the petitioner appealed. *Id.* at __, 787 S.E.2d at 430. We held that because the petition was filed to initiate an administrative appeal rather than a new civil action the school board's response was not required to set forth affirmative defenses or specifically deny allegations set forth in the petition as would be required of an answer to a complaint under the North Carolina Rules of Civil Procedure.

> . . . Here, N.C. Gen. Stat. § 150B-46 provides that, in response to a petition filed following administrative proceedings, "parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response." *Id.* § 150B-46 (2015).
>
> Respondent-Board responded in a timely manner to the Petition. Respondent-Board was served with a copy of the Amended Petition by certified mail on 24 February 2015 and respondent-Board filed a copy with the trial court on 25 March 2015, within thirty days after receipt of the Petition (twenty-nine days later). Respondent-Board had no duty to respond to petitioner's improper motions. . . .

Id. at __, 787 S.E.2d at 430.

Thus, as the above-referenced cases make clear, this Court has previously applied N.C. Gen. Stat. § 150B-46 — as well as other provisions of the APA — in administrative appeals arising under Chapter 115C in the absence of contrary statutory guidance contained therein. Accordingly, given the lack of any provision in N.C. Gen. Stat. § 115C-325.8 governing the contents and service of petitions for judicial review, we conclude it is likewise appropriate to apply N.C. Gen. Stat. § 150B-46 in the present case.

[2] In a number of prior instances, we have affirmed the dismissal of petitions for judicial review based on (1) their failure to adequately state

exceptions to the underlying agency decision, *see, e.g.*, *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 72, 457 S.E.2d 892, 899 (mere listing of broad exceptions to agency decision could not "operate to salvage a petition which utterly disregards the statutory specificity requirements"), *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995); *Vann v. N.C. State Bar*, 79 N.C. App. 173, 174, 339 S.E.2d 97, 98 (1986) (petition for judicial review "was not sufficiently explicit to allow effective judicial review of respondent's proceedings"); and (2) the petitioner's failure to serve the petition in compliance with N.C. Gen. Stat. § 150B-46, *see, e.g.*, *Follum v. N.C. State Univ.*, 198 N.C. App. 389, 395, 679 S.E.2d 420, 424 (2009) (petitioner's service of petition for judicial review upon university board's attorney did not comply with mandate of N.C. Gen. Stat. § 150B-46 because attorney was "not a party of record to the administrative proceedings").

Butler's appeal was deficient in these same respects. First, his petition failed to state *any* specific exceptions to the Board's decision or the relief he sought to obtain as expressly required by N.C. Gen. Stat. § 150B-46. Second, he failed to comply with N.C. Gen. Stat. § 150B-46's service requirements in that instead of personally serving the Board with his petition within the ten-day time limit he simply served a copy of his petition upon the *attorney* for the Board. Thus, his petition for judicial review was properly dismissed by the trial court.[2]

Conclusion

For the reasons stated above, we affirm the trial court's 23 January 2017 order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

---

2. While not necessary to our decision, we observe that Butler expressly referenced several provisions of the APA in his petition, thereby demonstrating his awareness that the APA supplemented N.C. Gen. Stat. § 115C-325.8 in terms of imposing certain procedural requirements applicable to his appeal of the Board's decision. Moreover, in his appellate brief, he has not directed our attention to any alternative statutes addressing what must be contained in a petition for judicial review or the manner in which such a petition must be served.

THE CHERRY COMMUNITY ORGANIZATION, PLAINTIFF
v.
THE CITY OF CHARLOTTE, THE CITY COUNCIL FOR THE CITY OF CHARLOTTE, AND MIDTOWN AREA PARTNERS II, LLC, DEFENDANTS

No. COA16-1292

Filed 6 February 2018

Declaratory Judgments—standing—rezoning—failure to show special damages

The Court of Appeals dismissed plaintiff nonprofit's appeal in a rezoning case where it did not show it had standing to maintain a declaratory judgment action by failing to forecast evidence that it sustained special damages that were distinct from the rest of the community.

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

Appeal by plaintiff from order entered 15 August 2016 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

James, McElroy & Diehl, P.A., by Jon P. Carroll, John R. Buric, and Preston O. Odom, III, for Plaintiff-Appellant.

Charlotte City Attorney's Office, by Senior Assistant City Attorney Terrie Hagler-Gray and Assistant City Attorney Daniel E. Peterson for Defendants-Appellees City of Charlotte and City Council for the City of Charlotte.

K&L Gates LLP, by Roy H. Michaux, Jr., for Defendant-Appellee Midtown Area Partners II, LLC.

MURPHY, Judge.

The Cherry Community Organization ("CCO") appeals from the trial court's order granting the City of Charlotte and the City Council's (collectively, "Charlotte") Motion for Summary Judgment, granting Midtown Area Partners II, LLC's ("MAP") Motion for Summary Judgment, and denying CCO's Motion for Summary Judgment. Specifically, CCO maintains: (1) Charlotte's approval of an oral amendment made to MAP's rezoning petition violated its ordinance and was arbitrary and capricious;

and (2) Charlotte's violation of city ordinances and N.C.G.S. § 160A-383 (2017) renders the zoning amendment null and void. However, because we conclude that CCO failed to show it had standing to maintain its declaratory judgment action, we dismiss this appeal and need not reach the issues raised by CCO.

Background

CCO is a nonprofit organization that endeavors to protect the residential character, safety, and stability of, as well as the affordable housing within, the Cherry Community ("Cherry") – a historically African American neighborhood located in the Midtown Morehead Cherry District of Charlotte. In 1999 and 2012, respectively, Charlotte adopted the Cherry Small Area Plan and the Midtown Morehead Cherry Area Plan (the "MMC Area Plan") to guide land-use decisions in Cherry.

The real property (the "Parcels") at issue in this case involves four parcels owned by MAP in and around Cherry.[1] In August 2014, MAP submitted an application to Charlotte ("Initial Rezoning Petition") to rezone the Parcels from general-use districts to mixed-use development districts in furtherance of plans to construct a mixed-use development, which was to contain office, retail, hotel, and residential spaces. Specifically, MAP proposed constructing a 270,000 square foot building, 187,450 square foot parking structure, and 8 single-family attached dwelling units. The building's then-proposed height was 119 feet.

Two community meetings were held to discuss the nature of the proposed rezoning, and CCO filed a Protest Rezoning Petition urging Charlotte to deny MAP's Initial Rezoning Petition.[2] MAP thereafter submitted an Amended Rezoning Application (the "First Amended Petition") in which it increased the size of the rezoning site from 1.698 to 1.99 acres and requested that MAP be given five-year vested rights regarding its rezoning site plan.

On 12 February 2015, MAP submitted a Second Amended Rezoning Application, which changed the requested zoning of the Parcels "to B-2

1. Previously, three of the parcels were owned by StoneHunt. MAP and StoneHunt, LLC entered into a Joint Venture Agreement to develop their adjacent properties in a mixed-use development, with MAP holding a majority interest in the Joint Venture. Charlotte and MAP's brief notes that, since that time, "StoneHunt, LLC conveyed its three parcels to [MAP] on February 6, 2017 and MAP is authorized to pursue the development of the [Parcels]."

2. CCO owns one property across from the MAP Project. The area of the MAP Project immediately across from that property is designated for eight townhomes.

(PED-O), UR-C (PED-O) and R-8 MF (PED-O)," with five-year vested rights. On the basis of the amendment, a new community meeting was held on 4 March 2015. It is this Second Amended Petition (the "Rezoning Petition") that is at issue in this case.

Charlotte held a public hearing on the Rezoning Petition on 20 April 2015. Representatives of MAP and CCO attended and commented on the Rezoning Petition. Charlotte's Planning Department staff also commented that: (1) MAP's proposed development was inconsistent with the Pedestrian Zoning Overlay District ("PED Overlay") requirements that limit buildings in the area to a maximum height of 100 feet; (2) the proposed development was inconsistent with the MMC Area Plan recommendations relating to the maximum permissible building height, street setbacks, streetscapes, and residential density; and (3) the proposed parking structure would encroach on a portion of the area that the MMC Area Plan recommended for residential development.

By the time the Rezoning Petition came on for a vote before Charlotte at its meeting, MAP lowered the projected height of its building from 119 feet to 106 feet, which was still 6 feet over the maximum height permitted by the PED Overlay. The motion to approve the Rezoning Petition failed.

Several hours later, prior to adjourning the meeting, MAP agreed to bring the building's height down to a compliant 100 feet. Accordingly, Charlotte passed a motion to "reconsider" the Rezoning Petition as orally amended at the next scheduled meeting. At the next meeting on 28 September 2015, Charlotte voted 10-to-1 against sending the orally amended Rezoning Petition back to the Zoning Committee for a recommendation, and 10-to-1 in favor of rezoning the Parcels as outlined.

CCO petitioned the Mecklenburg County Superior Court for Writ of Certiorari and later added a claim for declaratory judgment against Charlotte and MAP. After the trial court dismissed CCO's certiorari petition, all parties moved for summary judgment on CCO's declaratory judgment claim. On 15 August 2016, the trial court granted summary judgment in favor of Charlotte and MAP and dismissed the case with prejudice. CCO timely appealed.

Standing

Typically, landowners may use their property as they wish, free from the interference of the government. However, our Supreme Court has held that lawful zoning ordinances are an exercise of the State's police powers. *See, e.g.*, *Turner v. City of New Bern*, 187 N.C. 541, 549, 122 S.E. 469, 474 (1924). The interference by the State, by exercising its

police powers, is the pinnacle of intrusion on private property rights by the government. Accordingly, our Courts appropriately have set a high bar for third parties to establish standing to bring actions relating to the exercise of police powers between the State and its citizens. CCO does not clear the bar to allow it to privately exercise Charlotte's police power over MAP.

As a preliminary matter, we must address Charlotte and MAP's assertion that CCO lacks standing to prosecute this declaratory judgment action. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91, 184 L. Ed. 2d 533, ___ (2013) ("We have repeatedly held that an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." (citation and internal quotation marks omitted)); *see Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity."). Standing must be maintained throughout the entirety of the suit. Charlotte and MAP contend that CCO has not forecasted evidence that it sustained special damages as a result of the rezoning at issue that are distinct from the rest of the community.[3] We agree and therefore modify and affirm the decision of the trial court to dismiss CCO's claims and, as a result, we need not reach the merits of CCO's appeal.

Standing refers to "[w]hether a party has a sufficient stake in an otherwise justiciable controversy" so as to properly seek adjudication of a matter, *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972), and it "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Thrash Ltd. P'ship v. Cty. of Buncombe*, 195 N.C. App. 678, 680, 673 S.E.2d 706, 708 (2009) (citation omitted). As standing is a question of law, we review the issue of standing de novo, *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876, *disc. review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016), and the party invoking jurisdiction, in this case CCO, bears the burden of establishing standing. *Thrash Ltd. P'ship*, 195 N.C. App. at 680, 673 S.E.2d at 708.

Specifically, "[s]ince standing is a jurisdictional requirement, the party seeking to bring [a] claim before the court must include allegations which demonstrate why she has standing in the particular case[.]" *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877. In establishing the

3. Charlotte and MAP also argue on appeal that CCO failed to properly elect its Board of Directors in accordance with its bylaws, and, therefore, the Board of Directors could not have properly authorized this litigation. We need not reach this contention, however, as we resolve this issue on the basis of insufficient evidence of special damages.

elements of standing, "each element must be supported in the same way as any other matter on which [CCO] bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation*." *Id.* at ___, 781 S.E.2d at 877 (quotation omitted) (emphasis added).

A party only has standing to challenge a zoning ordinance in an action for declaratory judgment when it "has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted). In this way, the standing requirement for an action for declaratory judgment is analogous to the requirement that a party seeking review of a municipal decision by writ of certiorari suffer damages that are "distinct from the rest of the community." *Compare Heery v. Zoning Bd. of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983) (holding that petitioners failed to allege that they would be subject to special damages distinct from the rest of the community), *with Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 880 (holding that allegations that fail to demonstrate special damages distinct to respondent and instead reference generalized damage to the overall neighborhood are insufficient to establish a party has standing to sue).

Although owning property immediately adjacent to or within close proximity of the subject property is not in and of itself sufficient to plead special damages, "it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); *see also Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 486, 520 S.E.2d 793, 796 (1999) (citing *Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 66, 344 S.E.2d 272, 281 (1986), for the proposition that "owners of property in the adjoining area affected by [an] ordinance[ ] are parties in interest entitled to maintain [a declaratory judgment] action" (citation and internal quotation marks omitted)).

Specifically, this Court has recognized that "[e]xamples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level." *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (quotation omitted). Further, the owner of property has standing to maintain a legal action to prevent a proposed use of nearby or adjacent property where he will suffer a reduction in

the value of his property pursuant to a proposed use that is prohibited by a valid zoning ordinance. *Jackson v. Guilford Cty. Bd. of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969).

"Once the petitioner's aggrieved status is properly put in issue, the trial court must then, *based on the evidence presented*, determine whether an injury has resulted or will result from the zoning action." *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (quoting *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 770, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted)) (emphasis added).

In the instant case, CCO pleaded in its complaint that it:

> is an aggrieved party who owns real property immediately adjacent to and/or in close proximity with the subject property, and will suffer special damages in the form of increased noise, traffic and parking, decreased visibility due to the height of the proposed project, diminution in the peaceful residen[tial] character of the Cherry neighborhood, and a reduction in the value of [CCO's] real property if MAP is allowed to proceed as approved by the City Council. Accordingly, [CCO's] damages are distinct from the community at large.

In comparing CCO's pleadings with the guidelines embraced by *Wiesner*, it is clear that CCO met the minimum pleading requirements of standing to survive a motion to dismiss in accordance with Rule 12(b)(6) of the North Carolina Rules of Civil Procedure in generally alleging special damages. However, the *evidence* submitted before the Superior Court is insufficient to *show* that CCO has or will suffer any individual harm as a result of the rezoning such that CCO is entitled to survive Charlotte's and MAP's motion for summary judgment. *See Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (holding that the plaintiff must establish each element "with the manner and degree of evidence required at the *successive* stages of the litigation" (emphasis added)).

In its brief, CCO submits that it proffered evidence of the specific harm it will suffer due to its proximity to the rezoned property. To support its contention, CCO refers this Court to the following record evidence of special harm: (1) the pleading quoted above; (2) page 167 of the record, wherein Dr. Bittle-Patton was speaking at the required public hearing before the City Council on the Rezoning Petition; (3) pages 98-100 of the transcript, which record CCO's argument at the summary judgment hearing pertaining to the issue of standing; and (4) document exhibit pages 5, 16, 32, and 40. However, a close inspection of these

materials reveals that they are utterly devoid of any actual proof of special damages. We address each in turn.

First, although relevant to surviving a motion to dismiss, CCO's pleading does not evince that a harm will result from the rezoning. *See* N.C. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." (emphasis added))

Furthermore, to the extent that CCO asserts in its complaint that it will suffer a reduction in the value of the property, which would be adequate to establish standing according to *Jackson v. Guilford County Board of Adjustment*, it has failed to provide the trial court or this Court with any evidence in support of that assertion. In fact, Dr. Sylvia Bittle-Patton, designated CCO's 30(b)(6) representative, testified during her deposition that "I don't say we would lose tenants because of the [MAP Project] because people need affordable housing. And that's scarce in the city." Therefore, by CCO's own admission, it would not lose any tenants as a result of the MAP Project. Accordingly, we cannot conclude CCO has standing on this basis.

Second, Dr. Bittle-Patton's criticisms at the public hearing prior to Charlotte's meetings were limited to concerns about the height of the proposed building – then a projected 119 feet – as it surpassed the 100 foot height allowed by the PED overlay. That concern was rectified by lowering the proposed height of the building to a compliant 100 feet. Dr. Bittle-Patton at no point alleged that the rezoning risked increased noise, traffic, or parking. Therefore, Dr. Bittle-Patton's comments are not evidence of any special harm that CCO stands to suffer from the rezoning.

Third, in regard to its oral argument before the trial court, CCO specifically stated:

> Our folks have a piece of property that they own that is right next to the subdivision. So I think that they have satisfied the requirements of being an aggrieved party, an affected party that has standing to bring this claim. So I think that for those reasons that we've got the standing that we need to be here.

This assertion is also insufficient to prove that harm will ensue from rezoning because, as we already explained, owning property immediately adjacent to or in the vicinity of the subject property is inadequate in and of itself to establish special damages and, in turn, standing.

Finally, CCO points us towards pages 5, 16, 32 and 40 of the Documentary Exhibits. Page 5 of the Exhibits contains Dr. Bittle-Patton's testimony that "[CCO] absolutely [is]" impacted by the rezoning more than anyone else. Pages 16 and 32 contain testimony by Dr. Biddle-Patton describing the height of the Korean Herald building. Page 40 shows, as noted above, that Dr. Bittle-Patton testified on behalf of CCO as its 30(b)(6) representative.

CCO points to *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011), as precedent that adjacent-owner status, combined with loss of view and associated diminution in property value are enough to confer standing to challenge a land use decision. However, CCO misinterprets our holding in *Sanchez* as, in that case, we were dealing with a diminution of property value due to a loss of a historic waterfront view. *Id.* at 579, 710 S.E.2d at 353-54. Even considering the record in the light most favorable to CCO, it has forecasted no evidence of special damages due to diminution in the value of their property. The loss of the waterfront view in *Sanchez* was a portion of the loss in their land value, not a separate element on its own. CCO, on the other hand, points us to a *change* in its skyline view and presented no evidence of a loss in value. Simply stated, CCO's forecast of evidence of special damages consists of nothing more than conclusory, unsupported allegations that certain damages will ensue coupled with evidence that, at one point, the proposed development plan included a building that was taller than that which is permitted in the area. The latter point was rendered moot prior to CCO filing its complaint by MAP's decision to lower the height of its development to a compliant 100 feet.

Therefore, CCO has failed to point us to any record evidence to meet its burden of production at summary judgment that CCO will suffer special damages distinct from the rest of the community by rezoning, nor can we find any. Accordingly, we conclude that CCO has failed to establish it has standing to maintain its action for declaratory judgment.

We do not reach CCO's remaining contentions as it has not shown it has standing to raise them. *See, e.g.*, *Bigger v. Arnold*, 221 N.C. App. 662, 665, 728 S.E.2d 437, 439 (2012) ("Plaintiff lacks standing to appeal because he is not a party aggrieved by the trial court's order. Accordingly, we do not reach the other issues in the case."); *Estate of Apple ex rel. Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 180-181, 607 S.E.2d 14, 18 (2005) ("Finally, as we have concluded plaintiff does not have standing to contest the compromise and settlement agreement between defendants and the medical provider, we do not reach the issue of whether the Commission had to approve the settlement agreement

under the facts of this case."); *Matter of Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994) ("Although Ezzell's argument may have merit, we do not reach the issue he attempts to raise because he does not have standing to raise the issue."); *Boone v. Boone*, 27 N.C. App. 153, 154, 218 S.E.2d 221, 222-23 (1975) ("We do not reach the questions raised by the assignments of error for the reason that defendant has no standing to raise the questions.") Therefore, we decline to reach the merits of CCO's appeal, and we dismiss this appeal for lack of subject matter jurisdiction.

Conclusion

For the foregoing reasons, we conclude that CCO lacks standing to prosecute its action for declaratory judgment. Accordingly, we modify and affirm the trial court's dismissal of CCO's claims.

MODIFIED AND AFFIRMED.

Judge DAVIS concurs in the result only.

Judge HUNTER, JR. concurs in separate opinion.

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

I write separately to concur in the result only.

Generally, the North Carolina Constitution grants standing to anyone who suffers harm. "All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (quoting N.C. Const. art. I, § 18).

> The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Id. at 642, 669 S.E.2d at 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)) (internal quotation

marks omitted). "[S]tanding relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute." *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876 (2016). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Mangum* at 642-43, 669 S.E.2d at 282 (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990).

Here, the CCO filed an action seeking a "declaration pursuant to Rule 57 of the North Carolina Rules of Civil Procedure and the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, that the rezoning effectuated through the granting of the Rezoning Petition is invalid and unenforceable as an arbitrary and capricious act." The CCO also contends it has standing to bring this action pursuant to N.C. Gen. Stat. § 160A-393.

N.C. Gen. Stat. § 160A-393 (2016) provides:

> (d) **Standing.** – A petition may be filed under this section only by a petitioner who has standing to challenge the decision being appealed. The following persons shall have standing to file a petition under this section:
>
> . . . .
>
> (2) Any other person who will suffer special damages as the result of the decision being appealed.

It is necessary for a party to include allegations demonstrating why that party has standing in a particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Weisner at ___, 781 S.E.2d 871, 877 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002)).

The CCO alleged:

> Petitioner is an aggrieved party who owns real property immediately adjacent to, or in close proximity to the subject property, and will suffer special damages in the form

> of increased noise, traffic and parking, decreased visibility due to the height of the proposed buildings, diminution in the peaceful residential character of the Cherry neighborhood, and a reduction in the value of Petitioner's real property if MAP is allowed to proceed as approved by the City Council. Accordingly, Petitioner's damages are distinct from the community at large.

Here, the CCO has alleged sufficient facts to assert standing to challenge the zoning amendment because it owns property immediately adjacent to the rezoned property and can potentially be adversely affected by the zoning amendment.

However, the CCO lost the summary judgment hearing because it failed to forecast competent evidence sufficient to support special damages, not because the CCO does not meet the status of an aggrieved party under the standing doctrine. This is clearly a justiciable issue capable of resolution by our Courts, and the CCO, in my opinion has only lost at the summary judgment level because of its failure to forecast evidence tending to show specifically how it will suffer harm by the Defendants in this case. Uncontroverted opinion is no longer sufficient evidence in North Carolina. *United Community Bank (Georgia) v. Wolfe*, ___ N.C. ___, ___, 799 S.E.2d 269, 272 (2017).

Furthermore, under N.C. Gen. Stat. § 1-257 (2016), a trial court may "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" *See Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 569 S.E.2d 287, *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2002) (holding the trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. § 90-270.15(a)(10) where it decided further grounds for relief were unnecessary and would serve no useful purpose). Here, the trial court found "the City complied with all the law, with the Ordinances, their own law, the State law . . . and with the City Council's own procedures." The trial court further reasoned "I don't see how a different result could possibly have taken place had the thing gone back to the Planning Board and an additional 30 days been given."

From these facts I conclude the trial court did not abuse its discretion in this case.

FORD MOTOR CREDIT COMPANY LLC, PLAINTIFF
v.
KENNETH L. McBRIDE AND MARY A. McBRIDE, DEFENDANTS

No. COA17-720

Filed 6 February 2018

1. Appeal and Error—preservation of issues—waiver—no ruling below

Defendant waived appellate review of whether the trial court erred by failing to allow defendant to join necessary parties where defendant did not obtain a trial court ruling on the issue.

2. Pleadings—failure to state a claim—sale of defective car

Defendants' allegations in counterclaims in an action arising from the sale of a defective car, when taken as true, were sufficient to withstand plaintiff's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), claims for breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of express warranty, and revocation of acceptance of the non-conforming vehicle.

3. Pleadings—summary judgment—verified pleading—sale of defective car

The trial court erred by entering summary judgment for plaintiff in an action arising from the sale of a defective car where plaintiff argued that defendants failed to present any evidence to oppose its affidavit, but defendants' verified motions, answer, and counterclaims constituted an affidavit for purposes of summary judgment.

Appeal by defendants from order entered 23 March 2017 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 10 January 2018.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Christina McAlpin Taylor and Hannah D. Choe, for plaintiff-appellee.

The Law Group, by Michael P. Kepley, for defendant-appellants.

ARROWOOD, Judge.

Kenneth L. McBride and Mary A. McBride ("defendants") appeal from an order granting Ford Motor Credit Company LLC's ("plaintiff") motion to dismiss defendants' counterclaims and motion for summary judgment. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 25 February 2016, plaintiff filed a complaint against defendants for breach of contract. The complaint alleged that defendants had executed a contract with Randy Marion Incorporated ("Randy Marion") on 19 March 2015 to purchase a new 2015 Ford Transit Connect (the "vehicle"). Under the contract, defendants agreed to finance $24,953.52 at an annual percentage rate of 9.69%, for a total sale price of $34,385.12. Defendants agreed to make seventy-two monthly payments of $460.21. Sometime after defendants and Randy Marion entered into the contract, Randy Marion assigned the contract to plaintiff. Plaintiff further alleged that defendants defaulted on the contract by failing to pay plaintiff and "[a]fter giving credit for all payments received, for the proceeds from the sale of the vehicle, if any are due, and for any amounts received under any contract of insurance, the Defendants owe a balance of $7,709.67 as of August 21, 2015[.]"

On 10 June 2016, defendants filed a verified "Motions, Answer and Counterclaims[.]" Defendants moved to dismiss for failure to join a necessary and indispensable party pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure, and in the alternative, moved to join Ford Motor Company and Randy Marion as defendants. Defendants alleged, in support of their affirmative defenses and counterclaims, as follows: On or about 19 March 2015, defendants purchased the vehicle for their personal use. The vehicle was sold to defendants by Randy Marion and Ford Motor Company as a new vehicle, with full warranties from Ford Motor Company, as the manufacturer of the vehicle. Within twenty-four hours of purchasing the vehicle, defendants noticed that the passenger seat continued to fall into a reclining position and would not remain upright "due to a fundamental defect in the design and manufacture of the vehicle." The defect was not apparent at the time of purchase. On 23 March 2015, defendants contacted Ford Motor Company to report the defect and were directed to take the vehicle back to Randy Marion for inspection and repair. Defendants went to Randy Marion that same day and Randy Marion refused to inspect the vehicle or to make any repairs. Defendants returned to Randy Marion on three additional dates: 24 March 2015, 26 March 2015, and 27 March 2015. On each occasion, defendants were turned away without Randy Marion making any inspections or repairs. Defendants rejected acceptance of the vehicle

by returning the vehicle to Randy Marion on 27 March 2015. Defendants advanced the following counterclaims: breach of implied warranty of merchantability; breach of implied warranty of fitness for a particular purpose; breach of express warranty; and revocation of acceptance of nonconforming goods.

On 11 August 2016, plaintiff filed a reply to defendants' motion and counterclaims.

On 21 November 2016, plaintiff filed a motion to dismiss defendants' counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and a motion for summary judgment.

On 23 March 2017, the trial court entered an order granting plaintiff's motion to dismiss and dismissing defendants' counterclaims with prejudice. The trial court also granted plaintiff's summary judgment motion, entering judgment against defendants in the amount of $7,709.67, with interest thereon at 9.69% per annum from 21 August 2015 until the date of judgment, interest at the statutory post-judgment rate from the date of judgment until paid in full, reasonable attorney's fees in the amount of $1,156.45, and court costs.

On 19 April 2017, defendants timely filed notice of appeal.

II. Discussion

A. Joining Necessary Parties

[1] In the first issue on appeal, defendants argue that the trial court erred by failing to allow defendants to join necessary parties to the action. Defendants contend that Randy Marion and Ford Motor Company are necessary parties.

On 10 June 2016, defendants filed a Rule 12(b)(7) motion, and in the alternative, a motion to join necessary parties. Upon thorough review, however, we can find nothing in the record before us that indicates that the trial court ruled on the merits of defendants' Rule 12(b)(7) motion or alternative motion to join necessary parties. In addition, neither plaintiff nor defendants can point us to a direct ruling. Thus, defendants have waived review of this issue by failing to obtain a ruling pursuant to N.C. R. App. P. 10(a)(1) (2018) ("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 a party *must* "*obtain a ruling* upon the party's request, objection, or motion.") (emphasis added).

B. Motion to Dismiss for Failure to State a Claim

[2] In their second issue on appeal, defendants argue that the trial court erred by granting plaintiff's motion to dismiss defendants' counterclaims with prejudice under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We agree.

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) 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). "This 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).

We first note that this case involves a "consumer credit sale" within the meaning of N.C. Gen. Stat. § 25A-2, and therefore, the provisions of Chapter 25A, entitled "Retail Installment Sales Act," are applicable. N.C. Gen. Stat. § 25A-2(a) (2017) ("a 'consumer credit sale' is a sale of goods or services in which (1) The seller is one who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, (2) The buyer is a natural person, (3) The goods or services are purchased primarily for a personal, family, household or agricultural purpose, (4) Either the debt representing the price of the goods or services is payable in installments or a finance charge is imposed, and (5) The amount financed does not exceed seventy-five thousand dollars ($75,000)[.]").

N.C. Gen. Stat. § 25A-25 provides as follows:

> (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness

> shall not exceed amounts paid by the buyer under the contract.
>
> (b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface font:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

N.C. Gen. Stat. § 25A-25(a)-(b) (2017). Based upon the plain language of N.C. Gen. Stat. § 25A-25, plaintiff, as an assignee of the seller, is subject to any of defendants' claims and defenses which might be asserted against Randy Marion. *See Commercial Credit Equipment Corp. v. Thompson*, 48 N.C. App. 594, 269 S.E.2d 286 (1980) (judgment on the pleadings was in error, where N.C. Gen. Stat. § 25A-25(a) applied, and the plaintiff, as assignee of the seller, was subject to the defendants' plea of fraud).

Defendants' first counterclaim was for breach of the implied warranty of merchantability. In order to recover for breach of the implied warranty of merchantability, a party must establish that:

> (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the [party] (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Ismael v. Goodman Toyota, 106 N.C. App. 421, 430, 417 S.E.2d 290, 295 (1992) (citations omitted).

In the present case, defendants alleged that the vehicle was sold to them by Randy Marion, a dealer engaged in the business of automobile sales; that the vehicle was not in merchantable condition at the time of sale or any time thereafter, as the passenger seat continued to fall into a reclining position and would not remain upright; the vehicle failed to provide safe and reliable transportation, proximately causing damages to defendants; and that four days after purchasing the vehicle, defendants returned to Randy Marion in an attempt to have the vehicle inspected

and defect repaired. These allegations, taken as true as is required when ruling on a 12(b)(6) motion, are sufficient to state a claim for breach of the implied warranty of merchantability.

Defendants' second counterclaim alleged a breach of the implied warranty of fitness for a particular purpose pursuant to N.C. Gen. Stat. § 25-2-315. N.C. Gen. Stat. § 25-2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [G.S. 25-2-316] an implied warranty that the goods shall be fit for such purpose.

N.C. Gen. Stat. § 25-2-315 (2017).

Defendants alleged that they informed agents of Randy Marion that "they were in the market for a vehicle for their personal use that could transport both Defendants at the same time." Randy Marion's agents told defendants that the vehicle "could safely transport both Defendants at the same time and that the vehicle was brand new with no mechanical issues." Defendants alleged that based on these assurances, they relied on Randy Marion's agents' skill and judgment to select a suitable vehicle for the intended purpose. Randy Marion's agents knew or had reason to know that defendants were relying on them. Furthermore, defendants alleged that the vehicle was not fit for defendants' purpose because the passenger seat would not remain upright, making transportation unsafe and unreliable. Taking defendants' allegations as true, they state a claim for which relief can be granted sufficient to survive a 12(b)(6) motion to dismiss.

In their third counterclaim, defendants alleged a breach of express warranty. N.C. Gen. Stat. § 25-2-313(1) provides:

> (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

N.C. Gen. Stat. § 25-2-313(1)(a)-(b) (2017). The seller does not need to use formal words such as "warrant" or "guarantee," nor does he need to have a specific intention to make a warranty. N.C. Gen. Stat. § 25-2-313(2). Recovery under this claim requires proof of "(1) an express warranty as to a fact or promise relating to the goods, (2) which was relied upon by the plaintiff in making his decision to purchase, (3) and that this express warranty was breached by the defendant." *Harbour Point Homeowners' Ass'n v. DJF Enters., Inc.*, 206 N.C. App. 152, 162, 697 S.E.2d 439, 447 (2010) (citation and quotation marks omitted).

Defendants alleged that at the time of purchase, they informed agents of Randy Marion that they were "in the market for a vehicle that they both could ride in for their personal use." Randy Marion's agents stated that the vehicle "could safely transport both Defendants at the same time and that the vehicle was brand new with no mechanical issues." Defendants further alleged that they relied on this express warranty when purchasing the vehicle and would not have purchased it had Randy Marion's agents not represented to them that the vehicle was in "good working order and fit to transport" them both. Randy Marion's agents breached the express warranty when the vehicle was not in good working order. Defendants also alleged that Randy Marion and Ford Motor Company breached a written warranty which formed part of the basis of the bargain and upon which defendants relied. The written warranty had promised to repair or replace, free of charge, any vehicle parts found to be defective in materials or workmanship within thirty-six months or 36,000 miles. Defendants' allegations, treated as true, are sufficient to state a claim upon which relief can be granted.

In their final counterclaim, defendants alleged that they revoked their acceptance of the non-conforming vehicle. N.C. Gen. Stat. § 25-2-608(1)(a) provides that

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it . . . (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

N.C. Gen. Stat. § 25-2-608(1)(a)-(b) (2017). Moreover, "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by

their own defects. It is not effective until the buyer notifies the seller of it." N.C. Gen. Stat. § 25-2-608(2).

Here, defendants alleged that the defect in the vehicle existed at the time of sale and substantially impaired the value of the vehicle to defendants. Defendants accepted the vehicle without having previously discovered the nonconformity because the defect was not apparent at the time of purchase and because of the assurances made by Randy Marion's agents. Defendants further alleged that they revoked acceptance of the vehicle by returning it to Randy Marion and informing Ford Motor Company that they no longer wanted the vehicle. Revocation was within a reasonable time after they discovered or should have discovered the non-conformity and there was no substantial change in the condition of the vehicle not caused by its own defects in its entirety. These allegations, taken as true, are sufficient to overcome plaintiff's 12(b)(6) motion to dismiss.

In conclusion, we hold that defendants' allegations set forth in the counterclaims, when treated as true, were sufficient to withstand plaintiff's 12(b)(6) motion to dismiss. Thus, the trial court erred by dismissing defendants' counterclaims.

C. Summary Judgment

[3] In their final argument, defendants contend that the trial court erred in granting summary judgment in favor of plaintiff on its claim. Defendants argue that there was a genuine issue of material fact as to the condition of the vehicle.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Allied Spectrum, LLC v. German Auto Center, Inc.*, __ N.C. App. __, __, 793 S.E.2d 271, 274 (2016) (citation and quotation marks omitted). The non-moving party "may not rely upon the bare allegations of

his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Id.* (citation and quotation marks omitted).

In support of its motion for summary judgment, plaintiff submitted the affidavit of Jennifer Axon ("Axon"), one of its employees. Axon's affidavit stated that she was a custodian of records for plaintiff and that those records indicated as follows: defendants executed a retail installment contract with Randy Marion on 19 March 2015 for the purchase of the vehicle; defendants agreed to pay the financed purchase price of $24,953.52 by making seventy-two monthly payments of $460.21; plaintiff was assigned the rights of Randy Marion under this contract; Randy Marion received a complaint from defendants regarding the passenger seat of the vehicle; Randy Marion investigated the complaint and found the seat was not defective; Ford Motor Company sent a field engineer to investigate defendants' complaint and found no defect; defendants defaulted on the payment of the retail installment contract; possession of the vehicle was retaken on 24 July 2015; and a deficiency balance of $7,709.67 remains due on the installment contract.

Plaintiff argues that defendants failed to submit any evidence to oppose its affidavit, and as such, plaintiff has proven that there are no genuine issues of material fact. We disagree. Defendants' verified 10 June 2016 "Motions, Answer and Counterclaims" "constitute an 'affidavit' for purposes of determining either party's right to summary judgment." *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729 (1988). "Rule 56(e) does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively 'set forth specific facts showing that there is a genuine issue for trial.' " *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972).

Because there is a genuine issue of material fact as to the condition of the vehicle at the time of sale, we are unable to say that plaintiff has met its burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Thus, the trial court erred by granting summary judgment in favor of plaintiff.

The 23 March 2017 order, dismissing defendants' counterclaims with prejudice and granting summary judgment in favor of plaintiff, is reversed.

REVERSED.

Judges CALABRIA and ZACHARY concur.

HONEYCUTT v. WEAVER

[257 N.C. App. 599 (2018)]

TOMMY LEE HONEYCUTT, PLAINTIFF
v.
BRENDA HONEYCUTT HARRIS WEAVER, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARGARET L. HONEYCUTT, DEFENDANT

No. COA17-410

Filed 6 February 2018

1. Statutes of Limitation and Repose—distribution of deceased's assets—statute of limitations

Plaintiff did not bring claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations in an action between a brother and a sister arising from the sister's transfer of real estate to herself under her mother's power of attorney. The doctrine of adverse possession was not relevant, and any such claim would be subject to the 7-year statute of limitations under N.C.G.S. § 1-38. The statute of limitations was not stayed by plaintiff's petition claiming that the sister had renounced her right to be executor because the claims were not related to the mother's will but to the conveyance of real property while the sister was acting as attorney-in-fact.

2. Statutes of Limitation and Repose—conversion—transfer of land by attorney-in-fact

Plaintiff did not cite any legal authority or set forth a cohesive argument for a conversion claim as an independent cause of action with its own statute of limitations where he relied entirely on his breach of fiduciary duty and constructive fraud claims in asserting a 10-year statute of limitations in his claims arising from the division of his mother's assets. His claims arising from the conveyance of real property were barred by the applicable statute of limitations, and his action for conversion of chattels and goods was not brought within the applicable three-year statute of limitations.

Appeal by plaintiff from order entered 11 January 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 20 September 2017.

Collins Price, PLLC, by Andrew S. Price; and Stafford R. Peebles, Jr., P.C., by Stafford R. Peebles, Jr., for plaintiff-appellant.

Craige Jenkins Liipfert & Walker, LLP, by William W. Walker, for defendant-appellee.

ELMORE, Judge.

Tommy Lee Honeycutt ("plaintiff" or "Tommy") appeals from an order dismissing his amended complaint against Brenda Honeycutt Harris Weaver ("defendant" or "Brenda") on the basis that his six claims for relief are either barred by the applicable statutes of limitation or are within the exclusive jurisdiction of the clerk of court. For the reasons stated herein, we affirm.

I.

This appeal arises out of a dispute between brother and sister regarding the distribution of their mother's assets both before and after her death.

On 15 August 2002, Margaret L. Honeycutt ("Margaret") executed a last will and testament providing that her daughter, Brenda, be appointed executor of her estate and that all of her property be divided equally between her two children, Tommy and Brenda.

On 10 December 2004, Margaret executed a durable power of attorney appointing Brenda as her attorney-in-fact. The statutory form included an authorization for Brenda to make gifts from Margaret to Brenda herself as the named attorney-in-fact, but only in accordance with Margaret's history of making or joining in the making of lifetime gifts.

On 2 June 2005, Brenda, acting as Margaret's attorney-in-fact, executed a general warranty deed conveying lots 48–53 on the map of Blueberry Hills Development ("the real property") from Margaret to Brenda herself. This conveyance was made for no taxable consideration, and the deed was signed by Brenda and recorded in the Forsyth County Registry.

Margaret died on 8 June 2010. According to Tommy, Margaret owned various items of personal property at the time of her death, including but not limited to household belongings and furnishings, bank accounts, a 1977 Midas motorhome, and a 1996 Chevrolet Blazer vehicle ("the personal property"), all of which should have been divided equally between Tommy and Brenda as prescribed by Margaret's will. However, Brenda did not apply to be appointed executor of Margaret's estate immediately following Margaret's death; instead, she submitted Margaret's will and death certificate for filing with the clerk of court, and she represented to the clerk that Margaret had no remaining assets to be divided and that no probate of Margaret's will would be necessary.

At an unspecified time after Margaret's June 2010 death, Tommy discovered that Brenda had used her power as Margaret's attorney-in-fact

in June 2005 to convey the real property from Margaret to Brenda. He also discovered that Brenda had taken possession of Margaret's personal property. Tommy alleges that, despite his repeated demands, Brenda refused to divide the property with Tommy.

On 20 June 2013, more than three years after Margaret's death, Tommy filed a petition with the clerk of court requesting that Brenda be deemed to have renounced her right to be executor of Margaret's estate. No executor of Margaret's estate had been appointed prior to Tommy's petition, nor was one appointed during the pendency of his petition.

On 25 April 2016, the clerk of court issued an order providing that Brenda would have until 28 April 2016 to file an application for probate and letters testamentary for Margaret's estate.

On 2 May 2016, the clerk of court issued letters testamentary appointing Brenda as executor of Margaret's estate.

On 20 September 2016, Tommy filed his initial complaint against Brenda in her individual capacity and as executor of Margaret's estate. In his complaint, Tommy alleged that Brenda's conveyance of the real property from Margaret to Brenda in June 2005 constituted an unlawful, self-dealing conveyance in violation of Brenda's fiduciary duty to Margaret as her attorney-in-fact. Tommy also alleged that Brenda's failure and refusal to divide Margaret's personal property after Margaret's death in June 2010 constituted conversion of personal property belonging to Margaret's estate and to Tommy, as well as an additional breach of Brenda's fiduciary duty to Margaret. As a result of Brenda's conduct, Tommy alleged compensatory damages in excess of $25,000.00 as well as entitlement to punitive damages in excess of $25,000.00.

On 2 November 2016, Brenda filed a motion to dismiss Tommy's complaint for failure to state a claim upon which relief could be granted. In her motion, Brenda alleged that Tommy's claims for self-dealing, violation of fiduciary duty, and conversion were barred by the applicable statutes of limitation. Brenda also alleged that Tommy's claim that Brenda had failed and refused to divide Margaret's personal property was an issue within the exclusive jurisdiction of the clerk of court and, therefore, should be dismissed for lack of subject matter jurisdiction.

On 9 December 2016, Tommy filed an amended complaint, which Brenda stipulates relates back to the initial filing date of 20 September 2016. Tommy's amended complaint was essentially the same as his initial complaint, but it enumerated six specific causes of action as follows: (1) request for declaratory judgment to void the real property conveyance,

(2) breach of fiduciary duty, (3) constructive fraud, (4) conversion, (5) unjust enrichment, and (6) punitive damages.

On 13 December 2016, Brenda filed a motion to dismiss Tommy's amended complaint, again alleging that Tommy's claims were barred by the applicable statutes of limitation or jurisdictional defect pursuant to Rules 12(b)(6) and 12(b)(1) of the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1 (2015).

On 5 January 2017, the trial court held a hearing on Brenda's motion to dismiss Tommy's amended complaint. The court granted the motion and dismissed the complaint by order entered 11 January 2017 ("the dismissal order"). The dismissal order includes no findings of fact, stating only that

> After reviewing the Amended Complaint and the parties' briefs and supporting cases and statutes, and after hearing counsel's arguments, the Court concluded that Plaintiff's claims are barred by the applicable statutes of limitations, N.C. Gen. Stat. § 1-52(1) & (4) & 1-56, or are within the exclusive jurisdiction of the Clerk of Court, N.C. Gen. Stat. § 28A-2-4, and the Court therefore allowed the Motion.

Tommy filed timely notice of appeal from the dismissal order.

II.

On appeal, Tommy contends that the trial court erred in granting Brenda's motion to dismiss his amended complaint on the basis that his claims are barred by the applicable statutes of limitation.

First, Tommy argues that his claims for breach of fiduciary duty and constructive fraud are governed by the 10-year statute of limitations under N.C. Gen. Stat. § 1-56 (2015), and that the statute did not begin running until Tommy had knowledge of the real property conveyance from Margaret to Brenda. In the alternative, Tommy asserts that N.C. Gen. Stat. § 1-24 (2015) operated to stay the 10-year statute of limitations from 20 June 2013 to 2 May 2016 — while Tommy's petition was pending with the clerk of court and no executor had been appointed to Margaret's estate — such that his claims were instituted within the limitations period even if the statute began running, as Brenda contends, at the time of the June 2005 conveyance.

Next, Tommy argues that his request for declaratory judgment is governed by the 20-year statute of limitations for adverse possession under N.C. Gen. Stat. § 1-40 (2015) because the deed from Margaret to

Brenda did not pass color of title. In the alternative, Tommy argues that this claim is governed by the 10-year statute of limitations for actions upon an instrument of conveyance of an interest in real property under N.C. Gen. Stat. § 1-47(2) (2015), and he again asserts that N.C. Gen. Stat. § 1-24 operated to stay the limitations period for nearly three years.

As to his conversion claim, Tommy argues that this claim amounts to an additional breach of fiduciary duty and constructive fraud and, therefore, is governed by the 10-year statute of limitations applicable to those claims under N.C. Gen. Stat. § 1-56. Tommy fails to cite any legal authority in his brief for this particular contention; nevertheless, he summarily asserts that "[t]hese claims were instituted well within the 10 year statute of limitations as [Margaret] passed away on June 8, 2010 and [Brenda] was not appointed as executor of [Margaret's] estate until May 2, 2016." Brenda, however, maintains that Tommy's conversion claim is governed by the 3-year statute of limitations under N.C. Gen. Stat. § 1-52(4).

Lastly, Tommy contends that the trial court erred in concluding that any of his claims are within the exclusive jurisdiction of the clerk of court because under N.C. Gen. Stat. § 28A-2-4(c)(2) (2015), the clerk does not have such jurisdiction over "[a]ctions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence." Tommy argues that his assertion that Brenda has failed and refused to divide the personal property in accordance with Margaret's will is not an estate proceeding within the clerk's exclusive jurisdiction, but an element of his claim for breach of fiduciary duty, for which he seeks monetary damages.

We note that Tommy also brought claims against Brenda for unjust enrichment and punitive damages. In his brief, Tommy fails to address his unjust enrichment claim, which is therefore deemed abandoned on appeal. *See* N.C. R. App. P. 28(a). As to Tommy's claim for punitive damages, a plaintiff cannot maintain an action *only* to collect punitive damages; rather, he must first show that he is entitled to recover actual damages on an underlying claim. *See Ransom v. Blair*, 62 N.C. App. 71, 76, 302 S.E.2d 306, 309 (1983).

III.

Our standard to review the trial court's dismissal order is well established.

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) 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 [trial] 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). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

"[An affirmative] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). The statute of limitations applicable to a particular claim begins running when that claim accrues, which generally occurs at the moment a complete and present cause of action exists to allow a plaintiff to file suit and obtain relief. N.C. Gen. Stat. § 1-15(a) (2015). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton*, 344 N.C. at 136, 472 S.E.2d at 780 (citations omitted).

Here, the dismissal order refers to the relevant statutes of limitation as N.C. Gen. Stat. §§ 1-52(1), 1-52(4), and 1-56. Although the order fails to specify which statute governs each particular claim, N.C. Gen. Stat. § 1-52(4) provides that a 3-year statute of limitations governs actions for conversion of goods or chattels. Likewise, "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the [3]-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1)[.]" *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Where such allegations do give rise to a claim of constructive fraud, that claim falls under the 10-year statute of limitations contained in N.C. Gen. Stat. § 1-56. *Id.* at 67, 614 S.E.2d at 335. N.C. Gen. Stat. § 1-56 provides that "[a]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued." Thus, where no other statute establishes the statute of limitations for a particular claim, the residual or "catch-all" period of 10 years set out in N.C. Gen. Stat. § 1-56 applies.

IV.

[1] Tommy contends, and Brenda stipulates, that the 10-year statute of limitations under N.C. Gen. Stat. § 1-56 applies to his claims for breach of fiduciary duty and constructive fraud insofar as those claims are based on Brenda's alleged self-dealing in executing the June 2005 deed from Margaret to Brenda.

As to his request for declaratory judgment, Tommy alleges — without presenting any authority in support of his position, other than a bare reference to two statutes — that because Brenda "knowingly exceeded her authority as attorney-in-fact" under N.C. Gen. Stat. § 32-A2 (2015) and "gifted herself the property . . . without providing any valuable consideration," the deed does not pass color of title. According to Tommy, Brenda's only claim to the property would therefore be by adverse possession, which Tommy asserts has a 20-year statute of limitations under N.C. Gen. Stat. § 1-40. We disagree with Tommy's argument on several grounds, the first being that the doctrine of adverse possession is at all relevant to the resolution of this matter.

In order to acquire title by adverse possession, an individual generally must possess the property "adversely to all other persons for 20 years," among other requirements. N.C. Gen. Stat. § 1-40. Challenges to an individual's possession "under color of title," however, are subject to a 7-year statute of limitations pursuant to N.C. Gen. Stat. § 1-38 (2015).

> Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it.

White v. Farabee, 212 N.C. App. 126, 132–33, 713 S.E.2d 4, 9 (2011) (citations and internal quotation marks omitted). "It is well established that a deed may constitute color of title to the land described therein." *Id.* "When the deed is regular upon its face and purports to convey title to the land in controversy, it constitutes color of title." *Id.*

Here, the premise of Tommy's argument that a 20-year statute of limitations applies to his request for declaratory judgment is that the deed purports to pass title to Brenda but does not in fact do so because of a defect in the method of conveyance. Notwithstanding the fact that Brenda does not claim to have acquired title by adverse possession or to have fulfilled the additional requirements for application of that

doctrine, Tommy's own argument demonstrates that the deed to Brenda passes the appearance or "color" of title, if not title in fact. Thus, a claim challenging Brenda's allegedly adverse possession of the real property would be subject to a 7-year statute of limitations under N.C. Gen. Stat. § 1-38, not a 20-year limitations period under N.C. Gen. Stat. § 1-40, as Tommy contends.

Tommy argues, in the alternative, that the 10-year statute of limitations under N.C. Gen. Stat. § 1-47(2) — a statute not cited in the dismissal order — applies to his request for declaratory judgment, while Brenda maintains that the claim is governed by the residual 10-year statute of limitations under N.C. Gen. Stat. § 1-56. Regardless of which 10-year limitation period is more appropriate, however, Tommy asserts that the period did not begin running as to his claims for breach of fiduciary duty, constructive fraud, and declaratory judgment until he had knowledge of Brenda's allegedly self-dealing conveyance. We disagree.

"An action for fraud accrues when *the aggrieved party* discovers the facts constituting the fraud, or when, in the exercise of due diligence, such facts should have been discovered." *Shepherd v. Shepherd*, 57 N.C. App. 680, 682, 292 S.E.2d 169, 170 (1982) (emphasis added). Where a confidential relationship exists between the parties, the aggrieved party "is under no duty to make inquiry until something occurs to excite his suspicions," so long as he does not purposefully remain ignorant of such facts. *Vail v. Vail*, 233 N.C. 109, 116–17, 63 S.E.2d 202, 208 (1951).

Between the signing of the deed in June 2005 and her death in June 2010, the aggrieved party here was Margaret, not Tommy. "She alone had the right to maintain an action for redress in her lifetime[.]" *Id.* at 118, 63 S.E.2d at 209. In filing his complaint, Tommy did not contend that Brenda concealed the deed from Margaret or that Margaret otherwise did not know about the deed,[1] nor did he allege that Margaret was ever incompetent such that she would have been unable to discover the allegedly fraudulent conveyance prior to her death. For these reasons, we hold that the 10-year limitation period applicable to Tommy's claims for breach of fiduciary duty, constructive fraud, and declaratory judgment began running in June 2005, when the conveyance was made.

---

1. In his brief, Tommy states, "Upon information and belief, [Margaret] had no knowledge of this transfer." However, no such allegation is contained in the record on appeal. *See* N.C. R. App. P. 28(e); *see also Long v. City of Charlotte*, 306 N.C. 187, 190, 293 S.E.2d 101, 104 (1982) (appellate court considers only what appeared on record before the trial court).

Tommy could have sued Brenda between Margaret's death in June 2010 and the expiration of the statute of limitations in June 2015, but he did not file his complaint until September 2016. *See Holt v. Holt*, 232 N.C. 497, 501, 61 S.E.2d 448, 452 (1950) ("[I]f the cause of action still exists in the person making the conveyance at the time of his death, it passes to those who then succeed to his rights."); *see also Vail*, 233 N.C. at 118, 63 S.E.2d at 209 ("[W]hen the statute of limitations has started running against the ancestor, but at his death the action is not barred, the statute continues to run against the heir or devisee."). Nevertheless, Tommy argues that his claims are not barred by the statute of limitations because N.C. Gen. Stat. § 1-24 operated to stay the 10-year limitations period for nearly three years, during which time Tommy's petition to have the clerk of court deem that Brenda had renounced her right to be executor was pending. We are not persuaded by Tommy's effort to avoid dismissal.

N.C. Gen. Stat. § 1-24, titled "Time during controversy on probate of will or granting letters," provides as follows:

> In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him.

It is apparent from the title and plain language of the statute that the purpose of its staying provisions are to assist an aggrieved party in a controversy regarding probate of a will or granting of letters testamentary, where his cause of action would be against the executor of an estate. Under such circumstances, if no executor has been appointed, the aggrieved party may be unable to bring an action within the applicable limitations period due to the simple fact that no executor exists for him to sue.

N.C. Gen. Stat. § 1-24 has no application here, where Tommy's claims are not related to the probate of Margaret's will, but to the conveyance of real property by Brenda while acting as Margaret's attorney-in-fact. We therefore hold that Tommy failed to bring his claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations, which ran uninterrupted from June 2005 until June 2015.

V.

[2] The only issue remaining on appeal is whether the trial court erred in dismissing Tommy's conversion claim against Brenda.

In his complaint, Tommy made the following allegations in reference to Brenda's acts of conversion:

> 29. [Brenda], as appointed Executrix of the estate of [Margaret], unlawfully converted the personal property of [Margaret] for [Brenda's] own use and benefit. This unlawful conversion constituted constructive fraud.
>
> . . . .
>
> 32. [Brenda's] self dealing actions, as attorney-in-fact, in deeding to herself lots 48-53 of Blueberry Hills Development, constitute conversion of the property of [Margaret].
>
> 33. [Brenda's] self dealing actions in refusing to transfer to [Tommy] his share of the personal property of [Margaret] and keeping that personal property for her own uses constitutes conversion of the property of [Margaret].
>
> 34. [Brenda's] unlawful conversion of the property of [Margaret] for [Brenda's] own use, and her failure to divide said property as directed in [Margaret's will], constituted a breach of her fiduciary duty to [Margaret] and her estate, which includes [Tommy].

On appeal, Tommy's entire argument that his conversion claim is not barred by the applicable statute of limitations consists of a single paragraph, which reads as follows:

> As noted above, [Tommy] alleges that [Brenda] converted items of [Margaret's] personal property including household belongings, bank accounts, household furnishings, a 1977 Midas Motor home, and a 1996 Blazer vehicle. Further, [Tommy] alleges that [Brenda] refused to include in the estate of [Margaret] lots 48–53 on the map of the Blueberry Hills Development, despite the fact that those lots were improperly transferred. The failure to include the above items of property in [Margaret's] estate is the basis for [Tommy's] claims for breach of fiduciary duty and constructive fraud. These claims were instituted well within the 10 year statute of limitations as [Margaret] passed

> away on June 8, 2010 and [Brenda] was not appointed as executor of [Margaret's] estate until May 2, 2016.

Here, Tommy fails to cite any legal authority or to set forth a cohesive argument for his conversion claim as an independent cause of action with its own statute of limitations; rather, Tommy relies entirely on his breach of fiduciary duty and constructive fraud claims in asserting that the applicable statute of limitations is 10 years. We disagree.

First, we note that insofar as Tommy's claims relate to Brenda's conveyance of the real property, those claims accrued in June 2005 and are, therefore, barred by the applicable statute of limitations. Second, by his own admission, Tommy discovered that Brenda had taken possession of Margaret's personal property following Margaret's death in June 2010. After making repeated demands for Brenda to divide the property with Tommy, Tommy filed a petition with the clerk of court in June 2013 requesting that Brenda be deemed to have renounced her right to be executor of Margaret's estate. Third, from June 2010 until May 2016, Brenda was neither Margaret's attorney-in-fact nor the executor of Margaret's estate, and she therefore owed no fiduciary duty to Margaret, Margaret's estate, or Tommy during that time.

N.C. Gen. Stat. § 1-52(4) provides that a 3-year statute of limitations governs actions for conversion of goods or chattels. "As a general rule, the claim accrues, and the statute begins to run, when the unauthorized assumption and exercise of ownership occurs[.]" *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 83, 712 S.E.2d 221, 227 (2011).

Here, Tommy's right to sue Brenda for conversion accrued upon Margaret's death in June 2010, but he did not file his complaint until 2016. We therefore hold that Tommy failed to bring his claim for conversion within the applicable 3-year statute of limitations under N.C. Gen. Stat. § 1-52(4).

VI.

Because Tommy's claims against Brenda for breach of fiduciary duty, constructive fraud, and declaratory judgment accrued with the conveyance of the real property in June 2005, we hold that Tommy failed to file those claims within the applicable 10-year statute of limitations period. Additionally, because Tommy's claim against Brenda for conversion of the personal property accrued with Margaret's death in June 2010, we hold that Tommy failed to file that claim within the applicable 3-year limitations period. Tommy's reliance on N.C. Gen. Stat. § 1-24 is misplaced, as that statute does not operate to stay the limitations period

where the underlying cause of action does not constitute a controversy on the probate of a will or granting of letters testamentary.

Lastly, because we hold that Tommy's claims for breach of fiduciary duty, constructive fraud, declaratory judgment, and conversion are barred by the applicable statutes of limitation, and because Tommy's claim for unjust enrichment has been abandoned on appeal, we do not address Tommy's contention that the trial court erred in concluding that any of his claims are within the exclusive jurisdiction of the clerk of court.

The order of the trial court granting Brenda's motion to dismiss Tommy's complaint is hereby:

AFFIRMED.

Judges STROUD and TYSON concur.

IN THE MATTER OF THE APPEAL OF LOWE'S HOME CENTERS, LLC
FROM THE DECISION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW
CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 2013.

No. COA17-220

Filed 6 February 2018

Taxation—ad valorem assessment—erroneous

The decision of the N.C. Tax Commission concerning Forsyth County's ad valorem tax assessment of Lowe's Home Centers' real property was reversed and remanded where the County relied only on the cost approach to valuation and should have considered the income and comparable sales approaches to establish a true value; there was a substantial difference in value whichever assessment the County used; and the County abandoned the presumption of correctness afforded its initial assessment by abandoning that assessment in favor of the higher value given by its expert. The burden on the taxpayer was one of production of evidence that the County's valuation was arbitrary, not of persuasion.

Appeal by Lowe's Home Centers, LLC from a final decision entered 24 August 2016 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 21 August 2017.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Bradley C. Friesen, and Justin M. Hardy, for Appellant-Lowe's Home Centers, LLC.

Attorney for Forsyth County, by Assistant County Attorney B. Gordon Watkins III, for Appellee-Forsyth County.

BERGER, Judge.

Lowe's Home Centers, LLC ("Lowe's") appeals from the Final Decision of the North Carolina Property Tax Commission ("Commission") that affirmed the decision of the Forsyth County Board of Equalization and Review concerning Forsyth County's (the "County") *ad valorem* tax assessment of Lowe's real property located in Kernersville, North Carolina. Lowe's contends its evidence produced in the May 17-19, 2016 hearing before the Commission was sufficient to rebut the presumption of correctness for the County's assessment, thereby shifting the burden of proof to the County to prove that its method of assessing Lowe's property produced a true value of that property. We agree and therefore reverse the decision of the Property Tax Commission.

Factual and Procedural Background

The County assessed Lowe's commercial property at 145 Harmon Creek Road, Kernersville, North Carolina ("Property") at $14,572,900.00, or $107.43 per square foot as of January 1, 2013. The Property was constructed in 2001 with 135,652 gross leasable square footage on 19.6 acres of land. On December 2, 2013, Lowe's contested the County's valuation of the Property by appealing the valuation to and requesting a hearing before the Commission. Prior to Lowe's appeal, both parties conducted independent appraisals. The County's assessor reappraised the Property at $16,100,000.00 or $118.69 per square foot, while Lowe's appraisal was $6,340,000.00 or $46.74 per square foot. As a result of the County's higher appraisal, the County abandoned the former assessment of $14,572,900.00 and adopted its expert's latter appraisal of $16,100,000.00.

Lowe's was granted a hearing before the Commission in its appeal of the County's tax assessment. During the May 17-19, 2016 hearing, Lowe's introduced four expert witnesses who testified to factors used in the valuation process, as well as their valuation of the subject Property.

Lowe's first expert was David Lennhoff, a real estate appraiser and consultant, experienced in valuating 'big box' retail real estate. Lennhoff testified to the average price per square foot of other Lowe's properties in North Carolina, finding that the valuations per square foot ranged "from $18.48 a square foot to $39.34."

Lowe's second expert to testify was Charles Williamson, Director of Real Estate for Lowe's. He testified that the County's appraisal of $118.69 per square foot is the highest valuation of any Lowe's in the United States, the average valuation being $29.59 per square foot. Williamson also testified about deed restrictions placed on the resale of 'big box' properties and those restrictions' effect on valuation. His valuation of similar 'big box' properties ranged from $21.63 to $49.00 per square foot, well below the County's valuation.

Robert Meiers also testified on Lowe's behalf. Meiers has served as Lowe's Property Tax Manager for over twelve years. Meiers testified that Lowe's had previously contested tax appraisals in nineteen North Carolina counties, and that Forsyth County's assessment of $118.69 per square foot was more than double the average valuation of $56.13 per square foot. Meiers proffered tax assessment valuations of Lowe's stores in similarly situated North Carolina counties:

> Q: On this list looking at the demographics, which county is the closest to Forsyth in terms of population and the number of building permits pulled in 2013?
>
> A: Cumberland County.
>
> Q: And what is the assessed value – the average assessed value of Lowe's stores in Cumberland County?
>
> A: [$]7,309,600.
>
> Q: And what is that on a per square foot basis?
>
> A: $57.61 a square foot.
>
> Q: And which county is the most similar to Forsyth in terms of growth percentage between 2010 and [2014] and in terms of median household income?
>
> A: It would be Guilford, Guilford County.
>
> . . .
>
> Q: Which is growing faster in terms of percentage growth and building permits pulled?
>
> A: That would be Guilford County.
>
> . . .
>
> Q: What's the average assessed value of all the stores in Guilford County?

A: [$]9,595,160.

Q: And what is that on a per square foot basis?

A: $74.78 a square foot.

Finally, James Katon, a real estate appraiser from Charlotte, North Carolina, was hired by Lowe's to appraise the fair market value of a fee simple interest of the Property as of the County's valuation date. Katon testified that he appraised the Property using the uniform appraisal standards mandated by N.C. Gen. Stat. § 105-283. In valuing the Property, Katon did not consider the "investment value" of the Property, but "the value of the real estate to the general real estate market." Katon's valuation for the subject Property was $6,340,000.00, or $46.74 per square foot.

After Lowe's had concluded its presentation of evidence, the County moved to dismiss Lowe's appeal because Lowe's did not "present competent, material, and substantive evidence to rebut the presumption of correctness of the [County's valuation]." The Commission granted the County's motion to dismiss. On September 19, 2016, Lowe's timely appealed the Commission's decision to grant the County's motion to dismiss.

Analysis

This Court's standard of review of a decision of the Commission is governed by N.C. Gen. Stat. § 105-345.2, which states in pertinent part:

> (a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.
>
> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of statutory authority or jurisdiction of the Commission; or
(3) Made upon unlawful proceedings; or
(4) Affected by other errors of law; or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2 (2017).

This Court reviews questions of law *de novo*, where this Court will consider "the matter anew and freely substitutes its own judgment" in place of the Commission's. *In re Appeal of Westmoreland-LG&E Partners*, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005) (citation omitted). Otherwise, this Court "shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (2017). "The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (citation and quotation marks omitted), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993). In determining "whether the whole record fully supports the Commission's decision, this Court must evaluate whether the Commission's judgment, as between two reasonably conflicting views, is supported by substantial evidence, and if substantial evidence is found, this Court is not permitted to overturn the Tax Commission's decision." *Id.* at 394, 424 S.E.2d at 218 (citations omitted).

"All property, real and personal, shall as far as practicable be appraised or valued at its true value in money." N.C. Gen. Stat. § 105-283 (2017).

> '[T]rue value' shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.

> It is also a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct. All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous.

In re Appeal of Amp, Inc., 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975) (citations and quotation marks omitted).

"Of course, the presumption is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E.2d at 762. "In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of production and not persuasion. If the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values." *In re Appeal of Villas at Peacehaven, LLC*, 235 N.C. App. 46, 49, 760 S.E.2d 773, 776 (2014) (citations, quotation marks, and brackets omitted). Therefore,

> to rebut this presumption, the taxpayer must present competent, material, and substantial evidence that tends to show (1) either the county tax supervisor used an arbitrary or illegal method of valuation and (2) the assessment substantially exceeded the true value in money of the property. It is not enough for the taxpayer to merely show that the method used by the county tax supervisor was wrong; the taxpayer must additionally show that the result of the valuation is *substantially* greater than the true value in money of the property assessed.

In re Westmoreland, 174 N.C. App. at 697, 622 S.E.2d at 129 (emphasis added) (citations omitted).

First, we must determine the correct approach to valuation for the case *sub judice*. The Commission concluded that the sales comparison approach and the income approach that Lowe's had used "were shown to have weaknesses that limited the credibility of the value estimate." The cost approach, as used by the County, was determined by the Commission to be the appropriate method to determine the true value of the fee simple interest in the Property. However, "[t]he cost approach is better suited for valuing specialty property or newly developed property." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d

921, 924 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). This Court has previously been critical of relying on the cost approach.

> For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. It seems to be used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach because cost may not effectively reflect market conditions.

Id. (citations and quotation marks omitted).

Relying on only one method to establish valuation does not necessarily mean that the method was arbitrary or illegal.

> An illegal appraisal method is one which will not result in 'true value' as that term is used in N.C.G.S. § 105-283. Since an illegal appraisal method is one which will not result in true value as that term is used in N.C.G.S. § 105-283, it follows that such method is also arbitrary. In appraising the true value of real property, N.C.G.S. § 105-317 has been interpreted as authorizing three methods of valuing real property: the cost approach, the comparable sales approach, and the income approach. However, the general statutes nowhere mandate that any particular method of valuation be used at all times and in all places. The statute contemplates that the assessors and the Commission will consider which factors in N.C.G.S. § 105-317 apply to each specific piece of property in appraising its true value. N.C.G.S. § 105-317 expressly directs that consideration be given to the income producing ability of the property where appropriate. Obviously, this is an element which affects the sale of properties, the purpose of which is the production of income. To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold in the customary manner in which they are sold. An important factor in determining the property's market value is its highest and best use. It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property.

In re Appeal of Blue Ridge Mall, LLC, 214 N.C. App. 263, 269-70, 713 S.E.2d 779, 784 (2011) (emphasis, citations, quotation marks, and brackets omitted).

The Property at issue here is held by Lowe's to facilitate the production of income, and this is the Property's highest and best use. Relying on the cost approach to valuation may have established a ceiling on the Property's valuation, but consideration should have been given to the income and comparable sales approaches to establish a true value. Therefore, in substantially relying on the cost approach, the County used an arbitrary and illegal method of valuing the Property.

Lowe's must also show that the assessment substantially exceeded the true value in money of the property. The County's original assessment of the Property was for $14,572,900.00, and its subsequent assessment was for $16,100,000.00. Lowe's experts explained their valuation methods in detail and how they resulted in a valuation of $6,340,000.00. Whichever assessment the County adopts from their appraiser, those valuations are more than *double* the valuation determined, and substantiated, by Lowe's. Either difference is a substantial difference. Furthermore, by abandoning its assessed value in favor of the higher opinion of value given by its expert, the County has also abandoned the presumption of correctness afforded its initial *ad valorem* tax assessment.

Keeping in mind that the burden on the taxpayer is of production and not persuasion, Lowe's met its burden of producing competent, material, and substantial evidence tending to show that the County's valuation was arbitrary and illegal, and substantially exceeded the true value of the Property. We therefore reverse the Final Decision of the Commission and remand to address the valuation issue raised by the taxpayer.

Furthermore, because N.C. Gen. Stat. § 105-345.1 (2017) instructs this Court to remand cases so that the Commission can receive "evidence [that] has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case," the Commission should consider such competent and material evidence that has come to light since the time of its hearing on this matter.

Conclusion

For the foregoing reasons, we vacate the Final Decision of the North Carolina Property Tax Commission dismissing the appeal of Lowe's. We remand for a reevaluation of the 2013 decision of the Forsyth County Board of Equalization and Review consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

IN THE MATTER OF D.E.M.

No. COA17-755

Filed 6 February 2018

Termination of Parental Rights—willful abandonment—findings not sufficient

An order terminating respondent's parental rights was vacated and remanded where the father's parental rights were terminated for willfully abandoning his child but the findings did not specifically address the six-month period immediately before the filing of the petition, were not adequate to support the ultimate finding that the father's conduct was willful, did not address the efforts the father could have been expected to make while incarcerated, and improperly mixed factual findings with conclusions of law.

Appeal by respondent from order entered 26 April 2017 by Judge Laura Powell in Rutherford County District Court. Heard in the Court of Appeals 21 December 2017.

No brief for petitioner-appellee.

Anné C. Wright for respondent-appellant.

MURPHY, Judge.

Respondent ("Alberto")[1] appeals from an order terminating his parental rights. After careful review, we vacate and remand.

Alberto is the father of the juvenile D.E.M. ("Danny"). Petitioner ("Beryl") is Danny's mother. On 25 August 2015, Beryl filed a petition to terminate Alberto's parental rights. Beryl claimed that Alberto had no contact with Danny since February 2005, that Danny had resided exclusively with Beryl since his birth, and that Alberto had not provided consistent child support for Danny's care and maintenance. On 26 April 2017, the trial court entered an order terminating Alberto's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (2017). Alberto filed timely notice of appeal.

1. Pseudonyms are used to protect the identity of the juvenile and to promote ease of reading. *See* N.C. R. App. P. 3.1(b).

Alberto argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

Every proceeding to terminate parental rights involves two distinct stages, the adjudication stage and the disposition stage. *In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014) (citation omitted). At "the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C.G.S. § 7B-1111(a)." *Id.* at 219, 753 S.E.2d at 734. 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 N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014). 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 Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, *appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001)).

Pursuant to N.C.G.S. § 7B-1111(a)(7), the trial court may terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal quotations and citations omitted). Factors to be considered include a parent's financial support for a child and "emotional contributions," such as a father's "display of love, care and affection for his children." *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 510 (2000) (citations omitted). "Although the trial court may consider a parent's conduct outside the six- month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) (internal citations, quotation marks, and alterations omitted).

Here, the relevant six-month period was between 25 February and 25 August 2015. The trial court made the following findings of fact to support its conclusion that Alberto abandoned the juvenile:

> 4. [Alberto] has never provided any financial support for the minor child.

> 5. [Alberto] has had no contact with the minor child in many years.
>
> 6. Prior to the filing of the petition in this matter, [Alberto] has sent one letter to [Beryl] concerning the minor child. Since the filing of the Petition in this matter, [Alberto] has sent other letters to [Beryl] concerning the minor child.
>
> 7. [Alberto] has spent a significant portion of the minor child's life incarcerated.
>
> 8. There have been extended periods of time during the minor child's life, in which [Alberto] was not incarcerated, yet [he] had no contact, other than incidental contact, and no personal visitation nor overnight visitation, with the minor child during these times.
>
> 9. [Alberto] made the willful choice to commit the crimes for which he was incarcerated during the minor child's life.
>
> 10. [Alberto] made the willful choice during the minor child's life to have his probation revoked and serve active prison time, rather than to stay out of prison and continue on probation, when remaining on probation could have increased the likelihood and possible opportunities of his having a relationship with the minor child.
>
> 11. [Alberto] has, by his choices, willfully abandoned the minor child for at least six consecutive months immediately preceding the filing of this action.

Our review of the trial court's findings leads us to the determination that they are inadequate to support the court's conclusion that respondent willfully abandoned the juvenile. First, the trial court's findings do not specifically address Alberto's behavior within the relevant six-month period immediately preceding the filing of the petition as required to adjudicate willful abandonment. We note that none of the trial court's findings provide any dates. In particular, in finding number 6, the trial court found that Alberto sent Beryl a letter prior to her filing the petition, but the finding neglects to indicate whether this action occurred prior to or during the relevant six- month period.

Second, the trial court's findings are inadequate to support its ultimate finding that Alberto's abandonment of Danny was willful. Alberto notes that he was incarcerated throughout the relevant six-month period, and that Beryl refused to provide him with contact information

for herself or Danny. Thus, Alberto contends that his inability to contact Danny negates a conclusion of willfulness.

"Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *Matter of M.A.W.*, ___ N.C. ___, ___, 804 S.E.2d 513, 517 (2017) (internal citations, quotation marks, and alterations omitted). Thus, a showing of incarceration alone is insufficient to prove willful abandonment. *In re Adoption of Maynor*, 38 N.C. App. 724, 726-27, 248 S.E.2d 875, 877 (1978). Although a parent's options for showing affection while incarcerated are greatly limited, a parent " '*will not be excused from showing interest in his child's welfare by whatever means available.*' " *In re J.L.K.*, 165 N.C. App. 311, 318-19, 598 S.E.2d 387, 392 (emphasis added) (quoting *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2004)), *disc. review denied*, 359 N.C. 68, 609 S.E.2d 773 (2004). Nevertheless, "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited." *D.M.O.*, ___ N.C. App. at ___, ___, 794 S.E.2d at 862-63.

Here, the trial court's findings demonstrate that Alberto was incarcerated for a significant portion of the juvenile's life, including the relevant six-month period preceding the filing of the petition, and he was still incarcerated at the time of the termination hearing. Alberto testified that he wrote the juvenile multiple letters while in prison, but the court's findings only state that Alberto had no contact with the juvenile and provided no financial support. Assuming the trial court rejected Alberto's testimony that he wrote Danny letters while in prison, the trial court's findings nevertheless do not address, in light of his incarceration, what other efforts Alberto could have been expected to make to contact Beryl and the juvenile. This was an error. In *D.M.O.*, the respondent-mother was also incarcerated during the determinative six-month period under N.C.G.S. § 7B-1111. *See id.* at ___, 794 S.E.2d at 864. We vacated and remanded the trial court's order terminating the parental rights of the respondent-mother in part because "the trial court here made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated." *Id.* at ___, 794 S.E.2d at 864.

There are further issues with the trial court's order, as it improperly mixes the court's factual findings with its conclusions of law in violation

of Rule 52 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 52. Under Rule 52, a trial court "must avoid the use of mixed findings of fact and instead, separate the findings of fact from the conclusion of law." *Pineda-Lopez v. N.C. Growers Ass'n*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002). Rule 52 applies to termination of parental rights orders. *In re T.P.*, 197 N.C. App. 723, 729, 678 S.E.2d 781, 786 (2009). Orders which do not follow Rule 52 are to be vacated and remanded "to the trial court to reissue its order in compliance with Rule 52(a)(1)." *Pineda* 151 N.C. App. at 590, 566 S.E.2d at 165.

Consequently, we conclude that the trial court failed to enter adequate findings of fact to demonstrate that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(7) to terminate Alberto's parental rights, and failed to list its Findings of Fact and Conclusions of Law in accordance with Rule 52. Accordingly, we vacate the trial court's order and remand to the trial court for further findings and conclusions to support the ground upon which it relied to terminate Alberto's parental rights, and to reissue those findings and conclusions in accordance with Rule 52. "We leave to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009). In light of our disposition, we decline to address respondent's remaining argument on appeal.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

IN RE IVEY, A MINOR CHILD

No. COA17-264

Filed 6 February 2018

Adoption—revocation—time limit—original or copy of written consent

The time for a biological parent to revoke a consent to adoption of her child does not begin to run until the parent is provided an original or copy of a written consent signed by her. Construing the language of N.C.G.S. § 48-3-605 in pari materia with the revocation requirements in N.C.G.S. § 48-3-608, the content requirements of N.C.G.S. § 48-3-606, and the underlying purposes of the adoption regime set forth in N.G.G.S. § 48-1-100, demonstrates the intent

of the legislature that a biological parent consenting to adoption receive, as a matter of fact, an original or copy of the signed consent in order for it to be effectuated.

Appeal by petitioners from order entered 15 November 2016 by Judge Thomas G. Foster in Haywood County District Court. Heard in the Court of Appeals 5 September 2017.

C. Caleb Decker for respondent-appellee.

Frank G. Queen, Dempsey Law, PLLC, by Kelly Tillotson Dempsey, and The Law Office of Ann Hines Davis, PLLC, by Ann Hines Davis, for petitioner-appellants.

INMAN, Judge.

In this case of first impression, we hold that the time period for a biological parent to revoke a consent to adoption of her child, as allowed by North Carolina statute, does not begin to run until the parent is provided an original or copy of a written consent signed by her.

Petitioner-appellants George and Laura Ivey (the "Iveys") appeal from an order (the "Order") in a consolidated declaratory judgment action and adoption proceeding dismissing the Iveys' adoption proceeding and restoring custody of minor child A.M.S. (the "Baby") to respondent-appellee S.M.S. ("Mother").[1] After careful review, we affirm the trial court's order.[2]

I. Procedural and Factual History

The record discloses the following:

In early 2015, the Iveys, who wished to adopt a child, engaged an adoption agency social worker to perform a domestic pre-placement assessment in preparation for a private adoption proceeding. In the summer of 2016, the Iveys met the then-pregnant Mother, a 15-year old minor from Tennessee, who agreed to pursue an open adoption with the

1. Because both the Baby and Mother are minors, we refer to them by pseudonyms in the interest of privacy.

2. The Iveys' notice of appeal states that they also appeal from a second order denying their motion to stay or vacate the prior Order. However, the Iveys assert no argument in their briefs concerning the order on their motion to stay or vacate, and their appeal as to that order is therefore deemed abandoned. N.C. R. App. P. 28(a) (2015).

Iveys as the adoptive parents of the Baby. Consistent with that plan, the parties executed an Open Adoption Agreement and a Birth Plan setting forth visitation, birthing details, and other provisions establishing the level of care and contact the Iveys and Mother would exercise toward the Baby and each other during delivery and following the adoption of the Baby by the Iveys.

Mother gave birth to the Baby on 31 August 2016. On 1 September 2016, Mother met with Pam Smith, an attorney hired by the Iveys to represent Mother in the adoption of the Baby, and Samuel Hyde, a notary, at the hospital. Mother signed an Affidavit of Parentage and Consent to Adoption (the "Consent") in the presence of Ms. Smith and Mr. Hyde.[3] The Consent includes an acknowledgment by Mother that she had the opportunity to employ independent legal counsel and the recitation "[t]hat I understand that my Consent to the adoption of the minor may be revoked within 7 days following the day on which it is executed, inclusive of weekends and holidays." By the terms of the Consent, notice of revocation of the Consent was to be sent to the Haywood County Clerk of Superior Court. The final paragraph of the Consent contains the acknowledgment by Mother "[t]hat I understand that unless revoked in accordance with [N.C. Gen. Stat. §] 48-3-608, my Consent to Adoption is final and irrevocable and may not be withdrawn or set aside except under a circumstance set forth in [N.C. Gen. Stat. §] 48-3-609."

Mr. Hyde, who notarized the documents, also signed a certification attached to the Consent that "to the best of [his] knowledge and belief" Mother "read, or had read to . . . her, and understood the Consent; signed the Consent voluntarily; received an original or copy of . . . her fully executed Consent; and was advised that counseling services may be available through county departments of social services or licensed child-placing agencies." Ms. Smith, the attorney hired to counsel Mother, told Mother to contact her should she have questions. The Iveys then took the Baby home from the hospital.

After executing the Consent, Mother began to have second thoughts about the adoption. On Friday, 9 September 2016, eight days after signing the Consent, Mother called Ms. Smith regarding the Consent and, per a later letter to the Iveys' attorney, sought to "start this process [of

3. While Mother is a minor, her age has no bearing on the enforceability or validity of the Consent; N.C. Gen. Stat. § 48-3-605(b) (2015) states "[a] parent who has not reached the age of 18 years shall have legal capacity to give consent to adoption and to release that parent's rights in a child, and shall be as fully bound as if the parent had attained 18 years of age."

revoking the Consent] . . . .” On 12 September 2016, the first business day following Mother’s call to her office, Ms. Smith contacted Mother. The following day, Mother retained attorney Caleb Decker to represent her in future attempts to regain custody of the Baby.

On 14 September 2016, the day after hiring Mr. Decker, Mother delivered a letter to the Iveys’ attorney stating that she: (1) was revoking the Consent; and (2) had never received a copy of that document. An affidavit attesting to these facts was delivered to the Iveys’ attorney on 19 September 2016. Mother’s father, as her guardian, filed a verified complaint on 21 September 2016 in district court seeking a declaratory judgment and injunction declaring the Consent invalid and returning custody of the Baby to her (the “DJ Action”).

Following the filing of the DJ Action, on 29 September 2016, Mother received a copy of the Consent from her medical file at the hospital. On 3 October 2016, the Iveys filed a petition for adoption of the Baby with the district court (the “Petition”). On 4 October 2016, Mother filed a revocation with the clerk of superior court. The DJ Action and Petition were consolidated by a *sua sponte* order of the district court.

Counsel for the parties presented evidence and arguments in a hearing before the district court on 7 November 2016. After taking the matter under advisement, the court entered its Order on 15 November 2016 dismissing the adoption proceeding. In the Order, the trial court found as facts:

> 47. That the Court cannot find that Ms. Smith left a copy of the signed consent with [Mother].
>
> . . .
>
> 49. That the Respondent Mother did not receive a copy of her signed consent until 29 September 2016.
>
> 50. That at no point after 1 September 2016 when Ms. Smith left [Mother’s] hospital room until 29 September 2016 did the [Mother] have a copy of her signed consent.
>
> 51. That the [Mother] filed a revocation within seven days of receiving her copy of the adoption documents, including the [Consent], and upon being properly noticed and informed of the person and location as to where to send notice of revocation as required by [N.C. Gen. Stat.] § 48-3-605, and further filed this revocation within the seven day period pursuant to [N.C. Gen. Stat.] § 48-3-608.

> 52. That the leaving of a copy of the signed consent with the consenting parent is required pursuant to N.C. Gen. Stat. § 48-3-605.

Based on these findings, the trial court concluded as a matter of law:

> 4. That the [C]onsent at issue was validly executed.
>
> 5. That [N.C. Gen. Stat.] § 48-3-605 requires that a copy of the executed consent be left with the consenting person in order for the consenting person to have notice of how to revoke consent, where to revoke consent, and with whom to give notice of the revoking of consent.
>
> . . .
>
> 8. That [Mother] filed a revocation with the proper party after receiving information as to who the party was for the purposes of revocation pursuant to [N.C. Gen. Stat.] §§ 48-3-607 and 608.

In addition to dismissing the Iveys' adoption petition, the trial court awarded legal and physical custody of the Baby to Mother and ordered the Iveys to immediately remit the Baby to her custody. The Iveys timely appealed.[4]

II. Analysis

The Iveys challenge findings 51 and 52 of the Order, arguing that the trial court erred as a matter of law in interpreting N.C. Gen. Stat. §§ 48-3-605 and 48-3-608 to provide that a consent to adoption is not deemed executed until a signed original or copy is delivered to the consenting party and that Mother filed a valid revocation of the Consent within 7 days of receiving a copy of the Consent. The Iveys leave unchallenged, however, the trial court's findings of fact 49 and 50, which established that Mother was not provided with a copy of the Consent at the time it was signed and that she received a copy for the first time less than seven days prior to filing her revocation. Those findings, therefore, are binding on appeal and dispositive of the issue before this Court.

Because we hold that N.C. Gen. Stat. § 48-3-605 requires (1) that an original or copy of a signed Consent to Adoption be provided to the biological parent who has signed the document and (2) that the time period

---

4. The Iveys filed a motion to stay the Order pending appeal, which was denied by the trial court. Thus, it appears from the record that Mother has had custody of Baby since entry of the Order.

allowed by N.C. Gen. Stat. § 48-3-608 for revocation does not begin to run until the requirements of N.C. Gen. Stat. § 48-3-605 have been met, we affirm the trial court's order.

A. Standard of Review

We review issues of statutory construction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1990) (citations omitted). "[A] statute [that is] clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citation omitted). Courts, in interpreting the "clear and unambiguous" text of a statute, "must give it its plain and definite meaning[,]" as "there is no room for judicial construction[.]" *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citation omitted). "This is especially true in the context of adoption, which is purely a creation of statute." *Boseman v. Jarrell*, 364 N.C. 537, 545, 704 S.E.2d 494, 500 (2010). In applying the language of a statute, and "[b]ecause the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't. of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). Finally, "we must be guided by the 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health and Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)).

B. North Carolina's Adoption Statutes

North Carolina's procedures for adoption are codified in Chapter 48 of the General Statutes. N.C. Gen. Stat. §§ 48-1-100 (2015), *et seq.* Per Section 48-1-100, '[t]he primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents . . . .' N.C. Gen. Stat. § 48-1-100(b)(1)(i). Further, it is a "[s]econdary purpose[] of this Chapter . . . to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption . . . ." N.C. Gen. Stat. § 48-1-100(b)(2). The statute goes on to direct that "[t]his Chapter shall be liberally construed and applied to promote its underlying purposes and policies." N.C. Gen. Stat. § 48-1-100(d).

Section 48-3-605 sets forth the procedures for the execution of a consent for adoption. N.C. Gen. Stat. § 48-3-605. Compliance with these procedures requires that the consent: (1) "be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments[;]" and (2) contain a certification by the notary that includes a statement that "to the best of the [notary's] knowledge or belief, the parent . . . executing the consent has . . . [b]een given an original or a copy of his or her fully executed consent." N.C. Gen. Stat. §§ 48-3-605(a) and (c).

Any consent containing the mandatory provisions of Section 48-3-606 and in accordance with the procedures set forth in Section 48-3-605 "may be revoked as provided in [N.C. Gen. Stat. §] 48-3-608. A consent is otherwise final and irrevocable except under a circumstance set forth in [N.C. Gen. Stat. §] 48-3-609." N.C. Gen. Stat. § 48-3-607.

A revocation of consent to adoption pursuant to Section 48-3-608 generally must be completed within seven days following the consent to adoption's execution,[5] while a consent may be voided pursuant to Section 48-3-609 if it is "established by clear and convincing evidence that it was obtained by fraud or duress[,]" the adoptive parents and consenting person agree to set aside the consent, the adoption petition is voluntarily dismissed with prejudice, or the adoption petition is dismissed and any rights to appeal the dismissal are either not exercised or exhausted. N.C. Gen. Stat. §§ 48-3-608 and 48-3-609.

C. Mother's Revocation Was Timely

The Iveys argue that the trial court erred as a matter of law in concluding that "[N.C. Gen. Stat.] § 48-3-605 requires that a copy of the executed consent be left with the consenting person" and, as a result, it erred in concluding that the revocation of the Consent was timely filed because it was filed within seven days of Mother's receipt of a copy of the Consent on 29 September 2016. We disagree.

Section 48-3-605 envisions the receipt of an original or copy of the signed consent to adoption by the person executing it. While the statute does not expressly require such receipt, the legislature's language anticipates just such a delivery by requiring the notary to certify that "to the best of the individual's knowledge . . . [the consenting party has b]een given an original or a copy of his or her fully executed consent." N.C. Gen. Stat. § 48-3-605(c)(3). Actual receipt of an original or copy of the

5. Section 48-3-608 provides for an alternative timeframe for revocation in certain factual situations that are not present in this appeal. N.C. Gen. Stat. § 48-3-608(b).

signed consent is further contemplated by Section 48-3-608(a), which requires that a written revocation be delivered "to the person specified in the consent." N.C. Gen. Stat. § 48-3-608(a). Additionally, Section 48-3-606 requires that the consent contain "[t]he name of a person and an address where any notice of revocation may be sent" so that the procedure for revocation in Section 48-3-608(a) may be accomplished. N.C. Gen. Stat. § 48-3-606. Construing the language of Section 48-3-605 *in pari materia* with the revocation requirements in Section 48-3-608, the content requirements of Section 48-3-606, and the underlying purposes of the adoption regime set forth in Section 48-1-100 demonstrates the intent of the legislature that a biological parent consenting to adoption receive, as a matter of fact, an original or copy of the signed consent in order for it to be effectuated.

Taking the provisions of Section 48-3-605 to mean that a consent is "executed" when it is signed by the consenting parent and certified and notarized by a notary, the Iveys further argue that Mother's revocation was time barred by Section 48-3-608 irrespective of when she received an original or copy of the Consent because the time for revocation is calculated from the date of execution, not receipt, of the written consent. We decline to adopt such a narrow interpretation of the word "executed" in this context. As recently reiterated by our Supreme Court:

> [W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

State v. Holloman, 369 N.C. 615, 628, 799 S.E.2d 824, 832-33 (2017) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)) (internal quotation marks and citation omitted). Adopting the strict interpretation of the word "executed" advocated by the Iveys would create just such an absurd result, leaving a consenting parent who never received an original or copy of the signed consent without written notice as to whom to deliver the necessary written revocation. N.C. Gen. Stat. § 48-3-608(a). Such an interpretation would frustrate the very purpose of the revocation procedure, which is inseparable from the intent of the adoption scheme established by law. *See, e.g.*, *In re Adoption of P.E.P.*, 329 N.C. 692, 704, 407 S.E.2d 505, 511 (1991) ("The procedural safeguards provided in the adoption statutes are not mere window dressing—they serve to protect the interests of the parties, the child, and the public."). Keeping in mind the plain language of Sections 48-1-100, 48-3-605, and 48-3-608 as set forth *supra*, we reject a reading of

the relevant statutes that would lead to a result contrary to the legislature's intent. Rather, we hold that the time for revocation under Section 48-3-608(a) does not begin to run until an original or copy of the signed consent is actually delivered to the consenting parent consistent with the provisions and purposes of Section 48-3-605.

We recognize that another primary purpose of the adoption statutes is to "assur[e] the finality of the adoption." N.C. Gen. Stat. § 48-1-100(b)(1)(iv). However, the legislature's statement of multiple primary purposes of these statutes requires that all purposes be respected. Our interpretation of the statutes to require actual delivery of an original or copy of the consent to the consenting parent in order to trigger the time period for revocation does not run counter to this purpose because the professionals responsible for ensuring delivery are in a better position than the biological parent to establish proof of compliance. Nor does it enlarge or expand the timeframe in which a parent may revoke as a matter of law. It instead recognizes the legislature's intention that: (1) a consenting parent receive the necessary information in order to revoke her consent by receiving an original or copy; and (2) the consenting parent have seven days to revoke once such information is furnished in compliance with the law.

Applying the above understanding of the law to the facts of the case, we hold that the trial court did not err in concluding that Mother's revocation was timely. The trial court determined from the evidence that it could not find that Ms. Smith left a copy of the signed consent with Mother, and the trial court found that "Mother did not receive a copy of her signed consent until 29 September 2016." It further found that Mother submitted a notice of revocation within seven days of her receipt of a copy of the Consent. None of these findings was challenged by the Iveys on appeal. They are therefore conclusive. Because we hold that Section 48-3-605 requires actual delivery of an original or copy of the signed consent to the biological parent and the time for revocation in Section 48-3-608(a) does not begin to run until such delivery is accomplished, the trial court did not err in concluding Mother's revocation was timely.

The trial court's findings were supported by substantial evidence. Mother testified under oath that she did not receive an original or copy of the Consent at the time it was signed. Her former foster parent, who was with Mother at the hospital on the night the Consent was signed, also testified that Mother had not received an original or copy. Mother's attorney testified that she "believed" she left a copy of the Consent with Mother at the time it was signed based on her general practice, but she

could not testify with certainty that she had done so. The Iveys did not testify, nor did the notary who signed the certification attached to the Consent. In fact, the Iveys called no witnesses whatsoever, and the trial court only heard testimony from the above three witnesses. The judge, sitting as the finder of fact, had the opportunity to hear and evaluate fact witnesses within weeks of the event in question. After judging their credibility, he found that Mother, as a matter of unchallenged fact, did not receive an original or copy of the Consent at the time it was signed.

This case does not present the dilemma of a biological parent who first challenges an adoption months or years after consenting to relinquish a child. Mother first sought to revoke her consent just eight days after she signed the Consent and the Iveys took custody of the Baby, when Mother was still in the hospital. She filed a legal challenge to the adoption proceeding less than two weeks later. The trial court heard Mother's testimony and received other evidence less than three months after Mother signed the Consent.

The Iveys present a final argument that the trial court's order is contrary to the Notary Public Act, which provides that "[i]n the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation of this Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld . . . ." N.C. Gen. Stat. § 10B-99(a) (2015). Specifically, the Iveys contend that the trial court's finding that Mother did not receive a copy of the Consent at the time it was signed despite the notary's certification that "to the best of [his] knowledge and belief . . . [Mother] received an original or copy of . . . her fully executed Consent" ignored Section 10B-99(a)'s presumption of regularity where there was no evidence of fraud or a knowing and willful violation. We disagree.

The notary certification required by Section 48-3-605 must state only that "*to the best of the [notary's] knowledge or belief*, the parent . . . executing the consent has . . . [b]een given an original or copy of his or her fully executed consent." N.C. Gen. Stat. § 48-3-605(c) (emphasis added). The certification provided by the notary in this case followed this statutory language. Thus, the notary did not certify to *actual* delivery of an original or copy of the Consent to Mother (or actual knowledge thereof), but instead that such delivery had occurred to "the best of [his] knowledge or belief." *See*, *e.g.*, *In re Yopp*, 217 N.C. App. 489, 493, 720 S.E.2d 769, 772 (2011) (noting that the phrase "to the best of my knowledge" in an affidavit is a " 'limitation to the affiant's personal knowledge' " (quoting *Faulk v. Dellinger*, 44 N.C. App. 39, 42, 259 S.E.2d 782, 784 (1979))). The trial court's finding that Mother did not, as a matter of fact, receive

an original or copy of the Consent at the time it was signed does not, therefore, contradict the certification by the notary. It is entirely possible that: (1) the notary believed or to the best of his knowledge thought an original or copy of the Consent had been left with Mother without any actual knowledge thereof; and (2) no such original or copy had, in fact, been delivered. Unlike Mother and her former foster parent, who both testified that Mother did not receive a copy of the Consent on the day she signed it, the notary did not testify before the trial court. Thus, it was entirely appropriate for the trial court to conclude that the notary's certification was valid and proper but that Mother did not receive an original or copy of the Consent, which it did in concluding that "the [C]onsent at issue was validly executed" but that "Mother did not receive a copy of her signed consent until 29 September 2016."

III. Conclusion

North Carolina statutes clearly contemplate that an original or copy of a signed consent to adoption must be delivered to the consenting parent to commence the time period within which the parent can revoke her consent. N.C. Gen. Stat. §§ 48-3-605(c)(3) and 48-3-606(5). We must vindicate this intention in interpreting and applying these statutes. In light of the purposes of the adoption statutes and the intention of the legislature evinced in the above statutes, the trial court did not err in concluding that the biological Mother's revocation of her consent to adoption was timely.

AFFIRMED.

Judges BRYANT and DAVIS concur.

IN RE M.J.S.M.

[257 N.C. App. 633 (2018)]

IN THE MATTER OF M.J.S.M.

No. COA17-688

Filed 6 February 2018

1. Termination of Parental Rights—neglect—probable repetition

There was sufficient support for terminating a mother's parental rights where a social worker's testimony, along with the trial court's findings about the mother's lack of significant progress on her case plan, provided sufficient support for the finding that there would be a probable repetition of neglect if the child was returned to her care. While the mother was correct that she did not completely fail to work on her case plan, that work was only sporadic and inadequate.

2. Termination of Parental Rights—no-merit brief—termination affirmed

The termination of a father's parental rights was affirmed where his counsel filed a no-merit brief and the termination order included sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed. The trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests.

Judge MURPHY concurring in part and concurring in the result in part.

Appeal by Respondent-Parents from order entered 18 April 2017 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 18 January 2018.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Batch, Poore & Williams, PC Sydney Batch, for respondent-appellant mother.

Diepenbrock Law Office, by J. Thomas Diepenbrock, for respondent-appellant father.

K&L Gates LLP, by Hillary Dawe, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-Parents appeal from an order terminating their parental rights to their minor child, M.J.S.M. ("Mary").[1] On appeal, Respondent-Mother argues the trial court erred in terminating her parental rights on the grounds of neglect, willful failure to pay a reasonable portion of the cost of Mary's care, and dependency. Respondent-Father's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). N.C.R. App. P. 3.1(d) (2017). We affirm.

I. Factual and Procedural Background

On 13 April 2016, petitioner Guilford County Department of Health and Human Services ("DHHS") filed a juvenile petition alleging five-month-old Mary to be a neglected and dependent juvenile. The petition alleged DHHS received a Child Protective Services ("CPS") report after Respondent-Father choked, hit, and pushed on the stomach of Respondent-Mother, while she was pregnant with Mary. As a result of Respondent-Father's actions: (1) doctors performed an emergency caesarian section due to fetal distress; (2) Mary had no heartbeat; and (3) doctors had to resuscitate Mary for twenty minutes, immediately after she was born.

In late 2015 and early 2016, Respondent-Parents entered into case plans and agreed Respondent-Father would not have any contact with Respondent-Mother or Mary. On 13 April 2016, a DHHS social worker made an unannounced visit to Respondent-Mother's home and discovered Respondent-Father there. Additionally, Respondent-Mother "failed to comply with the terms of her treatment plan, including her failure to enroll in and attend domestic violence education[.]" Respondent-Father "refused to complete substance abuse counselor or drug screens and has avoided contact with [the social worker]."

Consequently, DHHS filed the petition and requested nonsecure custody of Mary "[d]ue to the ongoing substance abuse and domestic violence and the lack of family resources to provide care and supervision." On 13 April 2016, the court granted nonsecure custody of Mary to DHHS.

On 6 May 2016, Respondent-Mother entered into an out-of-home services agreement with DHHS, replacing her prior case plan. Respondent-Mother agreed to, *inter alia*: (1) submit to a psychiatric assessment and

1. The parties stipulated to this pseudonym for the minor child, pursuant to N.C.R. App. P. 3.1(b) (2017).

comply with any recommendations thereof; (2) complete domestic violence programs and "not have any contact with [Respondent-Father]"; (3) maintain safe, stable housing; (4) maintain stable employment; (5) submit to a substance abuse assessment; and (6) attend other DHHS programs/courses.

On 15 September 2016, the court held a pre-adjudication, adjudication, and dispositional hearing. In an order entered 25 October 2016, the court adjudicated Mary as a neglected and dependent juvenile.[2] Respondent-Mother failed to submit to a psychiatric assessment, maintained contact with Respondent-Father, lived in the same apartment complex as Respondent-Father, failed to attend multiple appointments or did not engage in therapy sessions, failed to maintain employment, and used drugs. Respondent-Father failed to submit to a parenting/psychological assessment, failed to enroll in domestic violence classes, maintained contact with Respondent-Mother, and tested positive for marijuana in a drug screen.

The court ordered Respondent-Parents to comply with their case plans and permitted Respondent-Mother to have supervised visitation with Mary, who remained in DHHS custody, twice per week. The court did not permit Respondent-Father to have any contact with Mary. The court set the primary permanent plan as reunification.

On 20 December 2016, the trial court entered a permanency planning review order.[3] The court found Respondent-Parents showed a "lack of compliance" with their case plans. The court changed the primary permanent plan to adoption, with a secondary plan of reunification. The court ordered DHHS to file a termination of parental rights petition within sixty days. The court also reduced Respondent-Mother's visitation to once per week.

On 27 January 2017, DHHS filed a motion seeking to terminate Respondent-Parents' parental rights to Mary on the grounds of neglect, willful failure to pay a reasonable portion of the cost of Mary's care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3), (6) (2015). The court held a hearing for the motion on 20 March 2017.

On 18 April 2017, the trial court entered an order terminating Respondent-Mother's parental rights based upon all three grounds alleged

---

2. Respondent-Mother stipulated to the allegations in the DHHS petition and consented to the adjudication.

3. The court entered an amended permanency planning order on 17 January 2017, but this did not materially change the substance of the order.

by DHHS and Respondent-Father's parental rights based upon neglect and willful failure to pay a reasonable portion of the cost of Mary's care. Respondent-Parents entered timely notices of appeal.

II. Standard of Review

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984) (citation omitted). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re A.R.H.B.*, 186 N.C. App. 211, 214, 651 S.E.2d 247, 251 (2007) (internal quotation marks and citations omitted), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008).

III. Analysis

A. Respondent-Mother's Appeal

[1] Respondent-Mother argues the trial court erred by concluding three grounds existed to terminate her parental rights. We disagree.

Pursuant to N.C. Gen Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citing N.C. Gen. Stat. § 7B-1111(a)(1)). A neglected juvenile is defined, in relevant part, 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[.]" N.C. Gen. Stat. § 7B-101(15) (2015).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997 (citation omitted). However, when, as here, the child has been removed from her parent's custody such that it would be impossible to show the child is currently being neglected by their parent, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

If a prior adjudication of neglect is considered, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Thus, where:

> there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted). A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *In re D.M.W.*, 173 N.C. App. 679, 688-89, 619 S.E.2d 910, 917 (2005), *rev'd per curiam per the dissent*, 360 N.C. 583, 635 S.E.2d 50 (2006).

In this case, Respondent-Mother concedes Mary was previously adjudicated a neglected juvenile. However, she disputes the evidence at the termination hearing demonstrated a likelihood of future neglect. The trial court made the following finding, with respect to repetition of neglect:

> 17. . . . c. There is a likelihood of the repetition of neglect by [Respondent-Mother], given her history of neglect, her failure to adequately address the issues that resulted in the removal of the juvenile (particularly her mental health), the fact that she continues to minimize the impact of the domestic violence between herself and the father, the fact that she was not truthful about contact between herself and the father since removal of the juvenile, and the fact that she is currently inconsistent with mental health medications and therapy.

Respondent-Mother contends this finding is not supported by competent evidence because she made some progress on various aspects of her case plan. Specifically, she argues there was evidence she: (1) obtained appropriate housing, (2) engaged in some domestic violence counseling, and (3) was taking her prescribed medication for her mental health disorders. While Respondent-Mother is correct she did not completely fail to work on her case plan, the evidence presented at the termination hearing shows this work was only sporadic and inadequate.

In its termination order, the trial court made specific findings regarding Respondent-Mother's progress on her case plan. These findings reflected, *inter alia*, Respondent-Mother: (1) submitted to two psychiatric evaluations, but failed to comply with their recommendations; (2) did not begin taking medication for her mental health issues until March 2017; (3) completed only five of twelve sessions in a domestic violence program; (4) continued to be seen with Respondent-Father and

downplayed his domestic abuse; (5) failed to find housing in a separate apartment complex from Respondent-Father; (6) failed to adequately furnish her apartment; (7) failed to complete her parenting classes; and (8) was fired from multiple jobs due to attendance issues. Moreover, most of the limited progress cited by the trial court in these findings did not occur until after DHHS filed its termination petition. Respondent-Mother does not challenge these findings.

The DHHS social worker also offered the following testimony during the termination hearing with respect to repetition of neglect:

> Q Now, would you advise the Court how the respective parents have contributed to the conditions that led to the removal of the child?
>
> A Engaging in domestic violence, not addressing the mental health and substance issues, failing to comply with the safety plan and services meant to address the risk to the child.
>
> Q And the conditions that led to removal, do they continue to exist at this time?
>
> A Yes.
>
> Q And if you would describe the impact that the parents[’] actions or inactions in this case have had on the juvenile?
>
> . . .
>
> A The mother’s continued denial of domestic violence, their continued meeting and minimizing the issues that brought the child into – into care continue to place the child at risk.
>
> Q So if the -- if the juvenile were to be returned to either parent today, would the abuse or neglect likely continue or be repeated?
>
> A Yes. If they can’t admit that there’s a problem, they can’t change the behavior.

The social worker’s testimony, when considered in conjunction with the court’s findings regarding Respondent-Mother’s lack of significant progress on her case plan, provided sufficient support for the trial court’s determination there would be a probable repetition of neglect if

Mary was returned to her care. Accordingly, the trial court properly terminated Respondent-Mother's parental rights on the ground of neglect.

Since we conclude termination on this ground was proper, we need not address Respondent-Mother's arguments regarding the remaining grounds found by the trial court. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990) (citation omitted) (stating a finding of any of the separately enumerated grounds is sufficient to support termination). The portion of the trial court's order terminating Respondent-Mother's parental rights is affirmed.

B. Respondent-Father's Appeal

[2] Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C.R. App. P. 3.1(d), stating "[t]he undersigned counsel has conducted a conscientious and thorough review of the record on appeal. After this review, counsel concludes that the record contains no issue of merit on which to base an argument for relief and the appeal would be frivolous." Counsel asks this Court to conduct an independent review of the record for possible error. Additionally, counsel demonstrated he advised Respondent-Father of his right to file written arguments with this Court and provided him with the documents necessary to do so. Respondent-Father failed to file his own written arguments.

Consistent with the requirements of Rule 3.1(d), counsel directs our attention to the issue of whether the ground of neglect was sufficiently supported by the trial court's findings of fact. However, counsel acknowledges he cannot make a non-frivolous argument that Respondent-Father's parental rights should not be terminated on the ground of willful failure to pay a reasonable portion of the cost of Mary's care. As a result, his argument as to neglect does not provide a meritorious basis for appeal. *See Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34 (citation omitted).

After careful review, we are unable to find any possible prejudicial error by the trial court. As acknowledged by Respondent-Father's counsel, the termination order includes sufficient findings of fact, supported by clear, cogent, and convincing evidence, to conclude at least one statutory ground for termination existed. Moreover, the court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests. N.C. Gen. Stat. § 7B-1110(a) (2015). Accordingly, we affirm the portion of the trial court's order terminating Respondent-Father's parental rights.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating Respondent-Parents' parental rights.

AFFIRMED.

Judge DILLON concurs.

Judge MURPHY concurring in part and concurring in the result in part.

MURPHY, Judge, concurring in part and concurring in the result in part.

I concur in the Majority's opinion as it relates to Respondent-Father, and I concur in the result as it relates to Respondent-Mother. The Majority correctly states that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." However, I do not agree that the Respondent-Mother's actions after the initial finding of neglect indicate that she has failed to make progress. She made significant progress to improve her condition and express her love for her child, and the findings of fact do not support the conclusion that her parental rights should be terminated in accordance with N.C.G.S. § 7B-1111(a)(1). Further, given her limited income, her small payments of child support for Mary were not unreasonable and grounds do not exist to terminate her parental rights in accordance with N.C.G.S. § 7B-1111(a)(3).

The findings of fact, however, do support the trial court's conclusion that grounds existed to terminate Respondent-Mother's parental rights in accordance with N.C.G.S. § 7B-1111(a)(6).

> The court may terminate the parental rights upon a finding . . . [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S.§ 7B-1111(a)(6)(2017).

Respondent-Mother continues to struggle with mental health issues that will not be corrected in the foreseeable future, and she is incapable of providing for the proper care and supervision of Mary, a dependent juvenile. She also lacks an alternative child care arrangement. The trial court's findings of fact support this conclusion of law. Therefore, I concur in the result reached by the Majority in affirming the termination of Respondent-Mother's parental rights to Mary.

ANTHONY V. MARTIN, AND WIFE, SHERRY H. MARTIN, PLAINTIFFS
v.
MACK DEVAUGHN POPE, DEFENDANT

No. COA17-389

Filed 6 February 2018

1. Appeal and Error—JNOV—directed verdict motion—not renewed at the close of all evidence

Defendant did not preserve for appellate review the denial of his motion for JNOV when he did not move for a directed verdict at the close of all the evidence.

2. Civil Procedure—Rule 59 motion—standard of review on appeal

The Court of Appeals reviewed the trial court's denial of plaintiff's motion for a new trial under an abuse of discretion standard rather than de novo, and concluded that the trial court did not abuse its discretion. The trial court made a reasoned decision that was not manifestly arbitrary or a substantial miscarriage of justice.

3. Appeal and Error—preservation of issues—judge's response to jury question—invited error

The invited error doctrine barred appellate review of the trial court's answer to a jury question during deliberations where defendant initially consented to the answer and objected only after the jury resumed deliberations.

4. Parties—motion to add—denied—no abuse of discretion

There was no abuse of discretion in the trial court's denial of defendant's motion to add parties where the rulings on these issues were the result of reasoned decisions. The trial court ruled that adding a third-party defendant would be futile because it would not

impact the claims and prejudicial because the motion was made too close to the scheduled start of the trial.

5. Appeal and Error—attorneys—motion to disqualify denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion to disqualify plaintiffs' counsel where plaintiffs' attorney had represented defendant's ex-wife in an unrelated family law proceeding. The orders from that proceeding were public records, and there was no evidence that plaintiffs' counsel was aware of any information about defendant that would require disqualification.

6. Appeal and Error—preservation of issues—cross-appeal—argument included in appellee's brief

Plaintiffs' cross-appeal regarding attorney fees was deemed abandoned where they did not file an appellants' brief but included their argument in their appellee's brief. There was prejudice in that defendant was forced to respond in a 3,750-word reply brief while addressing plaintiffs' other claims on appeal, rather than in a 8,750-word appellee's brief.

Appeals by plaintiffs and defendant from judgment entered 27 July 2016 by Judge John W. Smith in Harnett County Superior Court. Heard in the Court of Appeals 1 November 2017.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiffs-appellees.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for defendant-appellant.

DIETZ, Judge.

Defendant Mack Pope appeals from a judgment finding him liable for concealing environmental contamination on property he sold to Plaintiffs Anthony and Sherry Martin.

As explained below, the bulk of Pope's arguments, which concern the statute of limitations and sufficiency of the evidence, are not preserved for appellate review because Pope failed to assert those issues in a directed verdict motion at the close of all the evidence at trial.

Pope's challenge to the trial court's answer to a jury question during deliberations likewise is barred because Pope initially consented to

that answer and only objected after the jury resumed deliberations. His objection is therefore barred by the invited error doctrine.

Pope's challenges to the denial of leave to assert third-party claims and to disqualify the Martins' counsel are reviewed for abuse of discretion. As explained below, we hold that the trial court's rulings on those issues were the product of reasoned decisions and thus within the trial court's sound discretion.

The Martins also cross-appealed, challenging the denial of their motion for attorneys' fees. But despite filing a cross-appeal, the Martins did not file an appellants' brief, instead including their argument in their appellees' brief. Because the lack of an appellants' brief prejudiced Pope, we deem this issue abandoned on appeal. Accordingly, we affirm the trial court's judgment.

Facts and Procedural History

The jury in this proceeding returned a verdict in favor of Plaintiffs Anthony and Sherry Martin and we therefore recite the relevant facts in the light most favorable to the Martins. We acknowledge that Defendant Mack Pope disputed many of these facts at trial.

In July 2004, Pope purchased property in Dunn from Royster-Clark, Inc. At the time, Pope received an environmental report of the property, which stated that the property had "recognized environmental conditions." Pope then leased the property to Agrium U.S. Inc.

In December 2007, Pope hired an environmental expert to conduct a limited environmental assessment, which did not include any groundwater testing. The report concluded that, "In review of the information as described herein regarding activities on and adjacent to the subject property, no physical evidence was discovered indicating ongoing negative environmental impacts to the subject property."

Between late 2007 and early 2008, Pope contracted to sell the property to a third party. The sale eventually fell through when the purchaser requested an extensive environmental report that included groundwater testing. That testing identified contaminants well above the legal limit.

In 2008, Anthony Martin expressed an interest in buying the property after learning that it was for sale. At a later meeting, in response to Mr. Martin's question regarding the current state of the property, Pope indicated that the property was "clean" and that it had no environmental risks or problems and provided Mr. Martin with a copy of the more limited 2007 environmental report. Pope did not provide Mr. Martin with

the 2008 report that found environmental contamination. On 20 March 2009, Pope sold the property to the Martins for $500,000.

In early 2013, the Martins agreed to sell the property to a new buyer for $800,000. Before the closing date, a loan officer for the purchaser discovered that the property was listed on a hazardous waste site list maintained by our State's environmental protection agency. After being advised of the status of the property, the Martins' attorney obtained a copy of the 2008 report and informed the buyer's attorney. The sale then fell apart.

The Martins later sued Pope for fraud and unfair and deceptive trade practices based on Pope's alleged concealment of the environmental contamination on the property. The jury returned a verdict in the Martins' favor on their claims and awarded both compensatory and punitive damages. The trial court later denied Pope's motion for JNOV or, alternatively, for a new trial. The trial court also denied the Martins' request for attorneys' fees. Pope timely appealed the judgment and the denial of his corresponding post-trial motions, and the Martins timely appealed the denial of their motion for attorneys' fees.

Analysis

We begin by addressing Pope's challenges to the verdict and various pre-trial and trial rulings. We then turn to the Martins' appeal from the denial of their request for attorneys' fees.

I. Denial of Pope's motion for JNOV

[1] We first address Pope's challenge to the denial of his motion for JNOV. Pope argues that the Martins' claims are barred by the statute of limitations and that there was insufficient evidence that he made any false representations; insufficient evidence that the Martins reasonably relied on those representations; and insufficient evidence that the Martins suffered any damages as a result. For all of these reasons, Pope argues that the trial court should have granted his JNOV motion and set aside the verdict as a matter of law.

We cannot address these arguments because Pope waived them. A JNOV motion is "essentially a renewal of a motion for directed verdict." *Barnard v. Rowland*, 132 N.C. App. 416, 421, 512 S.E.2d 458, 463 (1999). As a result, a JNOV motion "must be preceded by a motion for directed verdict at the close of all evidence." *Id.* Indeed, the official comment accompanying Rule 50 of our Rules of Civil Procedure, which governs the procedure for both directed verdict motions and JNOV motions, emphasizes that a directed verdict motion is an "absolute prerequisite" to a JNOV motion. N.C. Gen. Stat. § 1A-1, Rule 50, cmt.

Moreover, it is well-settled that to preserve the ability to assert a JNOV motion, a litigant must move for a directed verdict at the close of *all* the evidence, not merely at the close of the plaintiff's case. *Gibbs v. Duke*, 32 N.C. App. 439, 442, 232 S.E.2d 484, 486 (1977). This is so because, once defendants have presented their own case, the evidence in the trial record has changed. Although defendants during their own case in chief typically are focused on presenting evidence that disproves the plaintiff's allegations, through cross-examination or introduction of exhibits defendants may introduce the very evidence that renders the directed verdict improper.

For this reason, our Court repeatedly has held that "[b]y offering their own evidence, defendants waived their motion for a directed verdict made at the close of plaintiffs' evidence and, in order to preserve the question of the sufficiency of the evidence for appellate review, they were required to renew this motion at the close of all the evidence." *Cannon v. Day*, 165 N.C. App. 302, 305–06, 598 S.E.2d 207, 210 (2004). This rule also is followed by the federal courts and our sister states. *See*, *e.g.*, *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979); *Mathieu v. Gopher News Co.*, 273 F.3d 769, 776 (8th Cir. 2001); *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977); *State v. Hepbur*n, 753 S.E.2d 402, 410 (S.C. 2013).

Here, Pope concedes that, although he moved for a directed verdict at the close of the Martins' case, he did not renew that motion at the close of all the evidence. We are bound by our precedent holding that a JNOV motion must be preceded by a motion for directed verdict at the close of *all* the evidence; thus, we must hold that Pope's JNOV arguments are waived on appeal.

We acknowledge that this is a harsh outcome. But our precedent contains many examples of litigants who sought to raise what they believed to be meritorious JNOV arguments on appeal, only to have those arguments deemed waived for failure to make an appropriate motion for directed verdict. *See Gibbs*, 32 N.C. App. at 442, 232 S.E.2d at 486; *Overman v. Products Co.*, 30 N.C. App. 516, 520, 227 S.E.2d 159, 162 (1976); *Plasma Ctrs. Of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 88, 731 S.E.2d 837, 841 (2012).

The public, and other jurisdictions that may be called on to recognize our State's court judgments, expect our courts to apply procedural rules uniformly to all litigants who appear before them. Thus, although we recognize that justice is best served when this Court reaches the merits of the underlying issues raised on appeal, we are obligated to

enforce this well-settled procedural rule and hold that Pope's JNOV arguments are waived.

II. Denial of Pope's motion for new trial

[2] Pope next argues that the trial court erred by failing to grant his motion for a new trial. Pope acknowledges that, ordinarily, we review the denial of a Rule 59 motion for abuse of discretion and "a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). But Pope argues that his Rule 59 motion involves questions of "law and legal inference" and that this Court should apply *de novo* review.

The cases on which Pope relies for asserting a *de novo* standard of review involve trial courts acting under a misapprehension of the law. *See*, *e.g.*, *Chiltoski v. Drum*, 121 N.C. App. 161, 165, 464 S.E.2d 701, 704 (1995). The task of determining whether Pope asserted arguments similar to those in *Chiltoski* is hamstrung by the fact that the key page of Pope's Rule 59 motion—the page containing most of the grounds on which he sought a new trial—is not in the record on appeal. From surrounding context, from the Martins' response to that Rule 59 motion, and the parties' arguments on appeal, it appears that Pope focused his new trial arguments on the sufficiency of the evidence presented at trial. "[A] motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court." *Jones v. Durham Anesthesia Assocs.*, *P.A.*, 185 N.C. App. 504, 508, 648 S.E.2d 531, 535 (2007). Accordingly, we reject Pope's request to review the trial court's ruling *de novo* and instead review for abuse of discretion.

Under this standard, the trial court's decision to deny the motion for new trial was within its sound discretion. Although we acknowledge that Pope disputes much of the evidence on which the jury apparently relied, our Supreme Court has cautioned us that we should not second guess trial courts when evaluating the sufficiency of the evidence under Rule 59. "Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 (1982). As a result, "an appellate court should not disturb a discretionary Rule

59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* We recognize that this was not an easy case for the jury or the trial court. But our review of the appellate record convinces us that the trial court made a reasoned decision to deny the Rule 59 motion and that decision is not manifestly arbitrary or a substantial miscarriage of justice. Accordingly, we hold that the trial court did not abuse its discretion.

III. Challenge to the jury instructions

[3] Pope next argues that the trial court gave an erroneous and prejudicial answer in response to a question from the jury during deliberations. As explained below, Pope again failed to preserve this argument for appellate review.

During the jury charge, the trial court instructed the jury that, on the issue of the statute of limitations, the four-year limitations period began to run from the time the Martins "actually discovered or should have discovered the facts constituting the fraud." After deliberating for a time, the jury asked the trial court whether the Martins had to "satisfy both parts . . . as to the discovered or should have discovered the environmental issue." In other words, the jury appeared to be asking whether the Martins had to show both that they did not know *and* should not have known of the environmental contamination more than four years before filing suit.

The court discussed a proposed response to the question with the parties outside the jury's presence and ultimately gave the jury the following answer: "The burden is upon the plaintiffs to prove that they discovered or should have discovered. But not both." Pope concedes in his appellate brief that he discussed this proposed answer with the court before it was given and initially told the court that this answer "was correct." The trial transcript confirms this; after the jury retired with its answer, the court asked the parties, "Does that concur with what we discussed at the bench to the satisfaction of both sides?" Counsel for both parties replied, "Yes, sir."

Then, at some later point while the parties remained in the courtroom waiting on a jury verdict, counsel for Pope asked to approach the bench again. After a brief off-the-record discussion, the trial court stated on the record that Pope now objected to the court's answer. Pope's counsel explained to the court that "[w]e believe that is an incorrect statement" because the jury may mistakenly have interpreted the court's answer to mean that the Martins only had to prove that they did not

know *or* should not have known of the contamination more than four years before filing suit, rather than having to prove both that they did not know *and* should not have known.

After hearing from both parties, the trial court declined to call the jury back to change the answer, explaining that "I think it would be confusing and prejudicial at this stage."

In light of Pope's concession that he initially approved the trial court's proposed answer before it was given—a fact confirmed by the trial transcript—we hold that Pope has waived this argument on appeal. Our Supreme Court has long recognized that "under the doctrine of invited error, a party cannot complain of a charge given at his request." *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947).

A trial court's answer to a jury question is treated as an instruction to the jury. *See State v. Farrington*, 40 N.C. App. 341, 345, 253 S.E.2d 24, 27 (1979); *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992); *State v. Smith*, 188 N.C. App. 207, 211, 654 S.E.2d 730, 734 (2008). Thus, to preserve an objection on this issue, Pope had to object and state the grounds for the objection *before* the court answered the jury's question and permitted them to retire for further deliberations. *See State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). Because Pope did not object to the proposed answer until after the court read the answer to the jury and permitted the jury to continue deliberations, and because Pope concedes that he initially approved that proposed answer, Pope has failed to preserve his objection for appellate review. *State v. Gainey*, 355 N.C. 73, 106, 558 S.E.2d 463, 484 (2002).

IV. Motion to add third-party defendant

[4] Pope next argues that the trial court erred by denying his motion to add Agrium U.S. Inc.—the firm that leased the property from Pope—as a third-party defendant. Pope argues that "[t]o the extent that there is contamination on the property . . . it is possible that Agrium is partly responsible and partly liable."

Pope concedes that this Court reviews the trial court's refusal to grant leave to add Agrium for abuse of discretion. *See Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 489 (1972). Under this standard of review, we can reverse the trial court only if the court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006). Thus, in most cases, "[i]f the trial court articulates a clear reason for denying the motion . . . our review ends." *NationsBank*

of North Carolina, N.A. v. Baines, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994).

The trial court's ruling was not an abuse of discretion under this standard. The court ruled that adding Agrium as a third-party defendant would be futile because, even if Agrium caused the contamination, it would not impact the Martins' claims, which were based on allegations that Pope knew of the contamination and concealed it from the Martins. The trial court also ruled that adding Agrium would be prejudicial because Pope's motion was made too close to the scheduled start of the trial. We hold that the trial court's analysis was the product of a reasoned decision, not an arbitrary one, and thus the court's refusal to permit Agrium to be added as a third-party defendant was well within its sound discretion.

V. Motion to disqualify counsel

[5] Finally, Pope argues that the trial court erred by denying his motion to disqualify the Martins' counsel. A motion to disqualify counsel "is discretionary with the trial judge and is not generally reviewable on appeal." *In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764–65 (1987). This Court's review is limited to whether the court abused its discretion—which, again, means this Court can reverse only if we conclude that the decision was "so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

The trial court's decision was within its sound discretion under this standard of review. The Martins' counsel also represented Pope's ex-wife in an unrelated family law proceeding. During the punitive damages phase of the trial, the Martins introduced into evidence a child support order and equitable distribution affidavit from that other proceeding. Pope moved to disqualify the Martins' counsel on the ground that counsel may be aware of confidential spousal communications that occurred during the marriage, and because the custody order and affidavit from the family law proceeding "very likely" came from Pope's ex-wife.

The trial court denied the motion to disqualify on the ground that the custody order and affidavit were public records and there was no evidence that the Martins' counsel was aware of any confidential information about Pope that would require disqualification in this lawsuit. The trial court's ruling was the result of a reasoned decision and not arbitrary. Accordingly, under the applicable standard of review, we hold that the trial court did not abuse its discretion by denying the motion to disqualify.

VI. The Martins' motion for attorneys' fees

[6] The Martins also challenge the trial court's judgment in this case, arguing that the court should have awarded them attorney's fees. The Martins concede that, although they filed a timely notice of appeal challenging the denial of their motion for attorneys' fees, they did not file an appellants' brief on this issue; instead, the Martins raised this issue in their appellees' brief after responding to Pope's arguments.

A party who files a notice of appeal must file an appellant's brief setting forth the reasons why the challenged order or judgment is infirm. *See Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 118, 344 S.E.2d 97, 99 (1986). Ordinarily, an appellant who fails to file an appellant's brief will be deemed to have abandoned any argument on those issues. *See* N.C. R. App. P. Rule 28(h) (2017). Applying that rule here, the Martins abandoned their attorneys' fees challenge by failing to submit an appellants' brief on that issue.

To be sure, the Martins presented their argument in their appellees' brief, so this Court understands the merits of their claim. And, we recognize that our Supreme Court has encouraged us to reach the merits of issues presented on appeal whenever possible, to ensure "fundamental fairness to litigants" and to "promote public confidence in the administration of justice in our appellate courts." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008).

But this case is a rare example of one in which fundamental fairness and public confidence in the administration of justice cut the other way. The bulk of the Martins' brief addresses Pope's failure to preserve his own arguments for appellate review. Were we to reach the merits of the Martins' attorneys' fees claim, while declining to address Pope's arguments because they were not preserved, the result would appear unfair and unjust. As a colleague on our State's federal bench once observed, "courts recognize that what is good for the goose is good for the gander." *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010).

Moreover, Pope was prejudiced by the sequencing of the Martins' arguments. Had the Martins filed an appellants' brief, Pope could have responded to the attorneys' fees issue in an 8,750-word appellee's brief. Instead, Pope was forced to respond to the Martins' attorneys' fees issue in a far shorter 3,750-word reply brief while also addressing the Martins' arguments concerning his own claims on appeal. Thus, we hold that the interests of justice are best served by deeming the Martins' attorneys' fees issue abandoned for failure to assert it in an appellants' brief.

Conclusion

For the reasons discussed above, we affirm the trial court's judgment.

AFFIRMED.

Judges ELMORE and INMAN concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
DAWN E. ELY, ATTORNEY, Defendant

No. COA17-546

Filed 6 February 2018

1. Attorneys—disciplinary order—adjudicatory portion—administrative suspension—violation of Rules of Professional Conduct—Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c)

The Disciplinary Hearing Commission of the N.C. State Bar did not err by making certain challenged findings of fact to support its conclusions that defendant violated the N.C. Rules of Professional Conduct 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) in the adjudicatory portion of the disciplinary order based on defendant's actions in holding herself out as a licensed attorney despite an administrative suspension, continued operation of a company despite an administrative suspension, solicitation of professional employment for pecuniary gain via electronic communications, and holding another unlicensed individual out as an attorney offering legal services on behalf of the company.

2. Attorneys—disciplinary order—dispositional phase—act with the potential to cause harm—acts of dishonesty, misrepresentation, deceit, or fabrication—multiple offenses—refusal to recognize wrongful nature of conduct

The Disciplinary Hearing Commission of the N.C. State Bar did not err by making its findings and conclusions during the dispositional phase enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar that defendant intended to commit an act with the potential to cause harm; committed acts of dishonesty, misrepresentation, deceit, or fabrication; committed multiple offenses; and refused to recognize the wrongful nature of her conduct.

3. Attorneys—disciplinary order—five-year suspension—multiple instances of improper conduct

The Disciplinary Hearing Commission of the N.C. State Bar did not err by suspending defendant's license for five years where it sufficiently linked defendant's multiple instances of improper conduct to the potential for significant harm to the public and determined that a lesser sanction would fail to adequately address the severity of her misconduct. Defendant had an opportunity to reduce her suspension to two years if she complied with the requirements of her administrative suspension.

Appeal by defendant from order entered 24 August 2016 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 17 October 2017.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for plaintiff-appellee.

Crawford & Crawford, PLLC, by Robert O. Crawford III, for defendant-appellant.

DAVIS, Judge.

Dawn E. Ely appeals from an order of discipline entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar suspending her law license for a period of five years after determining that she had committed a number of violations of the North Carolina Rules of Professional Conduct. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

On 10 September 1993, Ely was admitted to the State Bar as an attorney licensed to practice law in North Carolina. In October 2006, she also became a licensed attorney in Georgia.

In 2005, Ely formed a business called Palladium Legal Services, LLC ("Palladium"), a limited liability company registered in Georgia. Palladium offers temporary or full-time in-house legal counsel for small to mid-sized businesses. In order to obtain its services, clients must first pay a fee to Palladium and are then matched with one of the company's attorneys, who are called "Chief Legal Officers" ("CLOs"). These CLOs receive from Palladium a portion of the fee paid to the company by the client. The CLOs do not receive any compensation directly from the client.

For several years, Ely served as the president of Palladium and as one of its CLOs. She is also the sole member of the limited liability company.

On 10 June 2011, Ely was administratively suspended by the State Bar from the practice of law in North Carolina for noncompliance with continuing legal education and dues requirements. On 1 July 2011, she was also suspended from practicing law in Georgia due to her failure to pay mandatory membership dues.

Despite these administrative suspensions, Palladium continued to operate, and Ely remained in her position as president. Her biographical information — including her previous legal experience — remained on Palladium's website on a webpage titled "Meet our CLOs."

In January 2008, Ely sent on behalf of Palladium a proposed employment contract to Henry Abelman, a North Carolina attorney whose license was inactive. Abelman did not sign the contract and never formally agreed to become a CLO. Ely nevertheless updated Palladium's website to list Abelman's biographical information and display his picture on the "Meet our CLOs" webpage.

In August and September 2012, mass-marketing emails were sent at Ely's direction targeting small business owners in North Carolina and informing them of the legal services offered by Palladium. One of the recipients of these emails was Tony Maupin, a North Carolina business owner, who received both an initial email and a follow-up email. At the bottom of the emails to Maupin, Ely signed her name as "Dawn Ely, Esq." Maupin subsequently filed a grievance against Ely with the State Bar regarding the emails.

On 6 September 2012, the Authorized Practice Committee of the State Bar sent Ely a letter informing her that she was "engaged in activities that may constitute the unauthorized practice of law in North Carolina." The record does not indicate that Ely ever responded to the letter. On 2 February 2015, the committee followed up on its 6 September 2012 letter with a Letter of Caution, informing her that the committee had "probable cause to believe that . . . [her] activities . . . violate[d] the unauthorized practice of law statutes." Once again, the record is devoid of any response from Ely.

On 30 July 2015, the Grievance Committee of the North Carolina State Bar issued a Notice of Admonition to Ely. Ely informed the State Bar on 9 September 2015 that she was "reject[ing] the allegations contained in th[e] Admonition."

On 4 January 2016, the State Bar filed a complaint with the DHC alleging violations of Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) of the North Carolina Rules of Professional Conduct based on Ely's (1) actions in holding herself out as a licensed attorney despite her administrative suspension; (2) continued operation of Palladium despite her administrative suspension; (3) solicitation of professional employment for pecuniary gain via electronic communications; and (4) actions in holding Abelman out as an attorney offering legal services on behalf of Palladium.

A hearing on the State Bar's complaint was held on 15 July 2016 before a panel of the DHC. On 24 August 2016, the DHC issued an Order of Discipline suspending Ely's license to practice law in North Carolina for five years. Ely filed a timely notice of appeal.

Analysis

On appeal, Ely challenges several of the DHC's findings of fact and conclusions of law made in connection with both the adjudicatory and dispositional phases of the hearing as well as the DHC's ultimate decision to suspend her law license. We first set out the standard of review applicable to orders of discipline from the DHC. Second, we address Ely's arguments as to the sufficiency of the DHC's findings of fact and conclusions of law in the adjudicatory phase. Third, we assess her contentions as to the findings and conclusions with regard to the dispositional phase. Finally, we consider Ely's challenge to the severity of her ultimate punishment.

I. Standard of Review

Pursuant to N.C. Gen. Stat. § 84-28, the DHC has the power to discipline any attorney admitted to practice law in the State of North Carolina upon determining that she has violated the North Carolina Rules of Professional Conduct. N.C. Gen. Stat. § 84-28(b)(2) (2017). A party may appeal to this Court from a final order of the DHC. N.C. Gen. Stat. § 84-28(h).

Disciplinary proceedings of the DHC are divided into two phases: At the "adjudicatory phase," the question is whether "the defendant commit[ed] the offense or misconduct[.]" *N.C. State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003). At the "dispositional phase," the issue concerns "[w]hat is the appropriate sanction for committing the offense or misconduct?" *Id.*

In reviewing an order of discipline by the DHC, we apply the whole record test. This test

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id. at 632, 576 S.E.2d at 309-10 (internal citations, quotation marks, and brackets omitted).

In applying this test, we employ a three-pronged inquiry: "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *N.C. State Bar v. Sossomon*, 197 N.C. App. 261, 275, 676 S.E.2d 910, 920 (2009) (citation omitted). "This three-step process must be applied separately to each disciplinary phase[.]" *Id.* (citation omitted).

II. Adjudicatory Phase

A. Challenged Findings of Fact

[1] Ely first argues that the evidence at the hearing was inadequate to support several findings of fact made by the DHC in the adjudicatory phase. The DHC's findings of fact stated as follows:

> 1. Defendant, Dawn E. Ely ("Defendant"), was admitted to the North Carolina State Bar on September 10, 1993; and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the

Rules and Regulations of the State Bar, and the Rules of Professional Conduct.

2. Defendant was administratively suspended by the North Carolina State Bar on June 10, 2011 for failure to comply with Continuing Legal Education requirements.

3. As of July 15, 2016, Defendant was still administratively suspended in North Carolina.

4. Defendant is also a licensed attorney in Georgia but has been administratively suspended since July 1, 2011 due to her failure to pay mandatory bar dues.

5. As of July 15, 2016, Defendant was still administratively suspended in Georgia.

6. Defendant operates a business registered in Georgia called Palladium Legal Services, LLC ("PLS") that functions under the trade name Palladium Chief Legal Officers ("PCLO").

7. Neither PLS nor PCLO is authorized to provide legal services in North Carolina.

8. Defendant describes herself as the "President and Founder" of PCLO.

9. Defendant advertises the services of PCLO via email solicitations and a website, www.palladiumclos.com.

10. According to the PCLO website and Defendant's email solicitations, PCLO offers to provide various businesses with legal services through a number of lawyers on the PCLO staff, including Defendant.

11. According to the PCLO website and Defendant's email solicitations, Defendant holds herself out to residents of North Carolina and Georgia as able to provide them with legal services through PCLO despite not being actively licensed in either state.

12. Defendant offers the services of PCLO to businesses and individuals in various states, including those in North Carolina and Georgia.

13. Defendant describes the legal services PCLO offers as "in-house" legal counsel services provided by "Chief Legal Officers."

14. Defendant offers to provide the legal services of attorneys under contract with PCLO to other businesses on a temporary or as needed basis.

15. To obtain the services of these attorneys, clients must retain and pay PCLO which will then instruct one of its attorneys to provide legal services to the client upon payment from PCLO.

16. PCLO attorneys are employees of PCLO and not the companies they serve.

17. Defendant makes all hiring and firing decisions regarding the attorneys who work for PCLO.

18. PCLO attorneys are not paid directly by the businesses they serve, but rather are paid by PCLO.

19. Defendant has sent solicitation emails to potential clients in North Carolina and other states representing that PCLO could provide them with legal services and advice.

20. In August and September of 2012, Defendant sent emails to Tony Maupin, a North Carolina resident and the owner of a North Carolina company, soliciting his business by offering to provide him with legal services through PCLO attorneys, including Defendant.

21. In Defendant's emails to Tony Maupin, she used the designation "Esq." after her name despite not being actively licensed to practice law in any state at the time.

22. The designation "Esq.," an abbreviation for "Esquire," has historically been used in the United States to indicate to others that someone is an attorney licensed to practice law. Defendant was using the designation "Esq." for this purpose.

23. In or around January 2008, Defendant sent a proposed employment contract to Henry Abelman ("Abelman"), a North Carolina licensed attorney who moved to inactive status in 1998, in an effort to hire him as an attorney employee of PCLO.

24. The contract Defendant sent to Abelman notes in one provision that Abelman "agrees to perform legal

counsel services on behalf of Company [PCLO] to third party companies retaining Company[.]"

25. Abelman did not agree to the provisions in the contract and did not agree to become an employee of Defendant's company.

26. Defendant nonetheless held out on her website that Abelman was an employee of PCLO and was able to provide legal services to North Carolina residents on behalf of the company.

27. The contract Defendant had clients of Palladium sign indicated in numerous places that Palladium was providing legal services to the clients:

> a. "This Attorney Engagement & Consulting Agreement for Services ("Agreement") is made and entered into effective as of the ___ day of ___, 2015, by and between Palladium Legal Services, a Georgia LLC d/b/a Palladium Chief Legal Officers ("Palladium" or "Company") with offices at 2625 Piedmont Rd., NE, Suite 56-117, Atlanta GA 30324 and _____, a _____ company with its principal offices located at _____ ("Client")."
>
> b. "Client hereby engages Company [Palladium], to provide in-house legal services for the term and compensation described herein. Company agrees to assign an appropriate Paladium [sic] Attorney, who at the time of execution of this Agreement shall be _____ ("Attorney") to perform the services specified in the "Description of Services" (the "Services") attached to this Agreement as Exhibit A and incorporated herein by reference."
>
> c. "Company [Palladium] warrants that it shall perform the Services utilizing at least the degree of skill and care exercised by diligent and prudent professionals performing similar services in accordance with best industry practices."

Although Ely challenges Finding Nos. 11, 22, and 26, the remainder of the above-quoted findings are unchallenged. Thus, these unchallenged findings are binding on appeal. *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."). We address each challenged finding of fact below.

1. Finding of Fact No. 11

Finding No. 11 states as follows:

> 11. According to the PCLO website and Defendant's email solicitations, Defendant holds herself out to residents of North Carolina and Georgia as able to provide them with legal services through PCLO despite not being actively licensed in either state.

Ely argues that she "did not provide legal services to anyone after being administratively suspended in North Carolina and Georgia and had not practiced law for several years before the suspensions." Moreover, she asserts that "[n]owhere on the website did she affirmatively state that she was actively licensed to practice law in North Carolina or that she was available to be a chief legal officer for any company."

During the adjudicatory phase of the 15 July 2016 hearing, the State Bar offered as evidence excerpts from Palladium's website. On the website's "Meet our CLOs" webpage, Ely was prominently listed as a CLO who could serve a client's legal needs. The webpage referenced Ely's previous legal experience (including her background serving as in-house counsel) and did not contain any statement or suggestion that she was not currently licensed to practice law in North Carolina.

The State Bar also provided evidence of the email correspondence between Ely and Maupin. In her email to Maupin, Ely stated that she wanted to discuss legal matters with him if he had time to speak to her. In this email, she made direct reference to Palladium's website by including a hyperlink to the "Meet our CLOs" webpage. Thus, had Maupin — or any other potential North Carolina client receiving this email — clicked onto this webpage link, he would have been under the false impression that Ely was licensed to provide legal services to clients in North Carolina. Thus, the DHC's finding that Ely falsely held herself out as being able to provide legal services was supported by clear, cogent, and convincing evidence.

2. Finding of Fact No. 22

Finding No. 22 states as follows:

> 22. The designation "Esq.," an abbreviation for "Esquire," has historically been used in the United States to indicate

> to others that someone is an attorney licensed to practice law. Defendant was using the designation "Esq." for this purpose.

Ely argues that Finding No. 22 was unsupported by evidence regarding her purpose in using the abbreviation "Esq." and the historical meaning of that term. The State Bar introduced evidence of Ely's first email to Maupin, which stated as follows:

> Hi Tony,
>
> Business executives complain about the high cost of legal services and the frustrating inaccessibility to legal expertise that can often compromise their business goals. In a quick 10 minute call I'd like to learn your areas of concern and explain how Palladium CLOs can provide you with answers and solutions – we are willing to provide you with information and see where we can help.
>
> Palladium Chief Legal Officers solve these problems by providing access to a cost-effective, part-time, in-house legal counsel who delivers extraordinary value to your company: Highly-experienced CLOs who understand business needs and have worked in your industry. Our fees are cost-effective with flat rates with zero infrastructure costs (vs. employee or hourly consultant model). Our service options are based on your legal needs and for less than your current legal fees, more work will get done, with the same level of expertise.
>
> Tony, are there 10 minutes in the upcoming weeks that I can call you to discuss these matters?
>
> Regards,
>
> Dawn Ely, Esq.
> President & Founder[1]

During Ely's cross-examination at the adjudicatory phase of the hearing, the following exchange occurred:

> [COUNSEL FOR STATE BAR:] And you indicate here at the bottom of both emails, you have your name and then you have "Esquire."

1. As noted above, the email contained a hyperlink that allowed the recipient to access Palladium's website.

[ELY:] Uh-huh (yes).

[COUNSEL FOR STATE BAR:] Why is that?

[ELY:] Well, because I have always, since I passed the bar, used that E-s-q as an identifier that I am a lawyer.

[COUNSEL FOR STATE BAR:] So it identifies that you are an attorney.

[ELY:] It identifies that I'm an attorney, but my role with the company is not as a chief legal officer, it is identified there in my signature block as president and founder.

[COUNSEL FOR STATE BAR:] But you included the esquire to identify to Mr. Maupin that you are an attorney.

[ELY:] An attorney that, frankly, because I am an attorney, I do understand all of these issues, I understand the needs, I understand the type of person that would be the right person for a particular role.

[COUNSEL FOR STATE BAR:] So you're indicating to him that your experience, which is also he [sic] could find on your website, and the legal services that you have provided to others in the past, which he could also find on your website, really adds some validity to Palladium.

[ELY:] I think it clarifies what my background and knowledge base is.

[COUNSEL FOR STATE BAR:] To what end?

[ELY:] To the fact that I have been there, I know what some of these issues are in terms of what a business needs, where a business can sometimes falter. I've had people, when they have a call with me, ask me, "Are you an attorney yourself?" and I say yes.

I've also have [sic] companies ask me if I can be their chief legal officer, and I say no.

[COUNSEL FOR STATE BAR:] *But you do say that you are an attorney.*

[ELY:] *Well, yes.*

(Emphasis added.)

She also stated the following in her testimony:

> [ELY:] Yeah. I want to make sure you understand the process. I, along with my business development drafter, drafted these emails. My business development director actually identified potential companies that fit the profile of company and executive that we have found typically is in the market for needing some part-time chief legal officer services. So I did not personally identify Tony Maupin, and the email was sent from my business development director, but the content of the email I approved.
>
> . . . .
>
> . . . I was wanting to clarify because it is being shown as being sent from me, but I do not hit the "Send" button, but I approved of the process for identifying target companies and executives that fit the profile of small/mid-size business that is large enough to potentially need somebody on an in-house basis, and so these emails go out to people from my business development director.
>
> . . . I take responsibility for them, but if your question is did I identify Tony Maupin, no, I didn't, but I identified the profile that he fits of the small/mid-size business size and senior executive that may have an interest in a part-time general counsel.

The DHC concluded — and we agree — that the clear implication from Ely's inclusion of the abbreviation "Esq." following her signature in the emails to Maupin, the hyperlink to Palladium's website, and her testimony on this subject at the hearing is that she intended to convey to recipients of the email that she was able to provide legal services as an attorney.[2] Moreover, while our courts have not previously had occasion to address this issue, courts in a number of other jurisdictions have determined that the use of the title "Esquire" by one not licensed to practice law constitutes the unauthorized practice of law. *See*, *e.g.*, *Fla. Bar v. Lister*, 662 So. 2d 1241, 1241-42 (Fla. 1995) (respondent engaged in unlicensed practice of law where he described himself as "Esquire" on correspondence and identified himself as an attorney in

2. Moreover, Ely's testimony supports the proposition that although she did not personally send the email to Maupin, she approved the content of the email and authorized it to be sent.

a phone conversation); *In re Contempt of Mittower*, 693 N.E.2d 555, 558 (Ind. 1998) (respondent engaged in unauthorized practice of law where he labeled himself "esquire," "general counsel," or "attorney-in-fact" on business cards, letterhead, and other documents available to general public); *Disciplinary Counsel v. Brown*, 121 Ohio St. 3d 423, 431, 905 N.E.2d 163, 171 (2009) (". . . [R]espondent's use of the term 'Esq.' induced clients to believe that he was a lawyer, a misunderstanding that he was aware of and failed to correct."); *In re V.I. Bar Ass'n Comm. on the Unauthorized Practice of Law*, 59 V.I. 701, 733 (2013) ("We hold that Campbell's general use of 'Esquire,' 'Esq.,' and 'Attorney' in emails and other correspondence, even when not issued in conjunction with a specific legal matter, constitutes hold[ing] oneself out as rendering any service which constitutes the unauthorized practice of law." (citations, quotation marks, and brackets omitted)).

3. Finding of Fact No. 26

Finding No. 26 states as follows:

> 26. Defendant nonetheless held out on her website that Abelman was an employee of PCLO and was able to provide legal services to North Carolina residents on behalf of the company.

Ely challenges the evidentiary support for Finding No. 26, contending that "[n]o representation was made on the website as to [Abelman's] licensure status in North Carolina or any other state." She also asserts that the mere presence of Abelman's name and biographical information on Palladium's website did not amount to holding him out as an attorney who was able to provide legal services on behalf of the company.

During the DHC hearing, the State Bar introduced evidence that (1) Abelman never signed an employment contract with Palladium; and (2) Abelman's license to practice law in North Carolina was inactive. Ely nevertheless listed him as a CLO whose credentials could be viewed on Palladium's website.

Furthermore, the email Ely sent Maupin — a North Carolina business owner — included a hyperlink to Palladium's website where Abelman's information was displayed. Thus, any visitor to the website would rationally conclude that Abelman was, in fact, a CLO of Palladium and thus capable of providing legal services to Palladium's clients. Moreover, a potential North Carolina client viewing the website would likewise assume that Abelman was authorized to provide legal services in North Carolina.

B. Challenged Conclusions of Law

We turn next to Ely's argument that the DHC improperly concluded that she violated Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) of the North Carolina Rules of Professional Conduct. We address in turn her arguments as to each of these rules.

1. Rule 5.5(b)(2)

Rule 5.5(b)(2) states as follows:

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> . . . .
>
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

N.C. R. Prof. Cond. 5.5(b)(2).

The DHC's findings demonstrate that Ely violated Rule 5.5(b)(2) by (1) identifying herself as a CLO on Palladium's website; (2) providing her background as an attorney on the website with no indication of the current status of her license; and (3) emailing Maupin a link to the website and using the title "Esq." in the signature line of her email to him. By committing these acts, Ely held herself out as a lawyer who was admitted to practice law in North Carolina in violation of Rule 5.5(b)(2).

2. Rule 7.1(a)

Rule 7.1(a) states, in pertinent part, as follows:

> (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> > (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

N.C. R. Prof. Cond. 7.1(a).

As previously stated, the DHC found that Ely (1) falsely implied she could serve as an attorney on behalf of Palladium; (2) listed herself as a CLO on Palladium's website; and (3) held herself out as an attorney to Maupin by emailing him a link to the website and using the title "Esq." in the signature line of her email. By taking these actions, Ely violated Rule 7.1(a).

Moreover, Ely violated Rule 7.1(a) by holding Palladium out as a company that could provide legal services and advice to Maupin when, in fact, at least two of the sixteen attorneys advertised on the website as CLOs (Ely and Abelman) were not licensed to practice law in North Carolina. Because the website's reference to both Ely and Abelman was misleading, she violated Rule 7.1(a) in this respect as well.

3. Rule 7.3(a)

Rule 7.3(a) states as follows:

> (a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer.

N.C. R. Prof. Cond. 7.3(a).

The DHC's findings demonstrate that Ely violated the prohibition against soliciting professional employment via electronic contact as contained in Rule 7.3(a). She emailed Maupin for the express purpose of promoting Palladium's legal services, and therefore, increasing her opportunity to obtain pecuniary gain.

4. Rule 8.4(c)

Rule 8.4(c) states as follows:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer[.]

N.C. R. Prof. Cond. 8.4(c).

The DHC's findings likewise support the conclusion that Ely violated Rule 8.4(c). She falsely represented on Palladium's website that Abelman could serve as an attorney on behalf of Palladium despite his status with the State Bar being "inactive" as well as the fact that he had never actually signed a contract with Palladium. She further included the hyperlink to the website in her emails to Maupin and the other recipients.

* * *

Thus, we are satisfied that the findings of fact contained in the DHC's order of discipline support its conclusions that Ely violated Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) and that those findings were supported by clear, cogent, and convincing evidence. Accordingly, we overrule Ely's arguments as to the adjudicatory phase of the DHC's order. *See N.C. State Bar v. Sutton*, __ N.C. App. __, __, 791 S.E.2d 881, 900 (2016) (upholding DHC's findings of fact and conclusions of law in adjudicatory portion of disciplinary order), *appeal dismissed*, 369 N.C. 534, 797 S.E.2d 296 (2017).

III. Dispositional Phase

[2] We next consider Ely's challenges to the DHC's findings and conclusions concerning the dispositional phase. The DHC may consider several factors in determining the appropriateness of a disciplinary measure. *See* 27 N.C. Admin. Code 1B.0114(w) (2016) (listing factors that DHC may find as meriting suspension, disbarment, or other disciplinary measures).[3]

However, it is well settled that

> [t]he DHC must support its punishment choice with written findings that are consistent with the statutory scheme of N.C. Gen. Stat. § 84-28(c). The order must also include adequate and specific findings that address how the punishment choice (1) is supported by the particular set of factual circumstances and (2) effectively provides protection for the public.

N.C. State Bar v. Adams, 239 N.C. App. 489, 495-96, 769 S.E.2d 406, 411 (2015) (internal citations omitted). Here, Ely challenges Conclusion No. 1 of the DHC's order, which states as follows:

> 1. The Hearing Panel considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar, and concludes that the following factors are applicable:
>
> 27 N.C.A.C. 1B § .0114(w)(l)
>
> a. Factor (B), Intent of the defendant to commit acts where the harm or potential harm is foreseeable; and

3. Since the DHC's 24 August 2016 order, this regulation has since been removed from 27 N.C. Admin. Code 1B.0114(w) and is now contained in 27 N.C. Admin. Code 1B.0116(f).

b. Factor (I), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(2)

a. Factor (A), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(3)

a. Factor (G), Multiple offenses; and

b. Factor (O), Refusal to acknowledge wrongful nature of conduct.

We address Ely's arguments as to each challenged factor in turn.

A. Intent to Commit Acts Causing Potential Harm

Ely contends that the DHC erred by concluding that she intended to commit any act with the potential to cause harm. However, the DHC found that Ely (1) falsely held herself out as a CLO who was able to provide legal services despite her administrative suspension; (2) contacted a North Carolina business owner on behalf of her company seeking to provide legal services for her own pecuniary gain; and (3) advertised the services of Abelman despite his inactive status and lack of any employment contract with Palladium.

The DHC's findings support the notion that Ely's wrongful acts were not by mistake or accident but were instead intentionally committed. *See Sutton*, __ N.C. App. at __, 791 S.E.2d at 901 ("To the extent Defendant argues there is no evidence that he knew he was violating a rule or causing a disruption, it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances." (citation omitted)). Indeed, as previously discussed, Ely's own testimony reveals that she approved of her business development director sending emails on her behalf with the intent of targeting small businesses in need of legal services and that she intended to communicate to Maupin that she was an attorney. Thus, we cannot say that the DHC erred in concluding that she intended to commit acts creating the potential for foreseeable harm.

B. Acts of Dishonesty, Misrepresentation, Deceit or Fabrication

Ely also argues that the DHC erroneously concluded that she committed acts of dishonesty, misrepresentation, deceit, or fabrication. However, her argument on this issue is largely derivative of her previous arguments as to the DHC's findings in the adjudicatory phase. The DHC

concluded that Ely "made false or misleading statements" in violation of Rule 7.1(a) about both her and her company's ability to provide legal services and that she engaged in the unauthorized practice of law in violation of Rule 5.5(b)(2). As discussed above, these conclusions were supported by the DHC's findings of fact.

C. Multiple Offenses

Ely next asserts that the DHC's conclusion that she committed multiple offenses constituted error. Once again, Ely's arguments on this issue simply restate her previous challenges to the findings made in connection with the adjudicatory phase of the proceedings. The DHC properly concluded that Ely violated the North Carolina Rules of Professional Conduct by (1) holding herself out as legally able to provide legal services; (2) holding her company out on its website as authorized to provide legal services; (3) contacting Maupin via email; and (4) listing Abelman as an attorney employed by her company on its website. Thus, we reject Ely's contention that the DHC improperly found that she had committed multiple offenses.

D. Refusal to Acknowledge Wrongful Conduct

Finally, Ely argues that the DHC improperly concluded that she refused to recognize the wrongful nature of her conduct. The DHC found during the dispositional phase as follows:

> 2. Defendant has not acknowledged the wrongful nature of her conduct or indicated remorse.

During the 15 July 2016 hearing, Ely continually refused to accept the fact that her conduct was in violation of North Carolina's Rules of Professional Conduct. The DHC chairman repeatedly gave Ely opportunities to acknowledge her violations, but she was unwilling to do so. Accordingly, Finding of Fact No. 2 and the DHC's subsequent conclusion of law that Ely had "[r]efus[ed] to acknowledge the wrongful nature of [her] conduct" was supported by clear, cogent, and convincing evidence.

IV. Five-Year Suspension

[3] The only remaining question before us is whether the findings and conclusions of the DHC adequately support its ultimate disciplinary decision. *See Talford*, 356 N.C. at 639, 576 S.E.2d at 314. Ely contends that her five-year suspension constituted an excessive punishment because the DHC order fails to demonstrate that (1) there was a significant potential harm resulting from her actions; and (2) a lesser sanction would be inadequate to protect the public. In support of this argument,

Ely asserts that the DHC did not properly apply the test required by our Supreme Court in *Talford*.

In *Talford*, the DHC entered an order disbarring an attorney for mismanagement of a trust account. On appeal, the attorney argued that the DHC's findings of fact and conclusions of law from the dispositional phase of the hearing did not adequately explain the conclusion that his misconduct had resulted in a significant potential harm to clients or support the determination that a lesser sanction was inadequate to protect the public. *Id.* at 639, 576 S.E.2d at 314. Our Supreme Court agreed, stating as follows:

> . . . . None of [the DHC's] discipline-related findings of fact even address, much less explain, why disbarment is an appropriate sanction under the circumstances. . . . Certainly, none of the DHC's discipline-related findings and conclusions expressly identify a particular harm, resulting from [the attorney's] actions, that either impeded the administration of justice or was suffered by a client, the public, or the legal profession. The order also does not expressly address how [the attorney's] failure to maintain accurate financial records might result in potentially significant harm to any of the four entities. . . . [I]n order to justify the imposition of a more severe sanction, such as censure, suspension, or disbarment, the attorney's misconduct must show either significant harm or the *potential* for *significant* harm. The portion of the DHC order pertaining to discipline assuredly does not expressly link defendant's conduct with such potential, and our review of both the underlying evidence and the DHC's findings and conclusions fails to find support for an inference of such potential. For while we may recognize that an attorney's pattern of commingling account funds necessarily creates the potential for harm to his clients, our review of a specific transgression must also encompass its context, duration, and result.
>
> . . . .
>
> . . . [I]n order to impose a more severe sanction under the statute—censure, suspension, or disbarment—an attorney's misconduct must include attending circumstances that demonstrate: (1) a risk of *significant* potential harm, and (2) that the chosen sanction is necessary in order to

> protect the public. This Court has already determined that the attending circumstances of defendant's misconduct fail to evidence a risk of significant potential harm to clients. Thus, in our view, the expressed parameters of the statute preclude the DHC on the facts of this case from imposing on defendant any sanction that requires such a showing. . . .

Id. at 639-41, 576 S.E.2d at 314-15 (internal citations omitted).

In its analysis in *Talford*, the Supreme Court "undertook an exhaustive review of the various sanctions imposed on offending attorneys in the past" and determined that "the disbarment judgment imposed on defendant stands as an aberration . . . ." *Id.* at 641-42, 576 S.E.2d at 315 (citation and quotation marks omitted). Based on this determination, the Court concluded that there was no rational basis to support disbarment as an appropriate sanction. *Id.* at 642, 576 S.E.2d at 315.

This Court, however, has distinguished *Talford* in a number of disbarment and suspension cases in which the order of discipline at issue sufficiently demonstrated significant actual or potential harm and established the inadequacy of a lesser sanction. *See, e.g.*, *N.C. State Bar v. Livingston*, __ N.C. App. __, __, __ S.E.2d __, __, slip op. at 38 (filed 19 December 2017) (No. COA17-277) (DHC's imposition of five-year suspension with opportunity to petition for stay after two years was fully supported by harm shown); *Sutton*, __ N.C. App. at __, 791 S.E.2d at 896 (five-year suspension by DHC complied with requirements of N.C. Gen. Stat. § 84-28); *N.C. State Bar v. Adams*, 239 N.C. App. 489, 502, 769 S.E.2d 406, 415 (2015) (DHC's findings of fact and conclusions of law adequately supported four-year suspension of defendant's license); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 670, 657 S.E.2d 378, 388 (2008) (DHC's conclusion of law "declaring defendant's conduct posed significant harm to his client and the legal profession has a rational basis in the evidence" and supported disbarment); *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 446, 632 S.E.2d 183, 191 (2006) (DHC's decision to disbar defendant had rational basis where "a determination that [defendant's] misconduct poses a *significant* potential harm to clients" was "[i]mplicit in a finding that [he] . . . violated Rule 8.4(b) and (c)"), *disc. review denied*, __ N.C. __, 641 S.E.2d 693 (2006).

In the present case, the DHC's order of discipline contained findings of fact and conclusions of law explaining why it believed a five-year suspension was the appropriate sanction for Ely. Its findings of fact included the following:

2. Defendant has not acknowledged the wrongful nature of her conduct or indicated remorse.

3. By attempting to practice law in North Carolina despite not being actively licensed here, Defendant caused significant potential harm to her company's clients and to the standing of the profession in the eyes of the public because it showed her disregard for one of the foundational duties of an attorney — practicing law solely within the bounds of licensure. Such erosion of public confidence in attorneys tends to sully the reputation of, and fosters disrespect for, the profession as a whole. Confidence in the legal profession is a building block for public trust in the entire legal system.

4. The Hearing Panel finds by clear, cogent, and convincing evidence any additional facts that may be contained in the conclusions regarding discipline set out below.

5. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case.

The DHC then made the following conclusions of law:

1. The Hearing Panel considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar, and concludes that the following factors are applicable:

27 N.C.A.C. 1B § .0114(w)(l)

a. Factor (B), Intent of the defendant to commit acts where the harm or potential harm is foreseeable; and

b. Factor (I), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(2)

a. Factor (A), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(3)

a. Factor (G), Multiple offenses; and

b. Factor (O), Refusal to acknowledge wrongful nature of conduct.

2. Although the Hearing Panel determined one of the factors under 27 N.C.A.C. 1B § .0114(w)(2) to be present, the Hearing Panel concluded that disbarment was not warranted in light of all of the circumstances of the case.

3. The Hearing Panel considered all of the disciplinary options available to it and determined that imposition of a suspension is appropriate and necessary.

4. The Hearing Panel concluded that Defendant, by unlawfully providing and offering to provide legal services to others through herself and her company, exposed the public to significant potential harm. Whenever attorneys engage in the unauthorized practice of law, there is the potential for significant harm, particularly when money exchanges hands, court appearances are made, and legal forms are drafted or filed on behalf of others. The risks of this type of arrangement include divided loyalties, fee splitting, inadequate representation, excessive fees, a lack of understanding sufficient to adequately represent and protect the interests of clients in a given jurisdiction, and criminal activity. There is also the inherent danger that someone other than a licensed North Carolina attorney will provide legal services to North Carolina citizens, thereby hampering the State Bar's ability to protect the public by regulating the practice of law in this state.

5. The Hearing Panel considered all lesser sanctions and concluded that discipline short of an active suspension would not adequately protect the •public. Imposition of lesser discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar of this State.

Based on the DHC's findings and conclusions, we cannot say that its decision to suspend Ely's license for five years exceeded its statutory

authority. The DHC's order sufficiently linked Ely's multiple instances of improper conduct to the potential for significant harm to the public. Furthermore, the DHC expressly weighed the other disciplinary options available to it before ultimately determining that a lesser sanction would fail to adequately address the severity of her misconduct. Finally, we note that the DHC's order provides Ely with an opportunity to reduce her suspension to two years if she complies with the requirements of her administrative suspension.

Thus, the DHC has established a rational basis for its decision, and Ely has failed to demonstrate that her suspension was contrary to applicable law. *See Ethridge*, 188 N.C. App. at 670, 657 S.E.2d at 389 (DHC's findings and conclusions had rational basis in evidence to support sanction imposed); *Leonard*, 178 N.C. App. at 446, 632 S.E.2d at 191 (DHC's decision to disbar defendant had rational basis in evidence).

Conclusion

For the reasons stated above, we affirm the DHC's 24 August 2016 order.

AFFIRMED.

Judges DILLON and INMAN concur.

RASHIA NORMAN, Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, Defendant

No. COA17-328

Filed 6 February 2018

1. Employer and Employee—harassment and retaliation—summary judgment

The trial court did not err by granting summary judgment for defendant on a hostile working environment claim where plaintiff was aware of her employer's sexual harassment policy but failed to take advantage of corrective opportunities provided by her employer and there was no evidence that plaintiff was threatened with retaliation. Plaintiff could not impute the alleged misconduct to defendant, an essential element of her hostile work environment claim.

2. Employer and Employee—discrimination—quid pro quo harassment

Summary judgment was correctly granted for defendant on a claim for quid pro quo sexual harassment where plaintiff did not demonstrate a causal connection between her rejection of the advances and her dismissal, for which defendant offered legitimate, non-discriminatory reasons that were not refuted.

3. Employer and Employee—discrimination—termination—discharge—opposition to unlawful practice—summary judgment

The trial court did not err by granting summary judgment for defendant in a claim for retaliation for reporting unlawful conduct. Plaintiff did not engage in the protected conduct prior to the moment when an adverse employment action was taken against her.

Appeal by plaintiff from order entered 21 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 20 September 2017.

Schiller & Schiller, PLLC, by David G. Schiller, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for defendant-appellee.

ELMORE, Judge.

Rashia Norman ("plaintiff") appeals from an order granting summary judgment in favor of the North Carolina Department of Administration ("defendant" or "NCDOA") on plaintiff's Title VII employment discrimination and retaliation claims. On appeal, plaintiff argues that she has demonstrated at least two genuine issues of material fact, and that the trial court should not have granted summary judgment on any of her claims. After careful review, we disagree and hold that the trial court did not err in granting summary judgment in favor of defendant. Accordingly, we affirm the order of the trial court.

I. Background

On 23 February 2010, plaintiff began probationary employment as a parking booth attendant with the State Parking Division of the NCDOA. Plaintiff's immediate supervisor at the NCDOA was Mr. Derrick Moore, a parking operations manager. However, Mr. Moore was on family medical leave from 4 March 2010 until 1 June 2010, during which time plaintiff

was supervised by Ms. Catherine Reeve, a state parking director. Plaintiff read and signed the NCDOA's unlawful workplace harassment policy on 10 March 2010.

While under Ms. Reeve's supervision, plaintiff left her booth unattended on more than one occasion, and she had to be counseled by Ms. Reeve regarding the importance of remaining at her assigned post. Because plaintiff was still in the learning stages of her probationary employment, no formal disciplinary measures were taken against her at that time.

Mr. Moore returned to work in June 2010. According to plaintiff, between late June and July 2010, Mr. Moore made multiple inappropriate comments of a sexual nature toward plaintiff. For example, Mr. Moore told plaintiff that he liked how she walked and twisted her hips; that she had a "big butt" and "don't let nothing out"; and that he liked a woman "with meat on her bones." Additionally, over the course of several days in July 2010, Mr. Moore pulled on plaintiff's bag and arm, touched her hair, held her hand, and asked her to eat lunch with him in his office; plaintiff declined Mr. Moore's request and told him to stop his inappropriate behavior. On one occasion, when plaintiff told Mr. Moore that she needed booth supplies, Mr. Moore responded in a low, breathy voice, "What else do you need?" Mr. Moore also told plaintiff that "his good word" would get her a promotion.

In late July 2010, plaintiff told a co-worker about Mr. Moore's behavior, which the co-worker then relayed to Mr. Moore. Mr. Moore telephoned plaintiff at her booth and asked her why she treated him "like a stepchild" before he ultimately apologized for making her feel uncomfortable. At that time, plaintiff did not suspect Mr. Moore of attempting to have her dismissed, and she did not report his behavior to NCDOA management or personnel. Mr. Moore did not make further comments of a sexual nature to plaintiff, nor did he touch her, at any point after July 2010.

On 18 August 2010, plaintiff failed to properly log off from her fee computer, which caused two days of transactions to be included in the daily transaction report for 19 August 2010. Ms. Reeve summoned plaintiff to her office, where Mr. Moore was also present, and counseled her regarding the importance of logging off properly. In September 2010, plaintiff submitted a certificate of return to work form signed by her healthcare provider in which she admitted altering the date, and Ms. Reeve and Mr. Moore again counseled plaintiff regarding her work performance.

Plaintiff received a pre-disciplinary conference letter on 20 September 2010 indicating that she was being considered for dismissal. The letter set forth the specific reasons for dismissal as follows: (1) plaintiff's failure to communicate with her supervisor regarding the time needed for necessary appointments and repeatedly leaving the parking division without sufficient time to secure replacement personnel; (2) plaintiff's altering a certificate of return to work form; and (3) plaintiff's failure to follow defined work procedures by failing to log off her fee computer. The letter also informed plaintiff that a conference would be conducted by Ms. Reeve on 22 September 2010.

Both Ms. Reeve and Mr. Moore were present at plaintiff's pre-disciplinary conference. At the end of the meeting, Ms. Reeve asked plaintiff if she had any questions, and plaintiff responded by telling Ms. Reeve that Mr. Moore had been sexually harassing her. This was the first time that plaintiff had lodged a complaint against Mr. Moore with NCDOA management, and Ms. Reeve immediately reported the allegations to the human resources office. The Office of State Personnel subsequently conducted an investigation into the report and determined there was no sexual harassment or retaliation.

With the approval of the human resources office, Ms. Reeve made the ultimate decision to dismiss plaintiff from probationary employment on 23 September 2010. On 28 September 2010, plaintiff filed charges against the NCDOA with the Equal Employment Opportunity Commission ("EEOC") in which she alleged a violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, *et seq.* ("Title VII"). Plaintiff received a right-to-sue letter from the EEOC on 3 February 2012 and filed an amended complaint against the NCDOA in Wake County Superior Court on 2 April 2015.[1] In her complaint, plaintiff alleged three claims in violation of Title VII as follows: (1) sexual harassment creating a hostile work environment, (2) sex discrimination resulting in *quid pro quo* harassment, and (3) sex discrimination resulting in retaliatory discharge.

On 3 March 2016, defendant filed a motion for summary judgment as to all of plaintiff's claims. The trial court held a hearing on the motion on 24 May 2016 and granted summary judgment in favor of defendant by order entered 21 December 2016. In its order, the court made three

1. Plaintiff filed her initial complaint, Wake County no. 12 CVS 6303, on 2 May 2012. Plaintiff voluntarily dismissed her complaint without prejudice on 3 April 2014, and she filed her amended complaint within the one-year period permitted by N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015).

dispositive findings of fact, citing plaintiff's own deposition as evidence of each finding.

> The Plaintiff did not report supervisor Derrick Moore's alleged illegal behavior to Defendant agency's management until the September 22, 2010 pre-dismissal conference. [Plaintiff's Deposition, p. 35, lines 23–25, p. 36, lines 1–4] The Plaintiff did not report alleged illegal behavior to Defendant agency's personnel office until "days after the conference" [Plaintiff's Deposition, p. 36, lines 5–7] and Plaintiff did confirm the occurrence of events which were cited as legitimate non-discriminatory reasons given for her dismissal. [Plaintiff's Deposition, pp. 27–28, 29–30, 32–33]

The court then concluded "there is no genuine issue as to any material fact in the [p]laintiff's claims" and that "[d]efendant is therefore entitled to judgment as a matter of law." Plaintiff entered timely notice of appeal.

II. Discussion

On appeal, plaintiff argues that the trial court erred in granting summary judgment in favor of defendant because genuine issues of material fact exist regarding whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the NCDOA, and whether the legitimate, non-discriminatory reasons given for plaintiff's dismissal were mere pretext.

Defendant contends that summary judgment was proper because plaintiff cannot impute the alleged misconduct to the NCDOA, and because plaintiff cannot establish a causal connection between the alleged misconduct, or between her complaint regarding the alleged misconduct, and her dismissal.

Because plaintiff has failed to forecast sufficient evidence of each essential element of her three claims, we hold that summary judgment was proper.

A. Standard of Review

Summary judgment is appropriate when the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The party moving for summary judgment bears the initial burden of proof, which may be met "(1) by

showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

Upon a forecast of evidence tending to support the motion for summary judgment, the burden shifts to the non-moving party to likewise "produce a forecast of evidence demonstrating that [she] will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 276 S.E.2d 425, 427 (1989) (citation omitted). The non-moving party survives the motion not by "rest[ing] upon the mere allegations" of her pleading, N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015); rather, she "must come forward with specific facts showing a genuine issue for trial." *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985) (citation omitted). In evaluating a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party, and all inferences of fact must be drawn in her favor. *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 329, 612 S.E.2d 664, 668 (2005). "Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Sexual Harassment under Title VII

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1). Sexual harassment, which includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, "is a form of sex discrimination prohibited by Title VII." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986). For analytical purposes, employment discrimination in the form of sexual harassment is often categorized into two varieties: harassment that creates an offensive or "hostile" work environment, and *quid pro quo* harassment, where sexual consideration is demanded in exchange for job benefits. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983). Here, plaintiff alleges that defendant subjected her to both varieties of sexual harassment by its employee supervisor, Mr. Moore.

i. *Hostile Work Environment*

[1] Because "an employee's work environment is a term or condition of employment, Title VII creates a hostile working environment cause

of action" in favor of individuals forced to work in a hostile workplace. *EEOC v. R&R Ventures*, 244 F.3d 334, 338 (4th Cir. 2001).

> To establish a hostile work environment based on sexual harassment under [Title VII], a plaintiff-employee must prove that (1) the conduct was unwelcome; (2) it was based on the plaintiff's sex; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer.

Crockett v. Mission Hosp., Inc., 717 F.3d 348, 354 (4th Cir. 2013) (citation omitted). As to the fourth element, an employer may "avoid strictly liability for a supervisor's sexual harassment of an employee if no tangible employment action was taken against the employee" in connection with the unwelcome conduct. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 266 (4th Cir. 2001). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d. 633 (1998). If no such action was taken against the employee in relation to the misconduct, the employer has an affirmative defense to vicarious liability if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Matvia*, 259 F.3d at 266–67 (citations omitted).

In regard to her hostile work environment claim, plaintiff does not assert that she suffered a tangible employment action in connection with Mr. Moore's conduct, nor does she argue that defendant failed to exercise reasonable care to deter harassment in the workplace. Rather, plaintiff contends that a dispute of fact exists as to the second element of the employer-liability defense: that is, whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the NCDOA.

"If Title VII's prohibitions against sexual harassment are to be effective, employees must report improper behavior to company officials." *Id.* at 269 (citation omitted). Thus, "evidence that the plaintiff failed to utilize the [employer's] complaint procedure will normally suffice to satisfy [the employer's] burden under the second element of the defense." *Id.* (citation and internal quotation marks omitted). Here, however, plaintiff claims to have feared retaliation from Mr. Moore had she complained

to defendant about his conduct. Plaintiff cites two cases—one from the Fifth Circuit Court of Appeals and one from the Second Circuit—for the proposition that under such circumstances, an employee's decision not to report sexual harassment can be reasonable.

In *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001), the plaintiff was a visiting professor from a foreign country who was sexually harassed by his supervisor. The supervisor told the plaintiff that the university would defend the supervisor against any type of harassment complaint, that it had done so in the past, and that the supervisor had previously helped remove from the university certain people whom he disliked, suggesting further that the plaintiff's immigration status could be jeopardized if he no longer worked at the university. *Id.* at 516. The court in *Mota* concluded that a rational jury could infer that the plaintiff's failure to take advantage of available remedies was not unreasonable given the supervisor's "repeated threats of retaliation" and "influence at the [u]niversity." *Id.* at 525–26.

In *Distasio v. Parkin Elmer Corp.*, 157 F.3d 55 (2nd Cir. 1998), the plaintiff was harassed by a co-worker and reported the conduct to her immediate supervisor. The supervisor first told the plaintiff she was crazy, then warned her not to report further conduct or she would lose her job. *Id.* at 59–60. As in *Mota*, the court in *Distasio* concluded that "the jury could find that [the plaintiff] . . . believed that she would lose her job if she reported further incidents to [the supervisor]" such that the plaintiff's failure to report was not unreasonable. *Id.* at 64–65.

The present case is readily distinguishable from both *Mota* and *Distasio*. Here, there is no evidence whatsoever that Mr. Moore ever threatened plaintiff such that she could reasonably have feared retaliation for reporting his conduct to management. Taking plaintiff's allegations as true, the harassment began in June 2010 and ended in July 2010, but plaintiff did not even begin to suspect Mr. Moore of attempting to have her dismissed until late August or September 2010.

Plaintiff was aware of the NCDOA's sexual harassment policy, yet she failed to take advantage of corrective opportunities provided by her employer. No rational jury could infer that this failure was reasonable due to fear of retaliation, as there is no evidence that Mr. Moore threatened to retaliate against plaintiff, either for denying his unwelcome advances or for reporting his conduct to management. Thus, plaintiff cannot impute the alleged misconduct to her employer—an essential element of her hostile work environment claim—and the trial court did not err in granting summary judgment as to that claim.

ii. Quid Pro Quo *Harassment*

[2] The second form of Title VII sex discrimination, known as *quid pro quo* sexual harassment, can be established by a five-element prima facie case as follows:

> 1. The employee belongs to a protected group.
> 2. The employee was subject to unwelcome sexual harassment.
> 3. The harassment complained of was based upon sex.
> 4. The employee's reaction to the harassment affected tangible aspects of [her] compensation, terms, conditions, or privileges of employment. *The acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit or cause of a tangible job detriment to create liability.* Further, as in typical disparate treatment cases, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.
> 5. The employer . . . knew or should have known of the sexual harassment and took no effective remedial action.

Spencer v. Gen. Electric Co., 894 F.2d 651, 658 (4th Cir. 1990) (citations omitted) (emphasis added).

In order to satisfy the fourth element of her *quid pro quo* claim, plaintiff must show that her reaction to the harassment—that is, her acceptance or rejection of Mr. Moore's sexual advances—was an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment. To that end, plaintiff asserts that Mr. Moore attempted to influence her to accept his sexual advances by telling plaintiff that the only thing between plaintiff getting an office job (*i.e.* a job benefit) was "his good word." Plaintiff also contends that her dismissal constitutes a tangible job detriment for purposes of her *quid pro quo* claim. We disagree.

"An insulting or demeaning remark does not create a federal cause of action for sexual harassment merely because the 'victim' of the remark happens to belong to a class protected by Title VII." *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772 (4th Cir. 1997). While plaintiff claims on appeal to have interpreted Mr. Moore's "good word" comment as an attempt to influence her to reciprocate his conduct, there is no

indication that the comment was sexual in nature, and it appears to be a reflection of plaintiff's status as a probationary employee rather than her gender. Similarly, plaintiff has not demonstrated a causal connection between her rejection of Mr. Moore's advances in June and July 2010 and her September 2010 dismissal, for which defendant offered legitimate, non-discriminatory reasons that have not been refuted.

Because plaintiff has failed to establish that her reaction to Mr. Moore's harassment affected a tangible aspect of her employment, the trial court did not err in granting summary judgment on plaintiff's *quid pro quo* claim.

C. Retaliation under Title VII

[3] In addition to making certain employment practices themselves unlawful, Title VII also makes it unlawful for an employer "to discriminate against any of [its] employees . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter[.]" 42 U.S.C. § 2000e-3(a). Unlike plaintiff's *quid pro quo* claim, which includes an element of retaliation resulting from her refusal to acquiesce to her supervisor's sexual advances, the form of retaliation prohibited by this subsection refers to retaliation in response to an employee's engagement in a protected activity, such as reporting the unlawful conduct. Here, plaintiff alleges that defendant terminated her employment in retaliation for her complaint regarding the alleged sexual harassment by her supervisor, Mr. Moore.

> [A] prima facie showing of retaliatory discharge requires a plaintiff to show: (1) [s]he engaged in some protected activity, such as filing an EEO[C] complaint; (2) the employer took adverse employment action against plaintiff; and (3) that the protected conduct was a substantial or motivating factor in the adverse action (a causal connection existed between the protected activity and the adverse action).

Emp't Sec. Comm'n of N.C. v. Peace, 128 N.C. App. 1, 9, 493 S.E.2d 466, 471 (1997). As to the third element, "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, ___, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d. 503 (2013). If the plaintiff establishes a prima facie case of retaliation, the defendant may rebut the showing with proof of a legitimate, non-discriminatory reason for the adverse action. *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997). The burden then shifts

back to the plaintiff to demonstrate that the reason given by the defendant is mere pretext by showing "that the reason was false, *and* that discrimination was the real reason for the challenged conduct." *Id.* (citation and internal quotation marks omitted).

Plaintiff argues that the trial court erred in dismissing her retaliation claim because a genuine issue of material fact exists as to whether the reasons given by defendant for her dismissal were mere pretext. However, plaintiff cannot prove the third essential element of this claim and has, therefore, failed to meet her initial burden of establishing a prima facie case of retaliatory discharge.

In her deposition, plaintiff admitted that she did not report the alleged unlawful conduct to NCDOA management until her pre-dismissal conference, and she did not report the conduct to the NCDOA personnel office until several days after the conference. Because plaintiff did not engage in a protected activity at any time prior to the exact moment in which adverse employment action was being taken against her, plaintiff's reporting of the misconduct could not possibly have been a substantial or motivating factor in her dismissal. Even assuming, *arguendo*, that plaintiff has established a prima facie case of retaliation, she nevertheless confirmed the existence of legitimate, non-discriminatory reasons for her dismissal. Thus, the trial court did not err in granting summary judgment on plaintiff's Title VII retaliation claim.

III. Conclusion

Because plaintiff has failed to forecast sufficient evidence of each essential element of her Title VII employment discrimination and retaliation claims, we hold that summary judgment was proper. The order of the trial court is hereby:

AFFIRMED.

Judges STROUD and TYSON concur.

CHRISTIAN G. PLASMAN, IN HIS INDIVIDUAL CAPACITY AND DERIVATIVELY FOR THE BENEFIT OF, AND ON BEHALF OF AND RIGHT OF NOMINAL PARTY BOLIER & COMPANY, LLC, PLAINTIFF

v.

DECCA FURNITURE (USA), INC.; DECCA CONTRACT FURNITURE, LLC; RICHARD HERBST; WAI THENG TIN; TSANG C. HUNG; DECCA FURNITURE, LTD.; DECCA HOSPITALITY FURNISHINGS, LLC; DONGGUAN DECCA FURNITURE CO. LTD.; DARREN HUDGINS; DECCA HOME, LLC; AND ELAN BY DECCA, LLC, DEFENDANTS, AND BOLIER & COMPANY, LLC, NOMINAL DEFENDANT

v.

CHRISTIAN J. PLASMAN A/K/A/ BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA17-151

Filed 6 February 2018

1. Civil Procedure—motion to dismiss—statement of claim—Rule of Civil Procedure 8

In a case involving the ownership and operation of a furniture company, the trial court did not abuse its discretion by dismissing a complaint for repeated violations of N.C.G.S. 1A-1, Rule 8 where plaintiffs' claims were vague, misleading, or incorrect as to people or entities, the alleged conduct, the legal basis, and in some instances the specific claim or claims being alleged. Plaintiffs were on notice that defendants were seeking dismissal based on Rule 8 violations, and the trial court's order contained sufficient findings and conclusions, though not labeled as such, demonstrating that it had considered lesser sanctions before deciding to dismiss for violations of Rule 8.

2. Civil Procedure—dismissal—Rule of Civil Procedure 12(b)(6)

In a case involving the ownership and operation of a furniture company, the trial court did not err by dismissing plaintiffs' claims under N.C.G.S. § 1A-1, Rule 12(b)(6), as an alternate to dismissal under Rule 8, where none of plaintiffs' challenges to dismissal under Rule 12(b)(6) had merit.

Appeal by Plaintiff Christian G. Plasman and Third-Party Defendant Christian J. Plasman from order dated 21 October 2016 by Judge Louis A. Bledsoe, III, in Superior Court, Catawba County. Heard in the Court of Appeals 21 August 2017.

Nexsen Pruet, PLLC, by David S. Pokela; and Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for Plaintiff-Appellant and Third-Party Defendant Appellant.

McGuireWoods LLP, by Robert A. Muckenfuss and Jodie H. Lawson, for Defendants-Appellees.

McGEE, Chief Judge.

This matter was filed more than five years ago and has been considered by both state and federal courts. Multiple appeals have been filed from orders of the trial court to this Court and our Supreme Court, including appeals that have already been decided by this Court, *Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 792 S.E.2d 865 (2016) ("*Bolier I*"), *disc. review denied*, __ N.C. __, 799 S.E.2d 620 (2017); and *Plasman v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 800 S.E.2d 761 (2017) ("*Bolier II*"). The following factual and procedural background is taken from the record before us, and from prior opinions of this Court.

Christian G. Plasman ("Plasman"), "in his individual capacity and derivatively for the benefit of, on behalf of and right of nominal party" Bolier & Company, LLC ("Bolier" or the "Company"), initiated the present action (the "Action") by filing a complaint in Superior Court, Catawba County, on 22 October 2012. The named Defendants ("Defendants") in that initial complaint were Defendant Decca Contract Furniture, LLC ("Decca China"), Decca Furniture (USA), Inc. ("Decca"), a wholly-owned subsidiary of Decca China, and Richard Herbst ("Herbst"), the president of Decca.[1] Plasman's son, Christian J. Plasman, a/k/a Barrett Plasman ("Barrett") (together with Plasman, "the Plasmans," together with Plasman and Bolier, "Plaintiffs"), is a third-party Defendant, who joins Plasman as an Appellant in this matter.[2]

I. Factual and Procedural Background

Bolier is a closely held North Carolina company in the business of selling furniture. Bolier was originally founded and owned by Plasman. Plasman and Decca entered into an operating agreement (the "Operating Agreement") on 31 August 2003, pursuant to which Plasman conferred a fifty-five percent ownership interest in Bolier to Decca while retaining

1. The named Defendants currently include Decca, Decca China, Herbst, Tsang C. Hung ("Tsang"), the chairman of Decca's board of directors, Wai Theng Tin ("Tin"), Decca Furniture, LTD ("Decca Furniture"), Decca Hospitality Furnishings, LLC ("Decca Hospitality"), Dongguan Decca Furniture Co., LTD, Darren Hudgins ("Hudgins"), and Decca Home, LLC. Bolier is also included as a "nominal party Defendant."

2. For this reason, we will be referring to Barrett, along with Plasman and Bolier, when we refer to "Plaintiffs," even though Barrett is technically a third-party defendant.

a forty-five percent interest for himself. In return, Decca agreed to supply Bolier with furniture for retail sale. The Operating Agreement also vested Decca with the authority to make all employment decisions related to Bolier. *Bolier II*, __ N.C. App. at __, 800 S.E.2d at 764. According to Plasman, prior to the execution of the Operating Agreement, Herbst and Tsang represented to him that while it was necessary for Decca to own a majority ownership interest in Bolier "on paper," due to certain rules of the Hong Kong Stock Exchange, Bolier would, in reality, be operated as a 50/50 partnership between Decca and Plasman. Plasman and Bolier entered into an employment agreement in November 2003 (the "Employment Agreement"), which provided, *inter alia*, that Plasman could be terminated without cause. *Id.*

Following execution of the Operating and Employment Agreements, Plasman served as Bolier's president and chief executive officer while Barrett worked as Bolier's operations manager. According to Decca, despite the significant investments of Decca and Decca China in Bolier's operations, Bolier sustained losses in excess of $2,000,000.00 between 2003 and 2012. As a result, Decca terminated the employment of Plasman and Barrett on 19 October 2012. *Id.* The Plasmans, however, refused to accept their terminations and continued to work out of Bolier's office space. During this time, the Plasmans set up a new bank account in Bolier's name, and they diverted approximately $600,000.00 in Bolier customer payments to that account. From these diverted funds, Plasman and Barrett paid themselves, respectively, approximately $33,170.49 and $17,021.66 in salaries and personal expenses. Plasman also wrote himself a $12,000.00 check, dated 5 December 2012, from the new account for "Bolier Legal Fees." *Id.* Decca eventually changed the locks to Bolier's offices, thereby preventing Plasman and Barrett from entering.

Plaintiffs filed the Action in Catawba County Superior Court on 22 October 2012, alleging claims for dissolution; breach of contract; fraud; constructive fraud; misappropriation of corporate opportunities; trademark, trade dress and copyright infringement; conspiracy to defraud; and unfair trade practices. The Action was designated as a mandatory complex business case on 24 October 2012, and assigned to the North Carolina Business Court. *Id.* Decca removed the Action to the United States District Court for the Western District of North Carolina on 29 October 2012. *Bolier I*, __ N.C. App. at __, 792 S.E.2d at 867. On that same date, Decca filed a motion for a temporary restraining order and preliminary injunction against the Plasmans pursuant to Rule 65 of the Federal Rules of Civil Procedure seeking, *inter alia*, to prohibit any additional diversion of Bolier funds and to recover the funds that had

already been diverted. *Id.* Decca moved to dismiss Barrett's counterclaims on 10 December 2012 and on that same date Defendants Decca, Decca China, and Herbst filed amended counterclaims, and Decca filed an amended third-party complaint, which included, *inter alia*, a request for a temporary restraining order and preliminary and permanent injunctive relief against the Plasmans. Plaintiffs moved to "supplement and amend [their] complaint" on 3 January 2013, and attached their "[P]roposed First Amended Complaint" thereto.

A hearing on Decca's motion was held before federal district court judge Richard L. Voorhees ("Judge Voorhees"). Judge Voorhees entered an order ("Judge Voorhees' Order") on 27 February 2013, granting Decca's motion by entering a preliminary injunction that barred the Plasmans from taking any further actions on Bolier's behalf, directed the Plasmans to return all diverted funds to Bolier within five business days, and provide an accounting of those funds to Decca. *Id.*

Plaintiffs filed a document entitled "Plaintiffs' and Third Party Defendant's Response to Court Order" on 6 March 2013. In this document, they represented that they had "fully complied to the best of their ability with the Court Order signed on February 27, 2013." In addition, they stated that "Plaintiffs['] response herein is intended to comply with the spirit of [Judge Voorhees' Order], and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." *Id.*

Plaintiffs never made any attempt to appeal Judge Voorhees' Order to the United States Court of Appeals for the Fourth Circuit. Nor did they file a motion for reconsideration of Judge Voorhees' Order. *Id.* Plaintiffs filed a "Renewed Motion to Amend Complaint to Include New Parties, Facts and Claims for Relief" on 6 November 2013, and included therein their "Second Proposed First Amended Complaint." Judge Voorhees allowed Plaintiffs motion to amend on 9 January 2014, and Plaintiffs filed their "First Amended Complaint" on 10 January 2014. Defendants filed a "Motion to Dismiss the First Amended Complaint" on 24 January 2014, and Plaintiffs filed a "Motion to Remand to Catawba County Superior Court" on 20 March 2014. Judge Voorhees heard these motions, and entered an order on 19 September 2014, dismissing Plaintiffs' federal copyright claims and declining to exercise supplemental jurisdiction over Plaintiffs' state law claims. As a result, the Action was remanded to our Business Court for consideration of "[a]ll remaining claims and motions[.]" *Id.*

Upon remand, Plaintiffs filed a "Motion to Amend Complaint" with the Business Court on 20 January 2015, which included Plaintiffs' "Draft

Proposed Second Amended Complaint." Defendants filed a "Motion to Strike Supplemental Pleadings and Motion to Dismiss Third-Party Defendant [Barrett's] Counterclaims" on 23 January 2015. Multiple additional motions were filed by Plaintiffs and Defendants, including Defendants' "Motion to Dismiss Petitioners' First Amended Complaint," Defendants' "Motion to Disqualify Counsel and Motion for Sanctions," Defendants' "Motion to Enforce Order, Motion for Contempt, and Motion for Sanctions," and "Plaintiffs' Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions." The trial court entered an order on 26 May 2015 (the "May 2015 Order"), granting Plaintiffs' motion to amend their First Amended Complaint, and deciding multiple other matters before it.

The Plasmans filed notice of appeal from the May 2015 Order on 25 June 2015, based upon issues related to the injunction imposed by Judge Voorhees, *Bolier II*, __ N.C. App. at __, 800 S.E.2d at 765, and on that same day filed their revised Second Amended Complaint, as allowed by the May 2015 Order. Defendants filed a "Motion to Dismiss Plaintiffs' Second Amended Complaint" on 22 September 2015, and the trial court heard Defendants' motion on 17 December 2015. The trial court entered its fifty-eight page order dismissing the Second Amended Complaint with prejudice on 21 October 2016 (the "October 2016 Order"). Plaintiffs appeal.

II. Analysis

Plaintiffs argue on appeal that the trial court erred by dismissing their claims pursuant to Rule 8(a)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

A. *Standard of Review and Relevant Law*

1. Rule 8 and Rule 41(b)

"Rule 41(b) of the Rules of Civil Procedure allows a court to dismiss an action '[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court[.]' N.C. Gen. Stat. § 1A–1, Rule 41(b) (2003)." *Lincoln v. N.C. Dep't of Health & Human Servs.* 172 N.C. App. 567, 572–73, 616 S.E.2d 622, 626 (2005). As a general proposition, "the trial court may dismiss for failure to comply with the Rules of Civil Procedure if it has first determined the appropriateness of lesser sanctions. '[T]he trial court must make findings and conclusions which indicate that it has considered . . . less drastic sanctions.' " *Wilder v. Wilder*, 146 N.C. App. 574, 577, 553 S.E.2d 425, 427 (2001) (citations omitted). " 'If the trial court undertakes this analysis, its resulting

order will be reversed on appeal only for an abuse of discretion.' " *Id.* (citation omitted).

Rule 8 of our Rules of Civil Procedure sets forth the "General rules of pleadings[.]" N.C. Gen. Stat. § 1A-1, Rule 8 (2015). Pursuant to Rule 8(a)(1):

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]

N.C.G.S. § 1A-1, Rule 8(a)(1).

Although North Carolina is a notice pleading state, our Supreme Court has cited with approval scholarly analysis that "under the directive of our Rule 8(a)(1) a complaint need not be as specific as under the former practice, but it must be 'to some degree more specific than the federal complaint.' " *Sutton v. Duke*, 277 N.C. 94, 100, 176 S.E.2d 161, 164 (1970) (citation omitted).

> "Under the notice theory of pleading a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial." *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985) (citation omitted) (citing N.C. Gen. Stat. § 1A–1, Rule 8(a)(1)[.] "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)."

Piro v. McKeever, __ N.C. App. __, __, 782 S.E.2d 367, 370 (2016) (quotation marks and citations omitted). "Merely asserting a grievance is not enough to comply with . . . Rule 8(a). The first avenue by which a party may properly address the failure to state a claim is through Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Westover Products, Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 63, 70, 380 S.E.2d 369, 374 (1989) (citation omitted).

Our Supreme Court and this Court have recognized that dismissal with prejudice for violations of the provisions of Rule 8 may be appropriate separate from a motion to dismiss pursuant to Rule 12(b)(6) for

failure to state a claim. *See Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 921–22 (1984); *Patterson v. Sweatt*, 146 N.C. App. 351, 357–59, 553 S.E.2d 404, 408–10 (2001); *Miller v. Ferree*, 84 N.C. App. 135, 136–37, 351 S.E.2d 845, 847 (1987). "Appellate courts should not disturb the trial court's exercise of discretion unless the challenged action is 'manifestly unsupported by reason.' " *Id.* at 137, 351 S.E.2d at 847.

2. Rule 12(b)(6)

Our Court has articulated the standard of review for a trial court's grant of a motion to dismiss for failure to state a claim as follows:

> "On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a *de novo* review[.]" "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " "The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief."
>
> "Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Hinson v. City of Greensboro, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014) (citations omitted).

B. *Rule 8*

[1] Plaintiffs argue that the trial court erred in dismissing the Second Amended Complaint for repeated violations of Rule 8. We disagree.

First, Plaintiffs allege that the Second Amended Complaint complied with Rule 8(a)(1) and, therefore, any dismissal on the basis of failure to comply with Rule 8(a)(1) constituted error. We have undertaken a thorough and laborious review of the Second Amended Complaint, and agree with the trial court that it "is generally imprecise, and the peculiarities of this pleading have made this consideration of Defendants' Motions exceedingly burdensome." Generally speaking, Plaintiffs' claims are vague, misleading, or incorrect with regard to (1) the alleged persons or entities involved – which Plaintiff is asserting the claim and which

Defendants are alleged to have engaged in any improper conduct; (2) the alleged conduct in support of the claim or claims; (3) the legal bases in support of the claim or claims; and (4), in some instances, which specific claim or claims are being alleged.

None of the issues upon which the trial court based its decision to dismiss the Second Amended Complaint pursuant to violations of Rule 8 should have come as a surprise to Plaintiffs. In the May 2015 Order, which resolved numerous motions filed by both Plaintiffs and Defendants, the trial court considered Defendants' motion to dismiss Plaintiffs' First Amended Complaint, alongside Plaintiffs' motion to amend Plaintiffs' First Amended Complaint. The trial court thoroughly addressed the deficiencies in Plaintiffs' First Amended Complaint, and plainly stated that those deficiencies had not been remedied in Plaintiffs' Proposed Second Amended Complaint. Nonetheless, the trial court ruled that it would, in its discretion, allow Plaintiffs yet another chance to remedy the deficiencies in the First Amended Complaint by granting Plaintiffs leave to further revise the First Amended Complaint and/or the Proposed Second Amended Complaint, and granted Plaintiffs the opportunity to file a corrected Second Amended Complaint. Therefore, the trial court, relevant to this appeal, denied Defendants' motion to dismiss Plaintiffs' First Amended Complaint. However, the trial court made clear that granting Plaintiffs' motion to amend their First Amended Complaint would be "without prejudice to Defendants' rights to move to dismiss the [S]econd [A]mended [C]omplaint, in whole or in part, as Defendants may deem appropriate."

The following portion of the May 2015 Order demonstrates some of the trial court's reasoning and direction to Plaintiffs:

> The [trial court] agrees with Defendants that Plaintiffs' First Amended Complaint and [P]roposed Second Amended Complaint reveal fatal deficiencies on their face.
>
> . . . .
>
> Plaintiffs current and proposed Complaints also fail to comply with the requirement under Rule 8 of the North Carolina Rules of Civil Procedure that a pleading contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and [a] demand for judgment for the relief to which he deems himself entitled." N.C. R.

> Civ. P. 8(a)(1)-(2) (2014). In particular, both Plaintiffs' First Amended Complaint and [P]roposed Second Amended Complaint fail to make clear which claims are brought by [] Plasman and which claims are purportedly brought by Bolier, and neither specifies against which Defendant or Defendants the alleged claims are asserted. Further, the current Complaint and [P]roposed Second Amended Complaint assert a number of claims for relief in a confusing, unfocused manner[.]
>
> . . . .
>
> Applying these considerations [addressed above in the 26 May 2015 order] to its review of Plaintiffs' First Amended Complaint and to Plaintiffs' Motion to Amend Complaint, the [trial court] concludes, in its discretion, that it is appropriate in these circumstances – where the action is still in its early stages in this forum, and Plaintiffs have sought to add parties, claims, and allegations based on conduct purportedly arising after the filing of the First Amended Complaint – to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action.

In the October 2016 Order dismissing Plaintiffs' actions, the trial court discussed Plaintiffs' failure to cure these defects, despite having been given multiple opportunities to do so:

> 3. Plaintiff [] Plasman originally filed this action in October 2012, and Defendants subsequently removed the matter to the United States District Court for the Western District of North Carolina[.]
>
> 4. Upon remand [from the federal district court], the parties filed a number of substantive motions, which this [c]ourt resolved in [the May 2015 Order]. In that [order], the [c]ourt ruled on Plaintiff's Motion to Amend Complaint, [and] Defendants' Motion to Dismiss Plaintiff's First Amended Complaint[.]
>
> 5. This [c]ourt concluded in [the May 2015] Order that the "First Amended Complaint and [P]roposed Second Amended Complaint reveal[ed] fatal deficiencies on their face." The First Amended Complaint also asserted

claims "in a confusing, unfocused manner" by grouping claims together illogically and failing to make clear whether claims were brought individually or on Bolier's behalf and which Defendants were allegedly liable for which claims. Nevertheless, the [c]ourt, in the exercise of its discretion and under the specific circumstances in this case, determined that it was appropriate "to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action." Therefore, the [c]ourt granted [] Plasman's Motion to Amend and denied in part as moot Defendants' Motion to Dismiss Plasman's First Amended Complaint. The [c]ourt also denied in part as moot Defendants' Motion to Dismiss Barrett['s] Counterclaims.

6. [] Plasman filed his Second Amended Complaint on June 25, 2015. Barrett [] filed his Supplemented and Amended Third Party Counterclaims on the same day.[3] In *lieu* of filing any answer, Defendants filed the present Motions[.]

. . . .

18. Defendants contend, and the [c]ourt agrees, that the Second Amended Complaint has failed to fully cure those defects identified in [the May 2015 Order]. The Second Amended Complaint still fails to "specify against which Defendant or Defendants the alleged claims are asserted" and "asserts a number of claims for relief in a confusing, unfocused manner." As an example of the former, Plaintiff captions his misappropriation of trade secrets claims as against Decca [], Decca China, Decca Contract, Decca Hospitality, and Decca Home, but the allegations in support of that claim for relief fail to identify any involvement by Decca Contract or Decca Hospitality and instead focus

3. "The [c]ourt did not technically grant Barrett [] leave to amend. Instead, the [c]ourt anticipated that Barrett [] would refile any counterclaims at a procedurally appropriate time, if Defendants elected to file any third-party claims after answering the Second Amended Complaint. . . . . Nevertheless, Defendants did not challenge the timeliness of Barrett['s] filing, and the [c]ourt elects to evaluate Barrett['s] pleading on the merits." [Footnote is included in the October 2016 Order].

on conduct by Defendants Tin and Hudgins.[4] As an example of the latter, the Second Amended Complaint groups together allegations under the heading "Seventh and Eight Claims for Relief: Self-Dealing and Misappropriation of Corporate Opportunities – Derivatively for the Benefit of Bolier and Directly on behalf of Plasman as Minority Member[.]" This convoluted method of grouping claims is exacerbated by the Second Amended Complaint's repeated failure to distinguish between harm suffered by Bolier and harm suffered by [] Plasman, despite the well-established rule that "shareholders . . . generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation."

19. In addition, the Second Amended Complaint has not fully cured its "fail[ure] to make clear which claims are brought by [] Plasman and which claims are purportedly brought by Bolier." For instance, while Plaintiff has separately captioned his individual and derivative breach of fiduciary duty claims, several of the allegations under each section state that various Defendants breached "fiduciary duties to Bolier and [] Plasman" without distinction.

20. As a whole, and despite its length, the Second Amended Complaint is generally imprecise, and the peculiarities of this pleading have made this consideration of Defendants' Motions exceedingly burdensome. The [c]ourt therefore concludes that the Second Amended Complaint is not "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing

---

4. "As a further example, the Second Amended Complaint relies on broad allegations that the Plaintiff intends to hold most of the Defendants liable for most of the causes of action:"

> Herbst, Tin, Hudgins, and Tsang are officers and directors of one or more of Decca China, Decca [], Decca Contract, Decca Hospitality, Decca Home, Decca Classic, and Decca China Plant, and do not distinguish between actions taken by or for specific entities. For most of the allegations herein, each of the foregoing individuals and purported business entities are jointly and severally liable, and the actions and omissions of one or more of the named parties is attributable to one or more of the individuals and business entities because they act as agents and representatives of the other defendants. [Footnote is included in the October 2016 Order].

> that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1). After having already afforded Plaintiff the opportunity to re-plead his claims and specifically identified the ways in which Plaintiff's First Amended Complaint and Proposed Second Amended Complaint were insufficient, the [c]ourt, in the exercise of its discretion, concludes that the Second Amended Complaint's noncompliance with Rule 8 provides an alternate basis for dismissal in addition to the grounds identified under Rule 12(b)(6). [Citations omitted].

Upon our review of the Second Amended Complaint, we affirm the trial court's determination that the Second Amended Complaint continued to violate Rule 8(a)(1). However, Plaintiffs argue:

> Rule 8 prescribes no penalty for violation of its terms, and dismissal can only occur under N.C. R. Civ. P. 41(b). N.C. R. Civ. P. 7(b)(1) requires that a motion "shall state with particularity the grounds therefor[.]" However, Defendants never moved for dismissal under Rule 41(b) as required under Rule 7(b)(1), and Appellants never had notice of same." Therefore, the trial court erred by dismissing the [Second Amended Complaint] without referencing Rule 41(b) and <u>without a motion providing Appellants with **notice**</u> they were subject to Rule 41(b) dismissal.

This Court has recognized in *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E.2d 298 (1983), that

> Rule 8(a)(2) prescribes no penalty for violation of its proscription against stating the demand for monetary relief. Absent application of the Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment.
>
> The General Assembly thus must have intended application of the Rule 41(b) power of dismissal as a permissible sanction for violation of the Rule 8(a)(2) proscription.

Id. at 587, 299 S.E.2d at 300. We hold the same analysis applies to Rule 8(a)(1), as it also "does not identify a particular sanction that may be imposed" upon violation of its requirements. *Patterson*, 146 N.C. App. at 357, 553 S.E.2d at 409. Contrary to Plaintiffs' assertion in their brief, *Jones* does not hold that specific reference to Rule 41(b) is required,

only that Rule 41(b) serves as the vehicle for ordering sanctions for violations of Rule 8. In the present case, Defendants clearly indicated in their motion to dismiss the Second Amended Complaint that they were seeking dismissal in part based upon violations of Rule 8. Therefore, Plaintiffs were put on notice that Defendants were seeking dismissal based on Rule 8 violations through the only means available – Rule 41(b). *See Patterson*, 146 N.C. App. 351, 553 S.E.2d 404 (affirming dismissal of the plaintiff's action based upon violations of Rule 8 where the defendant's motion to dismiss did not reference Rule 41(b)).[5]

Finally, Plaintiffs argue that the trial court erred in dismissing the Second Amended Complaint "by not making findings of fact and conclusions of law which indicate that it had considered less drastic sanctions."

> Our [C]ourt [has] held that sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience. *[See] Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986) (in determining whether to dismiss a case for violation of motion in limine, trial court must determine the effectiveness of alternative sanctions). Once the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion.

Patterson, 146 N.C. App. at 357–58, 553 S.E.2d at 409 (citations omitted). Failure of the trial court to use the labels "finding of fact" or "conclusion of law" will not prevent this Court from reviewing the trial court's order to determine if it has appropriately considered and ruled upon the necessary issues. *See Brinn v. Weyerhaeuser Co.*, 209 N.C. App. 204, 707 S.E.2d 263 (2011) ("although the Commission did not label specific sentences as either 'findings of fact' or 'conclusions of law' within its order, the order was sufficient to allow us to review the Commission's reasoning").

As stated in the October 2016 Order, Plaintiffs were allowed to amend their complaint twice, including having been given two opportunities to draft their Second Amended Complaint in accordance with the requirements of Rule 8:

---

5. We have reviewed the record in *Patterson* and take judicial notice of the fact that the relevant motion to dismiss in part pursuant to Rule 8 includes no mention of Rule 41(b).

> This [c]ourt concluded in [the May 2015] Order that the "First Amended Complaint and [P]roposed Second Amended Complaint reveal[ed] fatal deficiencies on their face." . . . . Nevertheless, the [c]ourt, in the exercise of its discretion and under the specific circumstances in this case, determined that it was appropriate "to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action." Therefore, the [c]ourt granted [] Plasman's Motion to Amend[.]

Despite being given another opportunity to bring their complaint into compliance with Rule 8, and having been given specific direction concerning how to correct the deficiencies in their First Amended Complaint and their Proposed Second Amended Complaint, the trial court found "that the Second Amended Complaint has failed to fully cure those defects identified in the[c]ourt's prior order and opinion." The trial court then discussed the specific ways in which the Second Amended Complaint continued to violate Rule 8, and gave multiple examples from the complaint itself. As a result:

> The [c]ourt therefore conclude[d] that the Second Amended Complaint [wa]s not "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1). After having already afforded Plaintiff the opportunity to re-plead his claims and specifically identified the ways in which Plaintiff's First Amended Complaint and Proposed Second Amended Complaint were insufficient, the [c]ourt, in the exercise of its discretion, concludes that the Second Amended Complaint's noncompliance with Rule 8 provides an alternate basis for dismissal in addition to the grounds identified under Rule 12(b)(6).

We hold that the trial court's order contains sufficient findings and conclusions, though not labeled as such, demonstrating that it had considered lesser sanctions before deciding to dismiss the Second Amended Complaint for violations of Rule 8. In fact, the trial court indicates that it had decided not to issue any sanctions for Plaintiffs' continuing Rule 8 violations in the May 2015 Order, despite its belief that it had sufficient grounds to do so. We hold that the trial court took "into account the severity of [Plaintiffs'] disobedience[,]" and "the effectiveness of

alternative sanctions" before deciding that dismissal of the Second Amended Complaint was warranted. *Patterson*, 146 N.C. App. at 357–58, 553 S.E.2d at 409.

Plaintiffs do not specifically argue that the trial court's dismissal of the Second Amended Complaint amounted to an abuse of discretion. However, to the extent that Plaintiffs arguments could be interpreted to include such an argument, we hold that the trial court did not abuse its discretion in dismissing the Second Amended Complaint, pursuant to its authority under Rule 41(b), in response to Plaintiffs' multitudinous and continued violations of Rule 8. We therefore affirm.

C. Rule 12(b)(6)

[2] Although our holding above is sufficient to affirm the trial court's order dismissing the Second Amended Complaint, we have decided to review the trial court's alternate basis for dismissal. The trial court also ruled that the Second Amended Complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

We first hold that Plaintiffs' failure to state their claims with "sufficient[] particular[ity] to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[,]" N.C.G.S. § 1A-1, Rule 8(a)(1), warrant dismissal pursuant to Rule 12(b)(6). *Piro*, __ N.C. App. at __, 782 S.E.2d at 370 (quotation marks and citations omitted) (in order to conform with the dictates of Rule 8(a)(1), "a complaint must . . . state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)"). In addition, we have methodically reviewed Plaintiffs' arguments on appeal, which number in excess of twenty, and hold that none of Plaintiffs' challenges to the dismissal of certain claims in the Second Amended Complaint, pursuant to Rule 12(b)(6), have merit.

We note that the disjointed condition of the Second Amended Complaint rendered this review exceedingly difficult and time consuming, and has resulted in unnecessary delay in the resolution of this appeal. For instance, the allegations that Plaintiffs, on appeal, contend support specific claims are often not directly associated with those claims in any coherent or organized manner. On appeal, Plaintiffs attempt to cobble together support for individual claims by directing this Court to allegations scattered throughout the Second Amended Complaint, even though the context surrounding many of those allegations make clear that they are inapplicable to the claims to which Plaintiffs now attempt to apply them. As an obvious example of this practice, in Plaintiffs'

brief they often cite to allegations that are made *after* the claim they are alleged to support. Although each new claim in the Second Amended Complaint includes the regular boilerplate language that "[t]he allegations alleged in all above paragraphs are alleged herein and incorporated herein by reference[,]" there is no such boilerplate purporting to incorporate allegations in "all 'below' or 'subsequent' paragraphs" of the complaint. Nonetheless, on appeal, Plaintiffs regularly cite to allegations made *following* a claim in an attempt to provide support for that claim that is otherwise lacking. As one additional example of the incoherent nature of the Second Amended Complaint, the first substantive allegation made in the Second Amended Complaint in support of Plaintiffs' *derivative* claim *on behalf of Bolier* for alleged breach of fiduciary duty states: "Decca [] breached fiduciary duties *owed to Plasman* by failing to follow [the] Operating Agreement, [and] terminating Plasman without Member or Manager meeting[.]"

After painstaking review of the Second Amended Complaint, we also affirm the trial court's dismissal of the Second Amended Complaint pursuant to Rule 12(b)(6) because, for each of Plaintiffs' claims, one or more of the following is true: "(1) the complaint on its face reveals that no law supports [P]laintiff[s'] claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats [P]laintiff[s'] claim." *Hinson*, 232 N.C. App. at 208, 753 S.E.2d at 826 (citation omitted).

AFFIRMED.

Judges DIETZ and BERGER concur.

RAYMOND v. RAYMOND

[257 N.C. App. 700 (2018)]

KIMBERLY G. RAYMOND, PLAINTIFF
v.
CHARLES G. RAYMOND, DEFENDANT

No. COA16-1179

Filed 6 February 2018

1. Appeal and Error—notice of appeal—timeliness

A notice of appeal from a 5 May 2016 order was timely in an equitable distribution case even though it was filed more than 30 days after the entry of the order, where the record did not include a certificate of service and the husband did not move to dismiss the appeal. The trial court would not assume that the husband served the 5 May order on the wife within three days, and her time did not begin to run until she received it.

2. Appeal and Error—notice of appeal—jurisdiction

A wife's brief was treated as a petition for certiorari in an equitable distribution action where timeliness was not raised by the parties and there was confusion over the nature of the underlying proceedings and whether the time for filing an appeal had been tolled.

3. Divorce—separation agreement—modifications—summary judgment

The trial court erred by granting summary judgment for the husband in a divorce action where the parties signed a separation agreement, the parties agreed to a change, the husband modified and signed the revised agreement, and the wife never signed or acknowledged the modified agreement. There was no evidence in the record that the wife and husband ever signed and notarized the same separation agreement; the revision was not the correction of a typographical error.

Appeal by plaintiff from orders entered 28 January 2016 and 5 May 2016 by Judge Matthew J. Osman in District Court, Mecklenburg County. Heard in the Court of Appeals 18 April 2017.

Dozier Miller Law Group, by Adam S. Hocutt and Robert P. Hanner, II, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for defendant-appellee.

STROUD, Judge.

Plaintiff Kimberly G. Raymond ("Wife") appeals from the trial court's orders granting summary judgment, a declaratory judgment, and attorney fees to Defendant Charles G. Raymond ("Husband"). These orders are based upon the trial court's conclusion that the parties had entered an enforceable separation agreement and property settlement agreement. Because the same version of the agreement was never signed and acknowledged by both parties, as required by N.C. Gen. Stat. § 52-10.1, the trial court erred in concluding that the agreement is enforceable, and we reverse both orders and remand for further proceedings.

I. Facts and Procedural Background

The parties were married on April 3, 1999, and separated on some date prior to November 2014. Husband contends that the parties separated in December 2013, while Wife contends that the parties initially separated in December 2013, reconciled in May of 2014, and finally separated in September of 2014.

Wife engaged the services of attorney Carolyn Woodruff, who drafted a separation agreement which she presented to Husband on 13 December 2013. The parties thereafter continued to negotiate the terms of their separation. On 21 January 2014, Wife signed and notarized a document captioned "Separation and Property Settlement Agreement" and forwarded it to Husband.

The parties then had the following exchange by email. On 22 January 2014, Wife sent the following to Husband:

> I mailed the papers to you today. 3 copies. Please get all 3 notarized and send 2 back to me. You can give to Darlene and she can bring them to me on Friday as she will be here then.

On 23 January 2014, Husband emailed the following to Wife:

> I have gone over the agreement and it is correct and acceptable with one exception. Your attorney slipped in a requirement to divide the Carlyle investment. This has never been raised and is inappropriate. Your choices are to rewrite the agreement, deleting clause Article II Property Settlement, Para 1 C i (Carlisle Funds), or I will line it out and initial it. You would then return an initialed copy to me. Your choice. You told me you were playing no

> games. . . . That's why I suspect your attorney put that in in error. Please advise.

On 23 January 2014, Wife emailed the following to Husband:

> Cross out that part and initial it on all 3 copies. Darlene will wait in [sic] you. Sorry for that!

On the same day, Wife also emailed the following to Husband:

> Had to make certain contract would still be legit and it will as long as you mark thru, initial lines and initial bottom and then sign docs. You can also next day air to me today if you don't want to bother Darlene.

Husband made the requested changes to the document, initialed the changes, notarized the document and then sent it to Wife. Wife received the document but never signed or initialed the revised document.

On 4 February 2015, Wife filed a complaint for post-separation support, alimony, equitable distribution, an interim distribution of marital assets, and attorney's fees. Husband filed an answer, motions to dismiss, affirmative defenses, and counterclaims on 17 April 2015. In his answer, Husband moved for, among other things: dismissal under Rule 12(b)(6), declaratory judgment, breach of contract, and attorney's fees based on the argument that the couple had a valid and enforceable separation agreement and that Wife had waived her rights to pursue the claims. Husband also sought an award of reasonable attorney's fees because of Wife's breach of their separation agreement. On 5 October 2015, Wife moved for summary judgment and declaratory judgment because the parties had no legally enforceable separation agreement.

After considering evidence, affidavits, and depositions by the parties, on 28 January 2016, the trial court entered an order granting summary judgment and a declaratory judgment in favor of Husband because the parties had entered into a legally enforceable separation agreement.

Wife moved to set aside the judgment and filed a motion for relief from judgment on 4 February 2016. Husband, on 8 March 2016, moved to dismiss Wife's motion to set aside judgment and filed a motion for relief from judgment; a motion for attorney's fees because her motion raised no justiciable issue, and a motion for a transfer of property under Rule 70 of the Rules of Civil Procedure of North Carolina regarding the Linville property owned by the parties which Wife had refused to deed to Husband under the Separation Agreement. The trial court found for Husband on all claims in an order entered on 5 May 2016. This order has

no certificate of service to show service upon Wife. Wife filed notice of appeal on 8 June 2016, appealing the trial court's 28 January 2016 and 5 May 2016 orders.

II. Timeliness of Appeal and Jurisdiction

A timely notice of appeal is required to confer jurisdiction upon this Court. *See*, *e.g.*, *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 321 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure.").

A. 5 May 2016 Order

[1] Although neither party has addressed whether Wife's notice of appeal was timely filed for either order to confer jurisdiction upon this Court under N.C. R. App. P. Rule 3 to consider her appeal, we must raise issues of jurisdiction *sua sponte*. *See*, *e.g.*, *Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) ("[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.").

> Under our North Carolina Rules of Appellate Procedure, Rule 3(c), "Time for Taking Appeal," states, in pertinent part, the following: In civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period. The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal. Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.

Wallis v. Cambron, 194 N.C. App. 190, 192-93, 670 S.E.2d 239, 241 (2008) (citations, quotation marks, and ellipses omitted).

The order granting summary judgment and a declaratory judgment was entered on 28 January 2016, but Wife did not file her notice of appeal until 8 June 2016, far more than 30 days after entry of that order. In addition, the notice of appeal was filed more than 30 days after entry of the 5 May 2016 Order. We will address the timeliness of the appeal of the 5 May 2016 order first.

> Rule 3(c)(1) of the Rules of Appellate Procedure provides that a party must file and serve notice of appeal within thirty days after entry of judgment if the party has been served a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure. Rule 58 provides that service and proof of service shall be in accordance with Rule 5. Rule 5(b) provides: "[a] certificate of service shall accompany every pleading and every paper required to be served and shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served.

Frank v. Savage, 205 N.C. App. 183, 186-87, 695 S.E.2d 509, 511 (2010) (citations, quotation marks, emphasis, ellipses, and brackets omitted).

The 5 May 2016 order has no certificate of service and our record does not indicate when Wife was served. Under N.C. R. App. P. 3(c)(2), "a party must file and serve a notice of appeal . . . (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]" Under Rule 3, if Wife was properly served with the 5 May 2016 order, her notice of appeal would have been due on 6 June 2016.[1] Husband has not moved to dismiss the appeal, and neither party has addressed any concern regarding the timeliness of Wife's appeal.

In *Frank*, the order on appeal had a certificate of service but it did "not show the name or service address of any person upon whom the order was served." *Frank*, 205 N.C. App. at 187, 695 S.E.2d at 511. The appellees moved to dismiss the appeal because appellants' notice of appeal was filed 31 days after entry of the order; appellants contended that they actually received the order 4 days after its entry and the appeal was timely by their calculation. *Id.* at 186, 695 S.E.2d at 511. This Court placed the burden of showing that the order was properly served within three days upon the appellee who sought dismissal of the appeal, and since the certificate of service did not show the name or address of the parties served, held the appeal to be timely and denied the motion to dismiss the appeal. *Id.* at 187, 695 S.E.2d at 512.

> We faced a similar situation in *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001). Appellee in *Davis* argued

1. June 4 2016 fell on a Saturday, so the notice would have been due on the following Monday.

> that appellant "filed the notice of appeal more than 30 days after the judgment was entered and that her appeal should therefore be dismissed." *Id.* at 105, 554 S.E.2d at 404. The Court noted however that appellee "did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure." *Id.* Under the applicable provisions of Rule 3, appellant had thirty days from the date she was properly served with the judgment. *Id.* The Court therefore denied appellee's Motion to Dismiss the appeal.
>
> We believe that Defendants' failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure in the present case requires us to apply Rule 3(c)(2) and not Rule 3(c)(1). We therefore hold that Plaintiffs' appeal is timely. Defendants' Motion to Dismiss Plaintiffs' appeal is denied.

Frank, 205 N.C. App. at 187, 695 S.E.2d at 511-12 (footnotes omitted).

Here, the record includes no certificate of service. Husband has not moved to dismiss the appeal. We will not assume that Husband served the 5 May 2016 Order on Wife within three days as required by Rule 3(c)(1), and thus her time to appeal did not begin to run until she received it, under Rule 3(c)(2). Her notice of appeal of the 5 May 2016 order is therefore timely, and this Court has jurisdiction to consider her appeal of that order.

B. 28 January 2016 Order

[2] Neither party has addressed the timeliness of Wife's appeal of the 28 January 2016 order either, but again, we have no jurisdiction to consider her appeal of this order without a proper notice of appeal. Wife apparently assumed that her Motion to Set Aside Judgment and for Relief from Judgment under Rules 52, 59, and 60 tolled the time for her notice of appeal, since she appealed both orders after entry of the trial court's order denying her motions. As the substance of her motion determines whether the time for appeal was tolled, we must consider the grounds for her motion. *See* N.C. R. App. P. Rule 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).").

Wife's motion requested under Rule 52 that the trial court "amend its findings or make additional findings[,]" and under Rule 59(a)(7), she alleged that the order was "contrary to law." Under Rule 60(b)(1) and (6), Wife alleges "mistake" -- specifically, the trial court's legal error -- and "any other reason justifying relief from the operation of the judgment" -- also the trial court's legal error. The substance of Wife's motion alleges the trial court made a "legal error" by determining the separation agreement was valid. The motion also makes various allegations regarding cases addressing the validity of the separation agreement and argues that the trial court's ruling was contrary to those cases.

As noted above, a motion under Rule 60 does not toll the time for filing notice of appeal. *See Wallis*, 194 N.C. App. at 193, 670 S.E.2d at 241. But a motion under Rule 52(b) or 59 will toll the time for notice of appeal, if the motion actually presents a rationale for relief under one of these rules and is not simply " 'used as a means to reargue matters already argued[.]' " *Batlle v. Sabates*, 198 N.C. App. 407, 414, 681 S.E.2d 788, 794 (2009) (quoting *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997)).

> If a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order. As a result, the timeliness of Plaintiff's appeal from the 21 September 2007 order hinges upon whether Plaintiff's 5 October 2007 motion sufficiently invoked the provisions of N.C. Gen. Stat. § 1A-1, Rules 50(b), 52(b), or 59.
>
> . . . . [W]hile a request that the trial court reconsider its earlier decision granting the sanction may properly be treated as a Rule 59(e) motion, a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, cannot be used as a means to reargue matters already argued or to put forward arguments which were not made but could have been made. Thus, in order to properly address the issues raised by Defendant's dismissal motion, we must examine the allegations in Plaintiff's motion to ascertain whether Plaintiff stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59.

Batlle, 198 N.C. App. at 413-14, 681 S.E.2d at 793-94 (citations, quotation marks, brackets, and footnote omitted).

The January 2016 order is entitled "Order Re: Cross-Motions for Declaratory/Summary Judgment." Although summary judgment orders should not include findings of fact, *see, e.g.*, *Tuwamo v. Tuwamo*, __ N.C. App. __, __, 790 S.E.2d 331, 336 (2016) ("Of course, neither an order for dismissal under Rule 12(b)(6) nor a summary judgment order should include findings of fact."), this order has extensive findings of fact. In addition, Wife filed a motion under Rule 52 requesting amended or additional findings of fact. But this Court has held that because summary judgment orders should not have findings of fact, and on appeal we may disregard any such findings, Rule 52 does not apply to summary judgment orders. *See, e.g.*, *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) ("The named plaintiffs requested that the trial court, in rendering summary judgment, find facts specifically and express its conclusions of law pursuant to G.S. 1A-1, Rule 52. A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." (citations omitted)), *overruled in part on other grounds as stated in Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

But this analysis assumes that the January 2016 order is in fact a *summary judgment* order, although it does not look much like one. This jurisdictional discussion has perhaps gone on too long primarily as a result of the way the parties and trial court dealt with the hearing of the matter and the extensive findings and conclusions in the trial court's order.[2] Instead of continuing to attempt to characterize the order, we dismiss Wife's appeal from the 28 January 2016 order as untimely, but then exercise our discretion to treat Wife's brief as a petition for certiorari, allow the petition, and review the 28 January 2016 order. *See* N.C. R. App. P. Rule 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]"); *In re Will of Durham*, 206 N.C. App. 67, 74, 698 S.E.2d 112, 119 (2010) ("Given the complete

2. We have also reviewed the entire transcript of the hearing to determine if the parties and trial court treated this hearing as a bench trial, and although they did not refer to it as such, from the arguments and discussion, it could likely be considered a bench trial.

absence of any showing in the record on appeal that Caveator appealed the sanctions order in a timely manner, we have no alternative except to dismiss Caveator's appeal from the sanctions order as untimely. We do, however, have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C. R. App. P. 21(a)(1), to grant the petition, and to then review Caveator's challenge to the sanctions order on the merits.").

III. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In Re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

As noted above, the trial court's summary judgment order includes "findings of fact." Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact.

> The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment, where the basis of the judgment is that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

War Eagle, Inc. v. Belair, 204 N.C. App. 548, 551, 694 S.E.2d 497, 500 (2010) (citations and quotation marks omitted). It is not uncommon for trial judges to recite uncontested facts upon which they base their summary judgment order, however when this is done "any findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts." *Id.* In this case, all the material facts are uncontested so we will treat the "findings of fact" in the January 2016 order as "uncontested facts" for the purpose of evaluating the trial court's order for summary judgment.

> [I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*.

Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006) (citations omitted). We will therefore review the order's legal conclusion of the enforceability of the agreement *de novo*.

IV. Analysis

Wife contends that the trial court erred by granting summary judgment and declaratory judgment for Husband. We agree.

A. Validity of Separation Agreements under N.C. Gen. Stat. § 52-10.1

[3] The law of North Carolina has long been that a married couple, upon deciding to separate, may memorialize their decisions governing their separation and property settlement in a legally enforceable separation agreement. A separation agreement is a contract, but unlike other types of contract, separation agreements must meet several statutory requirements. Specifically, under N.C. Gen. Stat. § 52-10.1 (2015), a married couple may execute a legally binding separation agreement if that agreement is 1) not against public policy, 2) in writing and 3) acknowledged by both parties before a certifying officer. N.C. Gen. Stat. § 52-10.1. Such a certifying officer may include a notary public. N.C. Gen. Stat. § 52-10(b) (2015). The courts of North Carolina have routinely held that a separation agreement is void and unenforceable unless it was "executed in the manner and form required by [N.C.G.S. § 52-10.1]." *Daughtry v. Daughtry*, 225 N.C. 358, 360, 34 S.E.2d 435, 437 (1945). Any modification of a separation agreement must also "be in writing and acknowledged, in accordance with the statute." *Jones v. Jones*, 162 N.C. App. 134, 137, 590 S.E.2d 308, 310 (2004). An attempt to orally modify a separation agreement is insufficient as a matter of law and fails to meet the standards of the statute. *See Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985).

Here, Wife contends there is no legally enforceable separation agreement between the parties because the statutory requirements were never met. There is no factual dispute that the parties each signed and acknowledged different versions of the agreement. Wife signed and notarized the original version of the couple's separation agreement and sent it to Husband. Husband then modified, signed, and acknowledged the revised separation agreement. Wife never signed or acknowledged the revised separation agreement after it was modified by Husband, and there is no evidence in the record that Wife and Husband ever signed and notarized the same separation agreement.

Husband "acknowledges the historical respect afforded the formal requirements given to separation agreements[,]" but argues that

"the parties' legal right should not hang up on a technicality that can be fixed[.]" He contends that Wife's email from 23 January 2014 is sufficient to modify the separation agreement under N.C. Gen. Stat. § 52-10.1 and create a separation agreement binding on both parties. He also contends that his change to the agreement was merely the correction of "what amounts to a clerical error in the Agreement" so it should not be "fatal to the enforceability." He cites no law to support his contention this was a "clerical error," most likely because his revision was not the correction of a typographical error or transposed letters or numbers.

This Court is not simply giving "historical respect" to the formal requirements of separation agreements. We must enforce the law as established by the General Assembly in N.C. Gen. Stat. § 52-10.1 and as interpreted consistently by our courts. And Husband's revision to the agreement was far more than correction of a clerical error. Husband's revision changed the distribution of the Carlisle Funds account from an equal division between the parties to a distribution solely to Husband. Husband concedes that Wife never signed or acknowledged the separation agreement after his modifications on 23 January 2014. Given the lack of signature or acknowledgment, Husband's argument is without merit.

B. Equitable Argument

Husband raises the argument that even if this Court should find the agreement void, Wife should not be allowed to avoid its effect based upon "equitable principles." The trial court's order also addressed this issue. The trial court found:

> 12. The Court finds that, given Plaintiff/Wife's direction to Defendant/Husband that he should strike the relevant paragraph and have it executed, that the Agreement is not void and valid.
>
> 13. Additionally, even if the Court would have found the Agreement was not executed in accordance with relevant statutory authority (which it does not), the Court does find that Plaintiff/Wife made the voluntary choice to recognize the Agreement by treating it as valid for more than a year without complaint and that she has been permitted to enjoy and has enjoyed all of the benefits of the Agreement.
>
> 14. Plaintiff/Wife *has ratified the Agreement* and *she is estopped* from making the legal argument that it was

> not validly executed and therefore unenforceable. *See Moore v. Moore*, 108 N.C. App. 656 (1993).

(Emphasis added).

Husband's argument mentions words such as "estoppel," "equitable estoppel," and "quasi-estoppel," although we are not entirely sure how these principles may apply to this case. The trial court's order cited to *Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673, *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993), and Husband has addressed this case in his brief, so we will address it.

In *Moore*, the husband and wife signed the same agreement and the agreement was notarized. *Id.* at 657-58, 424 S.E.2d at 674-75. Both signed during a meeting at the wife's attorney's office and Ms. King, an employee in the office, was the notary. *Id.* at 658, 424 S.E.2d at 674-75. The couple signed several documents that day, and Ms. King was "in and out" of the room where they met "preparing additional paperwork" to be signed. *Id.* In seeking to avoid the agreement, the husband claimed that Ms. King was not actually present in the room at the moment when he signed the agreement, so she did not witness his signing. *Id.*, at 658, 424 S.E.2d at 675. Ms. King averred that she did witness both parties' signatures. *Id.* The trial court granted summary judgment to the wife, finding the agreement enforceable, and the husband appealed. *Id.* at 657, 424 S.E.2d at 674. On appeal, this Court affirmed the trial court. *Id.* at 658, 424 S.E.2d at 675. This Court stated that even if there was some factual issue regarding the notarization of the agreement, there was no genuine issue of material fact which would prevent summary judgment:

> Plaintiff's evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement. North Carolina recognizes a presumption in favor of the legality of an acknowledgment of a written instrument by a certifying officer. To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred.

Id. at 659, 424 S.E.2d at 675 (citation omitted).

In other words, the holding of *Moore* is entirely inapposite to this case, since the issue here is entirely different. In *Moore*, both parties signed the same agreement. *Id.* at 657, 424 S.E.2d at 674. Here, Husband and Wife each signed different versions of the agreement. Even under basic contract law -- N.C. Gen. Stat. § 52-10-1 notwithstanding -- where there is no meeting of minds on the essential terms of the agreement,

there is no contract. *See*, *e.g.*, *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) ("For an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. . . . [G]iven the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement." (citations and quotation marks omitted)). Therefore, Husband's argument must be based primarily upon the *Moore* Court's concluding comments:

> [E]ven if the notarization could be deemed invalid due to the technical statutory violation, plaintiff is estopped from asserting its invalidity. The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. The rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications. Having chosen to recognize the agreement by treating it as valid for two years without complaint, plaintiff has been permitted to enjoy the benefits of the agreement. He now pursues a course to overturn it. Equity dictates the result consistent with the trial court's judgment.

Moore, 108 N.C. App. at 659, 424 S.E.2d at 675-76 (citation omitted).

This portion of *Moore* is arguably dicta, since it was unnecessary for the decision. "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). In addition, this Court has recently held otherwise, in a case involving enforcement of an alleged amendment to a separation agreement which was not notarized:

> Plaintiff argues that, even if the 2003 Amendment is void, she may still recover based upon equitable theories, including estoppel and ratification, because Defendant had performed for eleven years under the terms of the 2003 Amendment with knowledge it had not been notarized. We disagree.
>
> It is well settled that a void contract cannot be the basis for ratification or estoppel. *See Bolin v. Bolin*, 246

> N.C. 666, 669, 99 S.E.2d 920, 923 (1957) ("A void contract will not work as an estoppel."); *see also Jenkins v. Gastonia Mfg. Co.*, 115 N.C. 535, 537, 20 S.E. 724, 724 (1894) ("[W]e have held that such contract, not being ... in compliance with the statute, and being executory in its nature, was void and incapable of ratification.").

Kelley v. Kelley, __ N.C. App. __, __, 798 S.E.2d 771, 777-78 (2017).

And in any event, even considering equitable principles, we see no "unfairness" to Husband based upon the record before us. He complains that he paid Wife $7,000.00 per month as post-separation support under the agreement until 4 February 2015, so she should not now be allowed to pursue her claims for post-separation support, alimony, and equitable distribution. But should the trial court ultimately grant the relief Wife seeks, the trial court can consider these payments in the final calculations. Husband may receive a credit for any payments he made under the void agreement toward any amount he may become obligated to pay based on Wife's claims -- or Wife may have to repay to Husband any amount he paid in excess of his obligations as ultimately determined by the trial court.

V. Conclusion

For the reasons stated above, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DAVIS concur.

SMITH JAMISON CONSTRUCTION, PLAINTIFF
v.
APAC-ATLANTIC, INC., YATES CONSTRUCTION CO., INC., DEFENDANTS

No. COA17-761

Filed 6 February 2018

Arbitration and Mediation—motion to compel by non-signatory

The doctrine of equitable estoppel did not require that plaintiff Jamison be compelled to arbitrate claims against a third party, Yates, who was not a signatory to a contract which contained an arbitration clause. Jamison was not attempting to assert against Yates claims premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause, but instead claims arising from legal duties imposed by North Carolina statutory or common law.

Appeal by defendant from order entered 13 April 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 8 January 2018.

Spilman Thomas & Battle, PLLC, by Bryan G. Scott, Matthew W. Georgitis and Steven C. Hemric, for plaintiff-appellee.

Tuggle Duggins, P.A., by J. Nathan Duggins III, Alan B. Felts, Benjamin P. Hintze and Jaye E. Bingham-Hinch, for defendant-appellant.

TYSON, Judge.

Yates Construction Company, Inc. ("Yates") appeals the superior court's order, which denied Yates' motion to compel Smith Jamison Construction to submit to binding arbitration and to stay all other proceedings in the dispute between these parties. We affirm the trial court's denial of Yates' motion asserting a right to demand arbitration.

I. Background

Smith Jamison Construction ("Jamison") is a concrete contractor based in Winston-Salem, North Carolina. In October 2012, Jamison entered into a contract (the "Subcontract") with APAC-Atlantic, Inc. ("APAC"), a general contractor, to construct catch basins, drop inlets,

concrete curbs, gutters, sidewalks, curb ramps, driveways, and concrete paved ditches along the Interstate 73 highway corridor.

Contained within section 22 of the Subcontract was a mandatory arbitration provision in which Jamison and APAC agreed to arbitrate claims arising out of or relating to the Subcontract as follows:

> All claims or controversies arising out of or related to this Subcontract shall be submitted to and resolved by binding arbitration by a single arbitrator in any County and State where the project is located. The American Arbitration Association ("AAA") shall conduct the arbitration unless the parties mutually agree to use an alternative arbitration service. Judgment upon any award made by the arbitrator may be entered in any court having jurisdiction thereof, if necessary.

Yates is a separate North Carolina corporation, which has engaged in construction work with APAC and Jamison on past projects. Yates is neither a party to nor a signatory of the Subcontract between Jamison and APAC.

Jamison alleges, although it was awarded the Subcontract for the concrete work on Interstate 73, the APAC Project Manager exchanged emails with Yates' vice president on multiple times concerning a subcontract approval form, under which Jamison would further subcontract to Yates the curb work previously assigned to Jamison's scope of work under the Subcontract. Jamison further alleges it did not request nor authorize Yates to be added to the project as a sub-subcontractor, but that, "Yates was expecting to perform [Jamison's] work as early as July 2013, due to such representations from APAC." Jamison further alleges APAC expressly requested Jamison to allow Yates to subcontract the curb and gutter scope of work, but Jamison refused. Jamison asserts that after it refused, APAC started sending it daily complaint emails. On 20 December 2013, the Department of Transportation approved APAC's request to terminate Jamison and replace them with Yates. Jamison was informed that the Subcontract had been terminated.

Jamison filed a complaint against APAC and Yates on 13 April 2016, alleging that APAC had terminated Jamison and replaced it with Yates. Jamison also asserted claims against Yates for: (1) fraudulent misrepresentation; (2) tortious interference with a contract; (3) civil conspiracy; and (4) unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1.

Yates filed an answer on 14 June 2016, denied all allegations of wrongdoing and asserted, in part, "the presence of a mandatory and binding arbitration clause in the subcontract between [Jamison] and Defendant APAC[.]"

The trial court entered a consent order compelling arbitration between Jamison and APAC and staying the claims against APAC on 30 December 2016. In the consent order, Jamison and APAC agreed to stay the action with respect to their claims and to submit those claims to binding arbitration, based upon the arbitration provision contained in the Subcontract between Jamison and APAC.

Yates filed a motion to compel arbitration and stay court proceedings on 24 March 2017. Yates sought the court to order Jamison to arbitrate its claims against it. The trial court denied Yates' motions by an order entered 13 April 2017. Yates filed timely notice of appeal.

II. Jurisdiction

Although an order denying a party's motion to compel arbitration is interlocutory, this Court has repeatedly held that "[it] is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citing *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983)); N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (2017). Yates' interlocutory appeal is properly before us.

III. Standard of Review

"[The] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). "Under *de novo* review, [this Court] consider[s] the matter anew and [is] free to substitute [its] judgment for that of the trial court." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

IV. Analysis

Yates argues the trial court erred in denying its motion to compel arbitration and stay the action. Yates asserts Jamison is equitably estopped from asserting Yates, a nonsignatory, was not covered by the arbitration clause contained within the Subcontract between Jamison and APAC.

A. Duty to Arbitrate

This Court applies a two-pronged analysis to determine whether a dispute is subject to arbitration. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). We must determine whether the specific dispute is covered by the "substantive scope of th[e] agreement[,]" and "whether the parties had a valid agreement to arbitrate[.]" *Id.* (citation omitted).

In the consent order compelling arbitration between Jamison and APAC, both parties to the Subcontract stipulated that the arbitration clause was valid, enforceable, and governed at least some of Jamison's claims against APAC. Because the applicability of the arbitration clause in the Subcontract is stipulated to cover the claims between Jamison and APAC, we must determine whether the arbitration clause also obligates Jamison to arbitrate its claims against Yates.

"The obligation and entitlement to arbitrate 'does not attach only to one who has personally signed the written arbitration provision.' Rather, '[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.' " *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (quoting *Int'l. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir. 2000)) (alteration in original).

B. Equitable Estoppel

"[A] nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate." *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006). "One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause." *Id.* "[E]stoppel is appropriate if in substance the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement." *Id.* at 628 (citation, internal quotation marks and brackets omitted).

"[E]quitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely upon the terms of the . . . agreement in asserting its claims against the nonsignatory." *Id.* at 626-27 (citations omitted). We examine Jamison's underlying claims in the complaint to determine whether equitable estoppel should apply. *See id.*

> Where the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause, a court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, *assert a breach of a duty created by the contract containing the arbitration clause.*

Carter v. TD Ameritrade Holding Corp., 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 (2012) (emphasis supplied) (internal quotation marks and citation omitted).

C. *Ellen v. A.C. Schultes of Maryland, Inc.*

In analyzing Yates' equitable estoppel argument, we find this Court's analysis in *Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C. App. 317, 320, 615 S.E.2d 729, 732 (2005), is instructive. This Court in *Ellen* affirmed the trial court's denial of a motion to compel arbitration, which was based upon the defendants' contention that the plaintiffs were equitably estopped from refusing to arbitrate their claims. *Id.* at 320-23, 615 S.E.2d at 731-33.

As is analogous here, the plaintiffs in *Ellen* had brought claims for unfair and deceptive trade practices and tortious interference with prospective business advantages against the defendants. *Id.* at 322, 615 S.E.2d at 733. The plaintiffs had not asserted the defendants in *Ellen* breached or owed them any duties arising from the contract containing the arbitration clause. *Id.*

In affirming the denial of the motion to compel arbitration, this Court reasoned that while the contract containing the arbitration clause "[p]rovided part of the factual foundation for plaintiffs' complaint," the plaintiffs' claims were "dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law." *Id.* at 322, 615 S.E.2d at 732-33.

Here, Jamison's claims against Yates consist of: (1) fraudulent misrepresentation; (2) tortious interference with a contract; (3) civil conspiracy; and (4) unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. Jamison's claims, like the plaintiffs' claims in *Ellen*, are dependent upon legal duties imposed by North Carolina statutory and common law, rather than alleged breaches of duties arising from the terms of the Jamison and APAC Subcontract. *See id.*

Jamison's fraudulent misrepresentation claim arises from a common law duty not to intentionally harm others through deception. *See*

Marshall v. Keaveny, 38 N.C. App. 644, 647, 248 S.E.2d 750, 753 (1978) (recognizing "that an action for fraudulent misrepresentations inducing the plaintiff to enter into a contract is an action in tort and not an action in contract").

Jamison's civil conspiracy claim is premised upon allegations that Yates conspired with APAC to defraud Jamison and is not a separate cause of action, in and of itself. *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (noting "that there is not a separate civil action for civil conspiracy in North Carolina").

Jamison's tortious interference with a contract claim arises from a common law duty of a third party not to interfere with another's right to freedom of contract or to enjoy the benefits thereof. *See Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) ("[U]nlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense."); *see also*, *United Labs.*, *Inc. v. Kuykendall*, 335 N.C. 183, 189-90, 437 S.E.2d 374, 378-79 (1993) (labelling tortious interference with a contract as a common law claim).

Jamison asserts its unfair and deceptive trade practices claim against Yates pursuant to N.C. Gen. Stat. § 75-1.1, which establishes a statutory, and not contractual, basis for the action. *See Ellen*, 172 N.C. App at 322, 615 S.E.2d at 732 (treating an unfair and deceptive trade practices claim as a statutory-based claim); *see also United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986) ("[A]n action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty.").

Jamison's claims against Yates are not premised upon any alleged breaches of duties created by the Jamison and APAC Subcontract, but rather upon alleged breaches of duties established by North Carolina common law or statutes. *See Carter*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 ("[A] court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause.").

Yates asserts the case of *Carter v. TD Ameritrade Holding Corp.* is indistinguishable from the matter at bar. In *Carter*, the plaintiffs were investors who alleged their IRA investment accounts were transferred without their assent to the defendants via contracts bearing their allegedly forged signatures. *Carter*, 218 N.C. App. at 223-24, 721 S.E.2d at

258-59. This Court held, *inter alia*, the plaintiffs had ratified the contracts by manifesting their approval of the transfer by accepting tax benefits and administrative services provided by the defendants under their investment contracts, and by failing to repudiate their accounts after they became aware of the transfer. *Id.* at 230, 721 S.E.2d at 262.

The contracts contained binding arbitration clauses, which named the defendants' predecessor-in-interest. *Id.* at 224, 721 S.E.2d at 259. This Court presumed, *arguendo*, the plaintiffs had not signed the investment contracts, and held the plaintiffs were estopped from arguing they were not subject to arbitration against the defendants, because the plaintiffs' claims were premised on enforcing duties arising from the contracts. *Id.* at 230-33, 721 S.E.2d at 262-63. The claims brought by the plaintiffs included, *inter alia*:

> [B]reach of contract, alleging defendants breached their respective investment contracts with the plaintiffs; breach of fiduciary duty, alleging [] defendants were plaintiffs' broker-dealers with whom plaintiffs had a special relationship of trust who, by [t]he above-described conduct, breached their fiduciary duties; gross negligence, alleging [] defendants had a duty to properly supervise [plaintiff's investment representative] and that [t]he failure of these defendants to properly supervise [plaintiff's investment representative] constitutes gross negligence.

Id. at 233, 721 S.E.2d at 264 (internal quotation marks omitted).

The plaintiffs in *Carter* were attempting to assert the contracts containing arbitration clauses and naming the defendants' predecessor-in-interest were not binding upon them, because their signatures were allegedly forged, while at the same time asserting the defendants had breached the duties established by those same contracts. *Id.*

Here, unlike *Carter*, Jamison is not attempting to assert claims against Yates that are premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause. The Subcontract between Jamison and APAC does not contemplate, name, or refer to Yates as a party to the agreement or in any other manner. We reject Yates' assertion that *Carter* is indistinguishable from the case at hand or compels a reversal of the trial court's order.

Although the existence of the Subcontract between Jamison and APAC "[p]rovide[s] part of the factual foundation for [Jamison's] complaint," Jamison's claims against Yates are "dependent upon legal duties

imposed by North Carolina statutory or common law rather than contract law." *Ellen*, 172 N.C. at 320, 615 S.E.2d at 732. We conclude that the doctrine of equitable estoppel does not require the Court, under these facts and allegations, to compel Jamison to arbitrate its asserted claims against Yates. *See id.* Yates' arguments are overruled.

V. Conclusion

Jamison's claims against Yates are premised upon duties created by North Carolina common law or statutes, and are not based upon the Subcontract duties or provisions between Jamison and APAC. Equitable estoppel does not apply to these claims to require the trial court to stay the action and compel Jamison to submit its claims against Yates to arbitration. The order denying Yates' motion to compel arbitration and to stay the action is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

RICHARD B. SPOOR, Derivatively, on behalf of Defendant
JR International Holdings, LLC, Plaintiff
v.
JOHN M. BARTH, JR., JOHN BARTH (SR.), and
JR INTERNATIONAL HOLDINGS, LLC, Defendant

No. COA17-308

Filed 6 February 2018

1. Civil Procedure—relation-back provision of Rule 41(a)(1)—applies only to claims that were included in voluntarily dismissed complaint

Where plaintiff asserted a single derivative claim against defendant Barth Jr. for breach of fiduciary duty in his 2012 complaint, Rule of Civil Procedure 41(a)(1)'s relation-back provision did not apply to plaintiff's 2015 derivative claims against defendant Barth Sr. or to a 2015 derivative claim for breach of contract against defendant Barth Jr., and the trial court properly dismissed those claims pursuant to Rule 12(b)(6) as barred by the statute of limitations. Plaintiff's 2012 derivative claim, which realleged the allegations of the previous paragraphs of the 2012 complaint, did not incorporate all the individual claims he asserted in that complaint. But the trial

court did err by dismissing plaintiff's 2015 derivative breach of fiduciary duty claim against defendant Barth Jr., because that claim was brought in plaintiff's 2012 complaint and thus Rule 41(a)(1)'s relation-back provision applied to that claim.

2. Civil Procedure—15(a) motion to amend complaint—denied on futility grounds—barred by statute of limitations

The trial court did not abuse its discretion by denying on futility grounds plaintiff's Rule 15(a) motion to amend his 2015 complaint to add derivative claims against defendants for fraud and unfair and deceptive trade practices. Plaintiff's 2012 complaint never alleged those claims, so adding them to his 2015 complaint would be effectively barred by the statute of limitations.

Appeal by plaintiff from order entered 12 October 2016 by Judge Robert T. Sumner in Wake County Superior Court. Heard in the Court of Appeals 4 October 2017.

Barry Nakell, for plaintiff-appellant.

WilsonRatledge, PLLC, by Reginald B. Gillespie, Jr. and N. Hunter Wyche, Jr.; and Foley & Lardner LLP, by Michael J. Small, pro hac vice, for defendant-appellee John M. Barth.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for defendant-appellee John Barth, Jr.

ELMORE, Judge.

Richard B. Spoor (plaintiff), derivatively on behalf of JR International Holdings, LLC ("JR Holdings"), appeals from an order (1) dismissing under Rule 12(b)(6) his derivative claims against John Barth Sr. ("Sr.") and John Barth Jr. ("Jr.") (defendants) as barred by the statute of limitations and (2) denying his Rule 15(a) motion to amend his complaint to add additional derivative claims as futile. We affirm in part and reverse in part.

I. Background

This is Spoor's second appeal to our Court. While we address only the factual and procedural background relevant to address this appeal, a more thorough background of this case may be found in our prior decision. *See Spoor v. Barth*, ___ N.C. App. ___, ___, 781 S.E.2d 627, 629–32,

disc. rev. and cert. denied, ___ N.C. ___, 787 S.E.2d 38, *and disc. rev. and cert. denied*, ___ N.C. ___, 789 S.E.2d 4 (2016) ("*Spoor I*").

In 2012, Spoor filed his first amended complaint ("FAC") and second amended complaint ("SAC") (collectively, the "2012 Complaint") against Sr. and Jr., asserting several individual claims against both defendants and one derivative claim, on behalf of JR Holdings, against Jr. for breach of fiduciary duty. In response, Sr. moved for summary judgment on grounds that Spoor lacked standing and that his claims were barred by the statutes of limitation; Jr. moved for summary judgment on the ground that Spoor lacked standing. On 19 June 2014, the trial court granted summary judgment in defendants' favor as to Spoor's individual claims on the grounds asserted by defendants. On 17 September 2014, Spoor moved under Rule 41(a)(1) of our Rules of Civil Procedure to voluntarily dismiss his derivative claim. Spoor then appealed the summary judgment order, which we reversed. *See Spoor I*, ___ N.C. App. at ___, 781 S.E.2d at 637. We held that the statute of limitations issue as to Spoor's individual claims against Sr. raised a question of fact for the jury, and that Spoor had standing to sue defendants individually. *Id.* at ___, ___, 781 S.E.2d at 635, 637.

On 10 September 2015, within one year of his Rule 41(a)(1) dismissal, Spoor filed another complaint ("2015 Complaint"), asserting derivative claims against both defendants for breach of contract ("first 2015 derivative claim") and for breach of fiduciary duty ("second 2015 derivative claim"). On 7 October 2015, Spoor amended his 2015 Complaint as a matter of course under Rule 15(a) of our Rules of Civil Procedure "solely to change the style of the case to show that he is bringing the case derivatively only and not individually." On 2 November 2015, Spoor again moved under Rule 15(a) to amend his 2015 Complaint to add derivative claims for fraud and for unfair and deceptive trade practices ("UDTP") against both defendants. Relevant here, defendants moved under Rule 12(b)(6) to dismiss the 2015 Complaint, alleging that Spoor's first and second 2015 derivative claims were barred by the statutes of limitation, and that Rule 41(a)(1)'s one-year extension period did not apply to save those claims.

After these and other motions were consolidated and heard on 8 April 2016, the trial court entered an order on 12 October 2016. In relevant part, that order granted defendants' Rule 12(b)(6) motion on the ground that Spoor's derivative claims were barred by the statutes of limitation, thereby dismissing those claims with prejudice; and denied Spoor's Rule 15(a) motion to add the derivative fraud and UDTP claims in relevant part for futility, effectively ending Spoor's 2015 action. Spoor appeals.

II. Analysis

On appeal, Spoor contends the trial court erred by dismissing with prejudice his first and second 2015 derivative claims under Rule 12(b)(6). He contends the trial court erroneously concluded that his 2012 Complaint neither alleged (1) those derivative claims against defendants, nor (2) the derivative fraud and UDTP claims, on the ground that he effectively incorporated by reference those claims in his 2012 Complaint under Rule 10(c) of our Rules of Civil Procedure. Spoor further contends that the trial court erred by concluding (3) his derivative fraud and UDTP claims would not relate back to the date he filed his 2012 Complaint under Rule 15(c) of our Civil Procedure Rules and, therefore, that the trial court (4) abused its discretion by denying his Rule 15(a) motion to add those claims on the ground that his proposed amendment would be futile.

A. Rule 12(b)(6) Dismissal

[1] Spoor first contends the trial court erred in dismissing on statute-of-limitation grounds his first and second 2015 derivative claims against defendants. He argues the trial court erroneously concluded that he did not assert these claims in his 2012 Complaint, because, Spoor contends, he effectively "incorporat[ed] those claims in his derivative claim" under Rule 10(c). Thus, Spoor argues, Rule 41(a)(1)'s relation-back provision applied to interpose a filing date on those claims of the date his 2012 Complaint was filed and, therefore, his first and second 2015 derivative claims were asserted within the applicable statutory limitation periods. We disagree.

We review *de novo* a Rule 12(b)(6) dismissal order. *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). The scope of our review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (citations and quotation mark omitted). Our "system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017) (citation and quotation mark omitted). But "[d]ismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *State Emps. Ass'n of N.C.*, 364 N.C. at 210, 695 S.E.2d at 95 (citation omitted). Claims asserted after the statutory limitation period has expired cannot survive. *See, e.g.*, *Marzec v. Nye*, 203 N.C.

App. 88, 93, 690 S.E.2d 537, 541 (2010) ("[A] motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar [a] plaintiff's claims if the bar is disclosed in the complaint." (citation and quotation marks omitted)).

Rule 8(a)(1) of our Rules of Civil Procedure requires that complaints include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2015). A complaint sufficiently states a claim upon which relief can be granted when

> it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and by using the rules provided for obtaining pretrial discovery to get any additional information he may need to prepare for trial.

Wray, ___ N.C. at ___, 802 S.E.2d at 898 (citation and quotation marks omitted).

Here, in his 2012 Complaint, Spoor advanced in relevant part the following individual claims: (1) a breach of contract as a third-party beneficiary claim against Sr., (2) a breach of fiduciary duty claim against Jr., (3) a fraud claim against both defendants, and (4) a UDTP claim against both defendants. After listing those claims, Spoor also advanced a single "DERIVATIVE CLAIM" in which he "reallege[d] the allegations of" every preceding paragraph of his 2012 Complaint, but specifically advanced only a derivative breach of fiduciary duty claim against Jr ("2012 derivative claim"). The 2012 derivative claim alleged in relevant part:

> 143. Plaintiff realleges the allegations of Paragraphs 1 through 142.
>
> 144. Barth, Jr. owes a fiduciary duty to JR International Holdings, LLC, and to Plaintiff.
>
> 145. Barth, Jr. has breached his fiduciary duty by failing to perform on his commitment to invest or contribute the sum of $8,000,000 to JR International Holdings, LLC.
>
> 146. This breach by Barth, Jr. was knowing, willful, wanton and grossly negligent.

> 147. Barth, Jr's breach has damaged JR International Holdings, LLC and Plaintiff in an amount in excess of $8,000,000.
>
> 148. Plaintiff has made several demands in and after October 2011 on Barth, Jr. that he fulfill his obligation to invest or contribute $8,000,000 into JR International Holdings, LLC, but Barth, Jr. has continued to fail and refuse to do so. On February 11, 2009, Plaintiff, through counsel, wrote to Barth, Jr., advising Barth, Jr. of his failure to make his contractual contribution of funds to JR International Holdings, LLC, and, demanded that Barth, Jr. remedy the situation by making his agreed payment of $8,000,000 to JR International Holdings, LLC. On October 5, 2011, Plaintiff filed his original Complaint in this action against Barth, Jr., in which he complained that Barth, Jr. had failed to fulfill his obligation to invest or contribute $8,000,000 into JR International Holdings, LLC, and demanded that Barth, Jr. remedy that situation by making his agreed payment of $8,000,000 to JR International Holdings, LLC.

In his 2015 Complaint, Spoor, on behalf of JR Holdings, advanced derivative claims against both defendants for breach of contract, the first 2015 derivative claim, and for breach of fiduciary duty, the second 2015 derivative claim.

Spoor argues on appeal that his 2012 derivative claim effectively incorporated by reference all of the individual claims he asserted in his 2012 Complaint under Rule 10(c) and, therefore, his first and second 2015 derivative claims were properly alleged in his 2012 Complaint. We disagree.

Rule 10(c) of our Rules of Civil Procedure provides: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading. . . ." N.C. Gen. Stat. § 1A-1, Rule 10(c) (2015). However, even when construing a complaint liberally, Rule 10(c) does not permit courts to "engage in judicial amending or rewriting of pleadings." *FCX, Inc. v. Bailey*, 14 N.C. App. 149, 152, 187 S.E.2d 381, 382–83 (1972) (holding that a plaintiff did not effectively under Rule 10(c) incorporate by reference a breach of contract claim against one party, when it alleged a breach of contract claim against another party).

Even under our notice-pleading standard, we conclude that Spoor's 2012 derivative claim was alleged so specifically that it failed to put Sr. on notice of any derivative claims against him, or to put Jr. on notice of

a derivative breach of contract claim against him. Spoor was entitled under Rule 10(c) to incorporate factual allegations by reference into his 2012 derivative claim. But even under a liberal construction, to interpret the 2012 derivative claim as effectively incorporating by reference every other individual claim asserted in the 2012 Complaint would amount to impermissible "judicial amending or rewriting of pleadings." *FCX*, 14 N.C. App. at 152, 187 S.E.2d at 382–83.

Rule 41(a)(1) of our Rules of Civil Procedure provides that when a party voluntarily dismisses a claim without prejudice, "a new action based on the same claim may be commenced within one year after such dismissal . . . ." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015). But Rule 41(a)(1)'s relation-back provision applies only to claims in a subsequent complaint that were included in the voluntarily dismissed complaint. *See Williams v. Lynch*, 225 N.C. App. 522, 523, 741 S.E.2d 373, 374 (2013) ("Although [the plaintiff] contends the causes of action in her second complaint were timely under Rule 41 because they arose out of the same facts and transactions as her first complaint, binding precedent requires that we look only at whether the claims in the second complaint were included in the first complaint.").

Because the only derivative claim Spoor advanced in his 2012 Complaint was one for breach of fiduciary duty against Jr., the trial court properly concluded that Rule 41(a)(1)'s relation-back provision did not apply to the first or second 2015 derivative claims against Sr., or to the first 2015 derivative claim against Jr. Since those claims were first brought in the 2015 Complaint, after the applicable limitation periods had expired, the trial court properly dismissed those claims under Rule 12(b)(6) as barred by the statutes of limitation. However, because Spoor brought a derivative breach of fiduciary duty claim against Jr. in his 2012 Complaint, Rule 41(a)(1)'s relation-back provision applied to the second 2015 derivative claim against Jr., interposing a filing date of 14 February 2012, when Spoor filed his FAC.

Typically, "[b]reach of fiduciary duty claims accrue upon the date when the breach is discovered and are subject to a three year statute of limitations." *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 501, 764 S.E.2d 203, 219 (2014) (citation omitted). However, "[t]he provisions of a written contract may be modified or waived . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived." *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944) (citations omitted).

In *Spoor I*, we specifically addressed whether Spoor's individual claims against Sr. were subject to a summary judgment dismissal on statute-of-limitation grounds. ___ N.C. App. at ___, 781 S.E.2d at 633. We held that Spoor's 2012 Complaint raised a factual question as to when those claims actually accrued due to Sr. and Jr.'s repeated reassurances that they would deliver on their promised $8,000,000 contribution. *Id.* at ___, 781 S.E.2d at 634–35. Reviewing the allegations of Spoor's 2012 Complaint, we explained:

> The complaint also alleged that on 17 August 2009, Junior submitted to AmerLink's bankruptcy attorney an e-mail purporting to be from Senior which committed to providing "money necessary to purchase the AmerLink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." The following day on 18 August 2009, Senior notified AmerLink's bankruptcy attorney that he was not the source of the 17 August 2009 e-mail and that "he has no intention to provide any financing in connection with the AmerLink Chapter 11."

Id. at ___, 781 S.E.2d at 631. Thus, we reasoned:

> A jury could determine that plaintiff's causes of action did not accrue until 18 August 2009 when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. Therefore, plaintiff's first amended complaint filed 14 February 2012 that included Senior as a defendant would have been commenced within the three-year statute of limitations for the breach of contract and fraud claims . . . .

Id. at ___, 781 S.E.2d at 635. Accordingly, we reversed the trial court's summary judgment ruling on the statute-of-limitation grounds. *Id.*

Under the law-of-the-case doctrine,

> when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) (citations omitted). While this case presents a question as to when Spoor's derivative breach of fiduciary duty claim against Jr. accrued for purposes of a Rule 12(b)(6) dismissal, the same facts are present, and we see no analytical difference between this question and the question we decided in *Spoor I* under the more stringent summary judgment review standard. Spoor's 2012 Complaint does not contain allegations establishing that the statute of limitations has run as to the derivative breach of fiduciary duty claim based on Jr.'s failure to perform on his commitment to invest $8,000,000 to JR Holdings. Liberally construing the allegations in Spoor's 2012 Complaint similarly raises a factual question as to when a derivative breach of fiduciary duty claim against Jr. actually accrued. Therefore, Spoor's second 2015 derivative claim against Jr. was improperly dismissed under Rule 12(b)(6) as barred by the statute of limitations, and we reverse the trial court's ruling on this claim.

In summary, we affirm the trial court's Rule 12(b)(6) ruling to the extent that it dismissed Spoor's first 2015 derivative claim against Sr. and Jr., and his second 2015 derivative claim against Sr., as these claims were barred by the statute of limitations. But we reverse the trial court's ruling to the extent that it dismissed Spoor's second 2015 derivative claim against Jr. on statute-of-limitation grounds.

B. Rule 15(a) Denial

[2] Spoor next contends that the trial court abused its discretion by denying on futility grounds his Rule 15(a) motion to amend his 2015 Complaint to add derivative claims against defendants for fraud and UDTP. He contends the trial court improperly concluded that he failed to allege these claims in his 2012 Complaint for the same reason advanced above—that is, that Spoor effectively incorporated by reference these individual claims into his derivative claim under Rule 10(c). Therefore, Spoor argues, these claims should have related back to the filing of his 2012 Complaint under Rule 15(c) of our Rules of Civil Procedure. We disagree.

Rule 15(a) of our Rules of Civil Procedure provides that where, as here, a party has previously amended his pleading once as a matter of course, "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires. . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). But justice does not so require when an amendment would be futile. *See*, *e.g.*, *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982) ("The facts [the plaintiff] attempts to add[ ] . . . are insufficient to state a second claim for relief; therefore

[the] plaintiff's proposed amendment could not withstand a motion to dismiss for failure to state a claim. Because to grant his motion to amend would be a futile gesture, the denial of his motion was not error." (citations omitted)); *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 347–48, 451 S.E.2d 358, 364 (1994) ("Reasons which might justify . . . a [Rule 15(a)] denial include the futility of a proposed amendment. Where the facts alleged in a proposed amendment would not state a claim for relief, it is not error to deny the motion to amend." (citations omitted)). "A motion to amend under Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Smith*, 306 N.C. at 671, 295 S.E.2d at 448 (citations and internal quotation marks omitted).

Rule 15(c) of our Rules of Civil Procedure governs the relation back of Rule 15(a) amendments and provides:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015).

Spoor contends that his 2012 Complaint gave defendants sufficient notice of the derivative fraud and UDTP claims he proposed adding to his 2015 Complaint and, therefore, under Rule 15(c), those claims should relate back to the 2012 Complaint and be interposed with the FAC's 14 February 2012 filing date. We disagree.

Having concluded above that Spoor's 2012 Complaint only advanced a single derivative claim for breach of fiduciary duty against Jr., and that his individual claims were not incorporated by reference into his derivative claim under Rule 10(c), Rule 15(c)'s relation-back provision does not apply to these claims. Since adding these claims to his 2015 Complaint would interpose a filing date after the applicable limitation periods had expired, the trial court properly denied Spoor's Rule 15(a) motion to amend on futility grounds. In light of this conclusion, we decline to address Spoor's remaining Rule 15(a) arguments. *Cf. Yarbrough*, 117 N.C. App. at 347, 451 S.E.2d at 364 ("[W]e cannot determine the trial court's reason for denying the [Rule 15(a)] motion. This, however, will not preclude our examining any apparent reasons for the denial." (citation omitted)); *see also Dobias v. White*, 240 N.C. 680, 688, 83 S.E.2d 785, 790 (1954) ("[T]here is sound authority to the effect that

where the court below has reached the correct result, the judgment may be affirmed even though the theory on which the result is bottomed is erroneous." (citations omitted)).

III. Conclusion

Because Spoor's 2012 Complaint only advanced a single derivative claim for breach of fiduciary duty against Jr., we affirm the trial court's Rule 12(b)(6) dismissal of Spoor's first 2015 derivative claim against both defendants, and his second 2015 derivative claim against Sr., as barred by the statutes of limitation. However, because Spoor's 2012 Complaint asserted a derivative breach of fiduciary duty claim against Jr., Rule 41(a)(1)'s one-year saving provision applied to interpose a 14 February 2012 filing date on the second 2015 derivative claim against Jr. The allegations of Spoor's 2012 Complaint do not definitively establish that this claim was barred by the statute of limitations. Rather, as in *Spoor I*, liberally construing Spoor's 2012 Complaint raises a factual question as to when this claim accrued and, thus, whether it was timely asserted. Therefore, we reverse the trial court's dismissal of the second 2015 derivative claim against Jr. on statute-of-limitation grounds. Additionally, because Spoor's 2012 Complaint never alleged derivative fraud and UDTP claims against defendants, adding those claims to his 2015 Complaint would be effectively barred by the statutes of limitation. Accordingly, the trial court did not abuse its discretion in denying Spoor's Rule 15(a) motion for futility.

AFFIRMED IN PART; REVERSED IN PART.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
STEPHANIE BRIDGES, DEFENDANT

No. COA17-579

Filed 6 February 2018

Drugs—possession of methamphetamine—identity of substance —defendant's out-of-court admission

In defendant's trial for possession of methamphetamine, the State satisfied its burden of proof for the element that defendant in fact possessed a controlled substance, even though it offered no empirical evidence of the substance's chemical composition. A police officer testified at trial, without objection, that defendant admitted to him that "she had a baggy of meth hidden in her bra," and the State admitted the crystal-like substance found in defendant's bra as an exhibit.

Appeal by Defendant from judgment entered 12 October 2016 by Judge Robert G. Horne in Swain County Superior Court. Heard in the Court of Appeals 28 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Durwin P. Jones, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for the Defendant.

DILLON, Judge.

Stephanie Bridges ("Defendant") appeals the trial court's judgment entered upon a jury verdict finding her guilty of multiple drug-related offenses. Defendant challenges her conviction for possession of methamphetamine, arguing that the State failed to present evidence of the chemical nature of the substance found on her person. Because Defendant admitted the contraband nature of the substance to the arresting officer, we hold there was no error.

I. Background

The evidence at trial tended to show the following:

Police investigated a parked car and discovered a "white crystalline substance" in the passenger compartment. Police then arrested Defendant, who had been sitting in the driver's seat of the car, and

transported her to a detention center. On the way, Defendant admitted to a detective that she had "a baggy of meth hidden in her bra." Once Defendant arrived at the center, an officer found a bag of a "crystal-like" substance in Defendant's bra during a search.

One of the arresting officers testified at trial, without objection, to Defendant's statement regarding the methamphetamine in her bra: "[Defendant] told me that she had a baggy of meth hidden in her bra." The State admitted the crystal-like substance found in Defendant's bra as an exhibit. However, the State did not present any testimony empirically describing the chemical composition of the substance.

Defendant moved to dismiss all charges based on the insufficiency of the State's evidence, which was denied by the trial court. The jury ultimately convicted her of possession of methamphetamine. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred in denying her motions to dismiss the charge of possession of methamphetamine. Specifically, Defendant argues that the State failed to satisfy its burden of proof by failing to offer any evidence establishing the chemical identity of the substance. Although the State offered no empirical evidence of the contraband nature of the substance, we must disagree with Defendant's contentions based on controlling jurisprudence from our Supreme Court.

"To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015).

Crimes for possession of a controlled substance, such as methamphetamine[1], require proof that (1) the defendant, in fact, possessed a *controlled substance*; and (2) the defendant *knew* the substance she possessed was a controlled substance. *See State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015). Regarding the proof sufficient to establish the presence of the first element, our Supreme Court has held that "some form of scientifically valid chemical analysis is required" unless "the State establishes before the trial court that another method of identification is sufficient to establish *the identity* of the controlled substance beyond a reasonable doubt[.]" *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010) (emphasis added).

1. Methamphetamine is a schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90(3)(c) (2015).

Here, Defendant argues that her alleged admission to the arresting officer may be evidence that she *believed* she was possessing methamphetamine, thus satisfying the second element, but that the State did not present sufficient evidence to prove the first element, that the substance Defendant believed she possessed was, in fact, methamphetamine. The only evidence offered by the State to prove that the substance was, in fact, methamphetamine was (1) the testimony from the arresting officer that Defendant stated that she had "meth" in her bra and (2) an exhibit consisting of the actual "crystal-like" substance retrieved from the bra. Defendant contends that, based on our Supreme Court's 2010 holding in *Ward*, this evidence was not sufficient to prove the first element, that the substance Defendant possessed was *in fact* methamphetamine.

In 2011, the year following *Ward*, our Supreme Court established an exception to the evidentiary rule laid down in its 2010 *Ward* decision. Specifically, the Court held that "when *a defense witness's* testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed." *State v. Nabors*, 365 N.C. 306, 313, 718 S.E.2d 623, 627 (2011) (emphasis added); *see also State v. Williams*, 367 N.C. 64, 69, 744 S.E.2d 125, 128 (2013) (holding that the defendant's trial testimony which admitted that the substance was cocaine was sufficient to prove the identity of the substance). Defendant argues that *Nabors* does not apply in the present case because Defendant's identification of the substance as methamphetamine was admitted through the testimony elicited by the State from a witness for the State.

We, however, are persuaded by our Supreme Court's opinion in *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), decided two years after *Nabors*, in which that Court concluded that the arresting officer's testimony offered without objection during the State's evidence concerning the defendant's out-of-court statement that (s)he was in possession of an illegal substance was sufficient to meet the State's burden of proof with respect to the first element of the crime of possession. Specifically, the *Ortiz-Zape* case involved a defendant who was arrested for possessing cocaine shortly after he purchased a white powdery substance. At trial, the State offered (1) evidence of a chemical lab analysis which identified the substance as cocaine; (2) the testimony of the arresting officer, who stated on direct examination, without objection, that the defendant had admitted to him that the substance was cocaine, and (3) the testimony of this same arresting officer, both on direct and cross-examination, that the substance appeared to him to be cocaine. *Id.* at 14, 743 S.E.2d at 164-65.

On appeal to our Supreme Court, the defendant argued that the evidence of the chemical lab analysis was inadmissible because the testifying expert was not the same person who had performed the chemical lab analysis, in violation of the Confrontation Clause. *Id.* at 2, 743 S.E.2d at 157.

In a 4-2 decision, our Supreme Court upheld the defendant's conviction. Though the Court was divided, all of the justices agreed that the testimony of the arresting officer during the State's direct examination concerning the defendant's out-of-court admission was sufficient to meet the State's burden as to the first element of possession.[2]

For instance, the majority in *Ortiz-Zape* – in an opinion written by Justice (now Chief Justice) Martin – held that the expert testimony regarding the chemical lab analysis was properly admitted. *Id.* at 13, 743 S.E.2d at 164. The majority, though, further stated that even if the admission of the expert testimony concerning the chemical lab report was error, the error was harmless beyond a reasonable doubt since other evidence was admitted concerning the identity of the drug in two different forms: (1) the arresting officer's testimony, which was not objected to, regarding defendant's out-of-court admission, and (2) the officer's own opinion concerning the drug's identity *during the defendant's cross-examination*:

> Even assuming admission of [the] expert's opinion violated defendant's rights under the Confrontation Clause, the alleged error was harmless, providing a separate, adequate, and independent state law ground for the judgment of the Court. . . .
>
> The arresting officer testified that when he found the plastic baggy containing a white substance, he picked it up and asked defendant, "What's this?" The officer further testified that defendant acknowledged it was his cocaine [that he had just purchased]. . . . Defense counsel elicited a statement from the arresting officer that the substance

2. Neither the majority nor the dissent state whether the defendant's out-of-court statement to the arresting officer was *competent* to prove the identity of the substance. However, like in the present case, the officer's testimony concerning the defendant's out-of-court statement came in without any objection from the defendant. *See* Transcript of Trial at 223, *Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156. And in determining the *sufficiency* of the State's evidence to get to the jury on an issue, our Supreme Court has instructed that a trial court "must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State[.]" *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

> "appears to be powder cocaine." *Under these facts, in which defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine, any possible error in allowing the expert opinion was harmless.*

Id. at 13-14, 743 S.E.2d at 164-65 (emphasis added).[3] In sum, the majority suggests that (1) a defendant's out-of-court admission offered through the testimony of a State's witness (at least where there is no objection lodged) is sufficient to meet the State's burden, (2) an officer's own opinion concerning the substance's identity *elicited by the defendant* on cross-examination is sufficient to meet the State's burden, and (3) both statements, taken together, render any error in admitting the expert testimony concerning the chemical lab report harmless beyond a reasonable doubt.

Likewise, the dissenting opinion in *Ortiz-Zape* – authored by Justice Hudson – suggests a view that the arresting officer's testimony concerning the defendant's out-of-court admission was sufficient to prove the first element, at least where the defense does not object to such testimony. These justices dissented, though, because they believed that the admission of the chemical lab report testimony was error *and* that the officer's testimony, though sufficient to get to the jury, was not so overwhelming to deem the admission of the chemical lab report harmless beyond a reasonable doubt:

> [Without the testimony of the expert witness concerning the chemical lab report,] all that remains is an uncorroborated assertion by an officer on the witness stand that defendant agreed the substance was cocaine. Yet defendant also testified and denied that he had said the substance was cocaine. Here the credibility of all those statements must be weighed by the jury, by contrast to the sufficiency analysis in *Nabors* [where the only issue was whether the evidence was sufficient to go to the jury]. The officer's testimony cannot be considered overwhelming under the constitutional harmless error standard we apply here.

Id. at 27-28, 743 S.E.2d at 172-73.

---

3. The Supreme Court so held even though the defendant in that case testified at trial that he never admitted to the arresting officer that the substance was cocaine. *Ortiz-Zape*, 367 N.C. at 28, 743 S.E.2d at 173.

One could argue that the majority's view in *Ortiz-Zape* is mere *dicta*, and is therefore not binding, since the majority expressly held that the chemical lab report testimony was admissible, thus satisfying the standard set forth in *Ward*. However, it could also be argued that the Supreme Court was expressing alternate bases for its holding, one of which being its view that the officer's testimony, alone, also met the State's burden. In either case, we feel it appropriate, as the Court of Appeals, to follow the unanimous sentiment expressed by all the justices in *Ortiz-Zape* just five years ago on the same issue which confronts us today.

We further conclude that Defendant's argument that her admission to the officer that she possessed "meth" was insufficient based on the doctrine of *corpus delicti* lacks merit. The doctrine of *corpus delicti* as it currently stands in North Carolina states that, before considering whether the State has presented sufficient evidence to survive a motion to dismiss, we must ensure that the State has presented evidence to show that the crime in question actually occurred. *State v. Cox*, 367 N.C. 147, 152, 749 S.E.2d 271, 275 (2013). To that effect, "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *Id.* 151, 749 S.E. 2d at 275.

To satisfy the *corpus delicti* rule in North Carolina, an extrajudicial confession must be supported by "substantial independent evidence tending to furnish strong corroboration of essential facts contained in defendant's confession so as to establish trustworthiness of the confession." *State v. Trexler*, 316 N.C. 528, 531-32, 342 S.E.2d 878, 880-81 (1986). However, "[t]he [*corpus delicti*] rule does not require the State to logically exclude every possibility that the defendant did not commit the crime." *Cox*, 367 N.C. at 152, 749 S.E.2d at 275. The State need only present independent evidence concerning the "body of the crime," such as the body in a homicide case, or the controlled substances themselves in a possession case.

Here, we conclude that the *corpus delicti* rule does not apply because Defendant's out-of-court statement that she possessed "meth" in her bra is corroborated by the physical object of the crime. The police found a crystal-like substance in Defendant's bra and offered the substance as an exhibit at trial. Additionally, police investigation revealed that the individual from whom Defendant admitted to purchasing the substances had been under surveillance for drug-related activity.

We note what seems to be a subtext of Defendant's argument is that the two elements of possession of a controlled substance are being

conflated by our holding here and prior holdings of our courts, such as in *Nabors*, *Williams* and *Ortiz-Zape*, all cited above. That is, a defendant's statement (whether in court or out of court) as to the identity of a substance in her possession only tends to prove the second element of the crime of possession, that the defendant *believed* the substance she possessed was a controlled substance; it does not prove that the substance possessed was, in fact, a particular controlled substance. And, so the argument goes, the State should not be able to rely on a defendant's statement to prove the first element, even where its admission was not objected to or is offered by the defendant, since such evidence would generally be admissible anyway to prove the second element, and, therefore, any objection to its admission would properly be overruled.

However, the counterargument is that our Supreme Court's jurisprudence is consistent in instructing that a defendant's admission received into evidence relieves the State of any burden to otherwise provide scientifically reliable evidence because such admission by the defendant or a defense witness is "sufficient to establish *the identity* of the controlled substance beyond a reasonable doubt[.]" *State v. Ward*, 364 N.C. at 147, 694 S.E.2d at747 (emphasis added).

In any case, we must follow our Supreme Court's jurisprudence. In the present case, evidence was admitted that Defendant stated her belief that she possessed "meth" in her bra and that a "meth"-like substance was actually found in her bra and was admitted as an exhibit at trial. Therefore, we conclude that the trial court did not err by allowing the matter to go to the jury.

NO ERROR.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404-3

Filed 6 February 2018

1. Appeal and Error—Rule of Appellate Procedure 2—discretionary review—conviction unsupported by evidence

On remand from the Supreme Court, the Court of Appeals exercised its discretionary authority under Rule of Appellate Procedure 2 to consider defendant's argument concerning the sufficiency of the evidence to support his larceny conviction. The Court of Appeals explained a number of reasons for allowing discretionary review: The Supreme Court had previously suggested that fatal variances of the type in this case are sufficiently serious to justify review under Rule 2; allowing a conviction unsupported by evidence to stand would result in manifest injustice; and the exercise of discretionary authority under Rule 2 should be uniform and consistent from case to case.

2. Larceny—indictment alleged two owners of stolen property—evidence of only one owner—fatal variance

On remand from the Supreme Court, the Court of Appeals adopted the analysis from its previous opinion on the issue of whether the trial court erred by failing to dismiss defendant's larceny charge due to a fatal variance between the indictment and the evidence on the ownership of the stolen property. Because the larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church" and the evidence showed that the stolen property belonged only to the church, the Court of Appeals vacated defendant's larceny conviction.

3. Larceny—insufficient evidence—opportunity to take property

Having vacated defendant's larceny conviction, the Court of Appeals, in the interest of judicial economy, considered defendant's remaining arguments and concluded in the alternative that the evidence was insufficient to support the larceny conviction. At most, the State's evidence showed that he was present in the church and had the opportunity to take the stolen property.

4. Appeal and Error—argument not considered—conviction vacated based on other argument

Having vacated defendant's larceny conviction based on a fatal variance between the evidence and the indictment, the Court of Appeals did not need to address defendant's argument regarding a disjunctive jury instruction.

Judge BERGER dissenting.

Upon remand from the Supreme Court of North Carolina for further review of an appeal by defendant from judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Originally heard in the Court of Appeals on 7 May 2014, with opinion filed 1 July 2014. An opinion reversing the first decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 11 June 2015. On remand, a second Court of Appeals opinion was filed on 20 October 2015. On discretionary review, the Supreme Court of North Carolina filed an opinion on 9 June 2017 reversing and remanding the matter to the Court of Appeals once again so the Court could independently and expressly determine whether to exercise its discretion under Rule 2 to suspend the appellate rules and consider the merits of defendant's claim.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell and Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jason Christopher Yoder, Assistant Appellate Defender Barbara S. Blackmon, and Assistant Appellate Defender Hannah Hall Love, for defendant-appellant.

STROUD, Judge.

This is now the third time this appeal has been considered by this Court. To briefly recap, defendant Thomas Craig Campbell ("defendant") appealed from a judgment entered on a jury verdict finding him guilty of breaking or entering a place of religious worship with intent to commit a larceny therein and larceny after breaking or entering. Defendant raised six issues in his appeal, arguing that (1) the indictment for larceny was fatally defective because it failed to allege that Manna Baptist Church

was an entity capable of owning property; (2) insufficient evidence supports his conviction for breaking or entering a place of religious worship with intent to commit a larceny therein; (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict regarding the larceny charge.

Issues (1) and (2) were addressed in our first opinion and the Supreme Court's reversal of that decision on discretionary review. *State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014) ("*Campbell COA I*"), *rev'd and remanded*, 368 N.C. 83, 772 S.E.2d 440 (2015) ("*Campbell SC I*"). On remand, in our second unanimous opinion, this Court disagreed with defendant on Issue (3) but agreed with defendant on Issue (4). *State v. Campbell*, __ N.C. App. __, 777 S.E.2d 525 (2015) ("*Campbell COA II*"), *review allowed in part*, 368 N.C. 904, 794 S.E.2d 800 (2016) ("*Campbell SC review of COA II allowed*"), *and rev'd and remanded*, __ N.C. __, 799 S.E.2d 600 (2017) ("*Campbell SC II*"). On discretionary review, the Supreme Court once again remanded the matter to this Court, not on any substantive grounds but rather "for an independent assessment of whether that court need and should invoke its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order to reach the merits of one of defendant's substantive issues on appeal." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 601.

In this opinion, as the Supreme Court directed, we reiterate why we have once again chosen to invoke our discretion under Rule 2 to address defendant's arguments regarding Issue (4). In invoking our discretion under Rule 2 to reach the merits of defendant's arguments regarding Issue (4), we hold that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and evidence regarding ownership of the missing property. We also address Issues (5) and (6) in the interest of judicial economy.

I. Background

i. Factual Background

Because the Supreme Court remanded the matter to this Court on procedural grounds and no additional factual background is needed, we directly quote the underlying facts as stated in our prior opinions:

On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant "willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy [Stevens] and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a)." Defendant pled not guilty and proceeded to jury trial.

At trial, the State's evidence tended to show that Pastor Andy [Stevens] of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor [Stevens] found a wallet in the baptistery changing area that contained a driver's license belonging to defendant.

Pastor [Stevens] testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor [Stevens] admitted that the church door had been left unlocked overnight before. Pastor [Stevens] said that the secretary did not notice anything amiss on Thursday morning.

After Pastor [Stevens] realized that the audio equipment was missing he called the Cleveland County Sheriff's Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "[T]his can't possibly be good. What have

I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a [fifty-one-year-old] man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until he came upon the church. He noticed that the door was cracked slightly and a "sliver of light" was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains

> and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.
>
> Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant's call, also testified on defendant's behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.
>
> After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant's prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant's testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant's testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under [North Carolina Rule of Evidence 403]. At the close of all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.
>
> The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and sentenced defendant to a split sentence of 13-25 months [of] imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 527-28 (quoting *Campbell COA I*, 234 N.C. App. at 552-55, 759 S.E.2d at 382-83 (first alteration in original)).

ii. Procedural Background on Remand

We first note that this Court has not requested new briefs since this case was originally heard on 7 May 2014. New briefs were filed both times this case was considered by our Supreme Court. Defendant and the State jointly filed a motion with this Court to consider the Supreme Court briefs on remand or to allow supplemental briefing. Because the Supreme Court briefs and prior briefs with this Court sufficiently address the issues at hand, we have granted the motion in part, to consider the Supreme Court briefs, and denied in part as to supplemental briefing.

As noted above, this is the third time this appeal has been considered by this Court. After this Court's opinion in the first appeal, *Campbell COA I*, the Supreme Court on discretionary review overruled a line of cases from this Court which in the first opinion we had been required to follow:

> [We] hold 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, and the line of cases from the Court of Appeals that has held otherwise is overruled. *See*, *e.g.*, *State v. Patterson*, 194 N.C. App. 608, 614, 671 S.E.2d 357, 361 (holding that indictment naming "First Baptist Church of Robbinsville" was fatally defective), *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009); *State v. Cathey*, 162 N.C. App. 350, 353-54, 590 S.E.2d 408, 410-11 (2004) (holding that indictment naming "Faith Temple Church of God" was fatally defective). Accordingly, the larceny indictment here is valid on its face even though it does not specify that Manna Baptist Church is an entity capable of owning property, and the Court of Appeals erred in vacating defendant's conviction for larceny on that basis.

Campbell SC I, 368 N.C. at 87, 772 S.E.2d at 444.

The Supreme Court therefore reversed this Court's first opinion and

> held that (1) the larceny indictment was valid on its face even though it did not specify that Manna Baptist Church was an entity capable of owning property; and (2) sufficient evidence supported defendant's conviction for breaking or entering a place of religious worship with intent to commit a larceny therein. *State v. Campbell*,

> 368 N.C. 83, __, 772 S.E.2d 440, 444-45 (2015). The North Carolina Supreme Court remanded the case to this Court for consideration of any remaining issues. *See id.* at __, 772 S.E.2d at 445.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 526-27.

Defendant originally raised six issues on appeal, and the Supreme Court's first opinion resolved defendant's first two issues. Thus, on remand to this Court "for consideration of any remaining issues on appeal[,]" *Campbell SC I*, 368 N.C. at 88, 772 S.E.2d at 445, we noted defendant's remaining Issues (3), (4), (5), and (6). On these issues,

> Defendant contends . . . (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 526.

In *Campbell COA II*, we determined that defendant had not shown ineffective assistance of counsel, resolving Issue (3). *Id.* at __, 777 S.E.2d at 530. We decided, in our discretion, to allow review under Rule 2 of Issue (4), and in accord with *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976), and *State v. Hill*, 79 N.C. 656 (1878), we held that "a fatal variance exists because the evidence showed that the stolen property belonged to the church only." *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 534. We therefore vacated defendant's conviction for larceny. *Id.* at __, 777 S.E.2d at 534. Because of our ruling on Issue (4), we did not address Issues (5) and (6).

Once again, the Supreme Court granted discretionary review, but only "as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the circumstances of this case." *Campbell SC review of COA II allowed*, 368 N.C. at 904, 794 S.E.2d at 800. In its second opinion, the Supreme Court did not address the substantive issues, but remanded for this Court to "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1),and consider the merits of defendant's fatal variance

argument." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603. The Supreme Court stated:

> Here, the Court of Appeals did not reach the merits of defendant's fatal variance argument after an independent determination of whether the specific circumstances of defendant's case warranted invocation of Rule 2, but rather, based upon a belief that "this type of error" automatically entitles an appellant to review via Rule 2. *See Campbell*, __ N.C. App. at __, 777 S.E.2d at 530. The court thus acted under the erroneous belief that, because defendant presented a fatal variance argument, the court lacked the ability to act otherwise than to reach the merits of defendant's contention. In doing so, the lower court failed to recognize its discretion to refrain from undertaking such a review if it so chose. Because the Court of Appeals proceeded under this misapprehension of law, it failed to exercise the discretion inherent in the "residual power of our appellate courts." *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.
>
> Accordingly, we reverse and remand this case to the Court of Appeals so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument. The remaining issue addressed by the Court of Appeals is not before this Court, and that court's decision as to that matter remains undisturbed.

Campbell SC II, __ N.C. at __, 799 S.E.2d at 603. We will therefore, for the second time, "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise [our] discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603.

We first respectfully note this Court did not act under "the erroneous belief" that we were required to "reach the merits of defendant's contention" on his fatal variance argument, nor did we "fail[] to recognize [our] discretion to refrain from undertaking such a review if [we] so

chose." *Id.* at __, 799 S.E.2d at 603. Our opinion noted that review under Rule 2 is discretionary and that we had the authority to deny this review, which is why the opinion stated that we would "*exercise our discretion* under Rule 2 to review this issue." *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 530 (emphasis added). Yet we also appreciate the Supreme Court's concern that discretionary review under Rule 2 be granted only in the appropriate cases and understand that we should fully explain our rationale for allowing discretionary review.

II. N.C. Rule of Appellate Procedure Rule 2 Analysis

i. Discretion Under Rule 2

[1] Discretion is an essential concept in judicial decision-making. Determining how and when to exercise its discretion is a crucial part of any court's role. Black's Law Dictionary defines "judicial discretion" as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." Discretion, Black's Law Dictionary (9th Ed. 2009). To determine what is "fair under the circumstances," usually courts are "guided by the rules and principles of law," *id.*, since if a court acted without consideration of "rules and principles of law," including prior cases from the same court or a higher court whose opinions are binding upon the lower court, litigants similarly situated and with similar cases may be treated differently. In the United States, we normally consider such different treatment as unfair, if there are no other extenuating circumstances to justify such disparate treatment. Even a small child has a sense of fairness and believes that he has been treated unfairly if he gets the smaller piece of cake while his brother gets the larger piece. Individual judges and courts have discretion in many areas of law and our legal system is considered "fair" only where that discretion is exercised thoughtfully, carefully, and to the extent possible, in the same manner for cases and issues of the same sort.

Scholars who study how courts exercise discretion have described two types of judicial discretion: primary and secondary.

> When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process. When the law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses;

> that decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated. In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer.
>
> The other type of discretion, the secondary form, has to do with hierarchical relations among judges. It enters the picture when the system tries to prescribe the degree of finality and authority a lower court's decision enjoys in the higher courts. Specifically, it comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal.
>
> . . . .
>
> One source of confusion in treating the subject is that courts tend to use the two types of discretion indiscriminately, interchangeably and without marking the distinction.

Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 637-38 (1971).

As an appellate court, we have the secondary form of discretion, and although it is a "review-restraining concept," our Supreme Court has given us guidance in how to exercise our discretion under Rule 2. As explained by the Supreme Court in *State v. Hart*:

> Fundamental fairness and the predictable operation of and predictably operating the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an adequate and independent state ground barring federal habeas review, a state procedural bar is not "adequate" unless it has been consistently or regularly applied. Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring

> review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (citations, quotation marks, and brackets omitted) (emphasis added).

ii. Cases Addressing Rule 2 Review of Fatal Variance Issues

In our last opinion we briefly addressed our decision to allow review under Rule 2:

> Defendant next contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. Defendant's trial counsel failed to raise this issue at trial, so defendant requests that we invoke North Carolina Rule of Appellate Procedure 2, or, alternatively, that we review this issue for ineffective assistance of counsel. N.C. R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). In *State v. Gayton-Barbosa*, this Court invoked Rule 2 to review a similar fatal variance argument and held that this type of error is "sufficiently serious to justify the exercise of our authority under [Rule 2]." 197 N.C. App. 129, 134, 676 S.E.2d 586, 589-90 (2009). Accordingly, *we exercise our discretion under Rule 2 to review this issue.*

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 530 (emphasis added).

We regret we did not explain our deliberative process, but we were, and still are, well aware of this Court's discretion to decline to review defendant's fatal variance argument under Rule 2. As directed by the Supreme Court, we will explain why we now exercise our discretion to review defendant's argument under Rule 2.

Our discretion is guided in large part by other similar cases decided by this Court and the North Carolina Supreme Court, although clearly the result itself does not depend upon the result in any prior case. As directed by *Hart*, we have taken care to exercise our discretion in applying Rule 2 "consistently and uniformly." *Hart*, 361 N.C. at 317, 644 S.E.2d at 206. On remand, we have attempted to survey every North Carolina case, published and unpublished, which has addressed whether to grant discretionary review under Rule 2 of an argument based upon a fatal

variance.[1] We have found that in many cases which have granted discretionary review, this Court determined that the defendant raised a meritorious fatal variance argument, so his conviction on the particular crime would have to be reversed, but for this determination. *See, e.g.*, *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 180 (2016) ("[W]e conclude that one of these fatal variance arguments is meritorious and exercise our discretion under Rule 2 to suspend the appellate preservation rules and consider that argument[.]"); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135, 676 S.E.2d 586, 590 (2009) ("[G]iven the peculiar facts of this case, it is appropriate to address defendant's variance-based challenge on the merits."); *State v. Langley*, 173 N.C. App. 194, 199, 618 S.E.2d 253, 257 (2005) ("[W]e hold that there was a fatal variance between the indictment and the evidence. Accordingly, we vacate defendant's conviction for possession of a firearm by a felon."). Since failure to grant discretionary review would be a "manifest injustice" to the defendant, the court has granted discretionary review. *See, e.g.*, *Gayton-Barbosa*, 197 N.C. App. at 135, 676 S.E.2d at 590 ("[I]t is difficult to contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support[.]"); *Langley*, 173 N.C. App. at 197, 618 S.E.2d at 255 ("We believe it necessary to apply Rule 2 and consider the merits of defendant's argument in order to prevent manifest injustice."). *See also State v. Johnson*, 214 N.C. App. 195, 714 S.E.2d 530 (Aug. 2, 2011) (No. COA10-1031) (unpublished).

There are also cases in which this Court elected to invoke Rule 2 -- because those cases involved situations similar to others where we had invoked Rule 2 -- but then ultimately concluded that a fatal variance had not actually occurred under those facts and circumstances. *See, e.g.*, *State v. McNair*, __ N.C. App. __, __, 799 S.E.2d 631, 643, 644 (exercising Rule 2 discretionary review and comparing to *Gayton-Barbosa*, where "we invoked Rule 2 to review a similar fatal variance argument that had not been adequately preserved for appellate review[,]" but ultimately concluding "we cannot say that a variance existed between the charge alleged in the indictment and the evidence at trial."), *disc. review denied*, __ N.C. __, 803 S.E.2d 394 (2017); *State v. Everette*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014) (electing to review

1. Although citation of unpublished cases is disfavored under N.C. R. App. P. 30(e)(3) and such cases do not constitute controlling legal authority, we have reviewed both published and unpublished cases in the interest of understanding this Court's approaches to these cases and uniformity of treatment of similarly-situated cases. We are not citing unpublished cases as binding precedent.

defendant's argument "in our discretion pursuant to Rule 2" but concluding that the defendant "has not shown a variance between the indictment and the evidence presented."). *See also State v. Jefferies*, __ N.C. App. __, __, 776 S.E.2d 872, 878-79 (2015) (invoking Rule 2 but finding no fatal variance); *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996); *State v. Holloway*, __ N.C. App. __, 799 S.E.2d 466 (May 16, 2017) (No. COA16-940) (unpublished); *State v. Tomlinson*, 230 N.C. App. 146, 752 S.E.2d 258 (Oct. 15, 2013) (No. COA13-398) (unpublished); *State v. Maberson*, 225 N.C. App. 267, 736 S.E.2d 648 (Jan. 15, 2013) (No. COA12-227) (unpublished); *State v. Wilkes*, 188 N.C. App. 848, 656 S.E.2d 735 (Feb. 19, 2008) (No. COA07-395) (unpublished).

Where this Court has *not* granted discretionary review, the Court has typically determined there was no fatal variance and thus no need to consider the issue -- which is tacitly a determination of the issue -- because it would make no difference in the result if we allowed review. *See, e.g.*, *State v. Mostafavi*, __ N.C. App. __, __, 802 S.E.2d 508, 510 ("Defendant has failed to demonstrate the 'exceptional circumstances' necessary . . . for us to invoke Appellate Rule 2."), *temporary stay allowed*, __ N.C. __, 800 S.E.2d 419 (2017); *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 358 (2015) ("Because this case does not involve exceptional circumstances, we, in our discretion, decline to invoke Rule 2."). Failure to grant review causes no injustice since it would not change the result. *See, e.g.*, *Pender*, __ N.C. App. at __, 776 S.E.2d at 358 ("Even assuming, without deciding, that defendant's trial counsel's performance was deficient, defendant cannot show the requisite prejudice since, even if the alleged variances were made the basis for his motion to dismiss, the motion should have in any event been denied."). *See also State v. Joyner*, 227 N.C. App. 650, 745 S.E.2d 375 (June 4, 2013) (No. COA12-1244) (unpublished); *State v. Velasquez*, 204 N.C. App. 597, 696 S.E.2d 924 (June 15, 2010) (No. COA09-1274) (unpublished) ("As the evidence tends to show that there was no fatal variance between the indictment and the evidence presented at trial, we conclude that the facts in this case do not present such 'exceptional circumstances' that Rule 2 need be invoked to avoid 'manifest injustice.' "). By considering the potential merit of the fatal variance argument and determining that no fatal variance existed, these opinions imply that the Court may have granted review under Rule 2 if the case involved an actual fatal variance which could have changed the result on the merits.

In other cases, both this Court and the Supreme Court have avoided addressing directly whether or not to apply Rule 2 and instead taken the approach of assuming for argument's sake that the argument was

properly preserved for appeal, but then concluding nevertheless that the asserted fatal variance argument would fail, so it is not worth addressing further. *See*, *e.g.*, *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("[A]ssuming *arguendo* that defendant has preserved this argument for review, we hold that the asserted variance does not constitute error in this case."); *State v. Frazier*, 228 N.C. App. 568, 749 S.E.2d 112 (Aug. 6, 2013) (No. COA13-5) (unpublished). Just as in the cases above where the Court did not grant Rule 2 review because no fatal variance existed, by considering *arguendo* the fatal variance issue, these opinions also imply that the Court may have granted review under Rule 2 if the case involved an actual fatal variance which could have changed the result on the merits.

But there are also, in contrast, a limited number of cases where this Court has simply declined -- without evaluating the merits of the argument -- to exercise its discretion to review a fatal variance argument simply because no argument was raised to the trial court of such fatal variance. *See*, *e.g.*, *State v. Hooks*, __ N.C. App. __, __, 777 S.E.2d 133, 139 ("Defendant seeks for the first time on appeal to argue the trial court erred by denying his motion to dismiss due to a fatal variance between the indictment and the State's proof at trial. Defendant failed to raise or make this argument in support of his motion to dismiss at trial. Because Defendant failed to properly preserve this issue, he has waived his right to appellate review on this issue. We decline to address the issue and dismiss this issue." (citation omitted)), *disc. review denied*, 368 N.C. 605, 780 S.E.2d 561 (2015); *see also State v. Hester*, 224 N.C. App. 353, 358, 736 S.E.2d 571, 574 (2012), *aff'd per curiam*, 367 N.C. 119, 748 S.E.2d 145 (2013); *State v. Curry*, 203 N.C. App. 375, 385-86, 692 S.E.2d 129, 138 (2010). Since the Supreme Court has remanded this case to us with the direction to "independently and expressly determine whether, on the facts and under the circumstances of this specific case," *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603, we believe it would be inappropriate in this particular case to simply allow or reject review under Rule 2 with no further explanation in our opinion.

As directed by the Supreme Court in *Hart*, one of our considerations is to exercise our discretionary authority under Rule 2 uniformly and consistently from case to case, so we treat all parties in cases similarly situated and present similar issues the same, to the extent this is possible. In *State v. Hargett*, our Court recognized the injustice of either granting or denying discretionary review in a manner inconsistent with the treatment in other similar cases:

> However, to address the merits of Hargett's appeal, despite his failure to recognize and comply with longstanding case law both at trial and in his brief to this Court, would not prevent manifest injustice. Rather, we believe it would be an injustice to the numerous other defendants who have had their appeals dismissed by application of the holding of *Oglesby*. *See*, *e.g.*, *State v. Bryant*, __ N.C. App. __, 753 S.E.2d 397 (2013) (unpublished); *State v. Berrier*, 217 N.C. App. 641, 720 S.E.2d 459 (2011) (unpublished); *State v. Black*, 217 N.C. App. 196, 719 S.E.2d 255 (2011) (unpublished); *State v. Gause*, 201 N.C. App. 447, 688 S.E.2d 550 (2009) (unpublished); *State v. Toler*, 189 N.C. App. 212, 657 S.E.2d 446 (2008) (unpublished); *State v. Sullivan*, 186 N.C. App. 681, 652 S.E.2d 71 (2007) (unpublished). Hargett has not convinced this panel that invocation of Rule 2 is appropriate here. Accordingly, his appeal is dismissed.

State v. Hargett, 241 N.C. App. 121, 128, 772 S.E.2d 115, 121, *appeal dismissed*, *disc. review and cert. denied*, __ N.C. __, 776 S.E.2d 191 (2015).

In our prior opinion, when we compared defendant's situation to the facts and legal issue in *Gayton-Barbosa*, 197 N.C. App. at 135, 676 S.E.2d at 590, we considered this case to be so similar to *Gayton-Barbosa* we erroneously thought it unnecessary to present further explanation beyond that already apparent from the facts, procedural history, and issues presented. But we did not engage in an extended discussion of how we made our independent determination this case was so similar to *Gayton-Barbosa* and others that we believed we should allow review under Rule 2. Our dissenting colleague seeks to distinguish the two cases based upon the "gravity" of the offenses, but the defendant in *Gayton-Barbosa* was, like defendant here, charged with several felonies, and one of those charges was felony larceny, the same crime we are considering here. *Id.* at 131, 676 S.E.2d at 588. We cannot distinguish the "gravity" of the charge of felony larceny here from the *same charge* in *Gayton-Barbosa*, either by its effect on the defendant or on society, since it was the same crime. The same legal argument was addressed in both cases as well. *Id.* at 133-35, 676 S.E.2d at 589-90. After review of all of this Court's prior opinions on this subject, we seek to exercise our discretion in accord with this Court's prior treatment of similar cases. The Supreme Court did express approval for the analytical framework in *Gayton-Barbosa*, so we will use that approach and describe our independent determination to allow review under Rule 2.

iii. Application of *Gayton-Barbosa* Approach to Rule 2 Review

We first note the procedural and legal stance of defendant's request for Rule 2 review by this Court on first remand from the Supreme Court. Besides its factual, legal, and procedural history, this case presented the additional extraordinary element of the Supreme Court's opinion in *Campbell I*'s appeal, *which overruled an entire line of cases*. *Campbell SC I*, 368 N.C. at 87, 772 S.E.2d at 444. The law as established in *Campbell SC I* affected the legal issue defendant had presented for discretionary review under Rule 2. *See id.* ("Therefore, we hold 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, and the line of cases from the Court of Appeals that has held otherwise is overruled. Accordingly, the larceny indictment here is valid on its face even though it does not specify that Manna Baptist Church is an entity capable of owning property, and the Court of Appeals erred in vacating defendant's conviction for larceny on that basis." (citations omitted)).

The Supreme Court's ruling in *Campbell SC I* essentially created the law which gave defendant's Issue (4) such strength it could be outcome-determinative and could cause manifest injustice to defendant if not reviewed, since it changed the result on defendant's first issue. We noted as much in our second opinion:

> Based upon our Supreme Court's opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, 368 N.C. at __, 772 S.E.2d at 444 ("[W]e hold 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, and the line of cases from the Court of Appeals that has held otherwise is overruled."). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 533.

Since our Supreme Court, in *Campbell SC II*, overruled none of the many prior cases of this Court or the Supreme Court which granted

discretionary review of fatal variance issues under Rule 2 under the same of analysis as used in *Gayton-Barbosa*, we are still bound by those cases. Although we are not bound to reach the same result -- to allow review under Rule 2 or not -- we will consider the same factors and use a similar analysis in making this discretionary decision. The decision to allow review under Rule 2 is discretionary, but not arbitrary or based upon the whim of a particular panel or judge. Since the Supreme Court specifically expressed approval for the analysis in *Gayton-Barbosa*, we will use a similar analysis here. *See Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603, n.3 ("Notably, the Court of Appeals panel in *Gayton-Barbos*a, the case cited by the *Campbell II* panel, employed exactly such an individualized analysis in deciding to invoke Rule 2. *Gayton-Barbosa*, 197 N.C. App. 129, 135 & n. 4, 676 S.E.2d 586, 590 & n. 4 (discussing the specific circumstances and then determining that, '*given the peculiar facts of this case*, it is appropriate to address [the] defendant's variance-based challenge on the merits' (emphasis added)).").

Just as in *Gayton- Barbosa*, the issue before us is, "the extent, if any, to which the Court is entitled to address this variance-based challenge to defendant's felonious larceny conviction on the merits despite the absence of a contemporaneous objection at trial." 197 N.C. App. at 134, 676 S.E.2d at 589. As summarized in *Gayton-Barbosa*, we first consider "the Supreme Court's decision" in *State v. Brown*, 263 N.C. 786, 787-88, 140 S.E.2d 413, 413 (1965), where

> the Supreme Court granted relief on appeal as the result of a fatal variance relating to the ownership of allegedly stolen property despite the fact that no dismissal motion had been made at trial and that the variance issue had not been the subject of an assignment of error on appeal. Even so, the Supreme Court decided this issue on the merits under its general supervisory authority over the trial courts. The general supervisory authority under which the Supreme Court acted in *Brown* is currently embodied in N.C. R. App. P. Rule 2, which authorizes "either court of the appellate division" to "suspend or vary the requirements or provisions of any of these rules. . . ." Although N.C. R. App. P. Rule 2 is available to prevent "manifest injustice," the Supreme Court has stated that this residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in exceptional circumstances.

Gayton-Barbosa, 197 N.C. App. at 134, 676 S.E.2d at 589 (citations and quotation marks omitted).

The *Gayton-Barbosa* Court noted that "the Supreme Court's decision in *Brown* suggests that fatal variances of the type present here are sufficiently serious to justify the exercise of our authority under N.C. R. App. P. 2." *Gayton-Barbosa*, 197 N.C. App. at 134, 676 S.E.2d at 590. The same issue is presented here, and it is also "sufficiently serious to justify the exercise of our authority" under Rule 2. *Id.*

The *Gayton-Barbosa* Court noted a second factor, which is that

> a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction. The Supreme Court and this Court have regularly invoked N.C. R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction. *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982) ("Nevertheless, when this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse the conviction *sua sponte*, in order to 'prevent manifest injustice to a party.' " (quoting N.C. R. App. P. 2))[.]

Gayton-Barbosa, 197 N.C. App. at 134-35, 676 S.E.2d at 590 (citations omitted). This law applies here as well. Defendant's challenge is based upon the premise that the evidence is insufficient to support his conviction, since the State presented no evidence that Pastor Stevens had any ownership interest in the property and that he was simply an employee of Manna Baptist church. Defendant has presented a viable argument of a fatal variance and insufficiency of the evidence to support his conviction.

The third, and final, factor discussed by the *Gayton-Barbosa* Court was the potential for manifest injustice to the defendant if the court upheld a conviction without adequate evidentiary support:

> Finally, it is difficult to contemplate a more "manifest injustice" to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support, particularly when leaving the error in question unaddressed has double jeopardy implications. Thus, given the peculiar facts of this case, it is appropriate to address defendant's variance-based challenge on the merits.

Id. at 135, 676 S.E.2d at 589-90. Here, the exact same is true. Defendant's argument is that there was not sufficient evidence to show that Pastor

Stevens had any ownership interest in the property, and defendant is correct. It would be manifestly unjust for defendant's conviction to be sustained where the State did not present evidence that Pastor Stevens had an ownership interest in the stolen property under the fatal variance law as it stands and which this Court is bound to follow.

We therefore consider this to be an unusual and extraordinary case in which Rule 2 review is appropriate to exercise our discretionary authority consistently and fairly, and because our failure to do so would cause manifest injustice to a party, the defendant. *See Hart*, 361 N.C. at 315-16, 644 S.E.2d at 205 ("The text of Rule 2 provides two instances in which an appellate court may waive compliance with the appellate rules: (1) to prevent manifest injustice to a party; and (2) to expedite decision in the public interest. While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." (citations, quotation marks, and brackets omitted)). In our discretion, we also considered the application of the fatal variance rule in this case to present a "significant issue[] of importance," *id.*, particularly given the Supreme Court's ruling -- overruling a line of precedents from this Court -- in *Campbell SC I*. *Campbell SC I*, 368 N.C. at 87, 772 S.E.2d at 444.

We also know that we could exercise our discretion differently and make a different determination on review under Rule 2 than we did in our last opinion. In fact, had we simply exercised our discretion to decline to review Issue (4), our work would have been much easier and this opinion much shorter. But we have attempted to fulfill the Supreme Court's directions on remand, and in doing so, we have independently determined to exercise our discretionary authority in accord with *Hart*, *Gayton-Barbosa*, and our Court's prior treatment in similar cases, since our refusal to do so would result in manifest injustice to defendant.

III. Fatal Variance as to Ownership of the Stolen Property

[2] Since we have elected to allow discretionary review of defendant's Issue (4), our next task on remand is to consider the same issue as we considered in our last opinion -- whether the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence on the ownership of the stolen property. While there have been cases which have addressed fatal variance since our prior opinion was filed, *see*, *e.g.*, *State v. Bacon*, __ N.C. App. __, __,

803 S.E.2d 402, 406, *temporary stay allowed*, __ N.C. __, 802 S.E.2d 460 (2017); *State v. Fink*, __ N.C. App. __, __, 798 S.E.2d 537, 542 (2017); *Hill*, __ N.C. App. at __, 785 S.E.2d at 182; there has been no major change to case law in this area, so we adopt the same analysis as we did in *Campbell COA II*[2]:

ii. Analysis

> Defendant contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the stolen property. Defendant specifically argues that a fatal variance occurred "because the State never proved the property was owned by both Andy Stevens and Manna Baptist Church." Defendant relies on *State v. Hill* for the proposition that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners. *See* 79 N.C. 656, 658-59 (1878).
>
> In *Hill*, the indictment alleged that the stolen property belonged to "Lee Samuel and others," but the evidence at trial showed that the stolen property belonged to Lee Samuel alone. 79 N.C. at 658. Our Supreme Court held that this inconsistency constituted a fatal variance. *Id.* at 658-59. Hill has been consistently cited and followed as binding precedent by North Carolina courts since 1878. *See*, *e.g.*, *State v. Albarty*, 238 N.C. 130, 131-32, 76 S.E.2d 381, 382 (1953); *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950); *State v. Williams*, 210 N.C. 159, 161, 185 S.E. 661, 662 (1936); *State v. Corpening*, 191 N.C. 751, 753, 133 S.E. 14, 15 (1926); *State v. Harbert*, 185 N.C. 760, 762,

2. We also note we are bound to follow the cases from the Supreme Court (as cited in our prior opinion and quoted here) which hold that where a larceny indictment identifies two owners of the stolen property, the State must present evidence that both of the alleged owners had an ownership interest or special property interest in the stolen property. We agree that this requirement may be an "unnecessary technicality," as our dissenting colleague notes, but we have no choice but to follow precedent set by the North Carolina Supreme Court. If there is no facial invalidity of the indictment which identifies two owners of the stolen property, as is true here, there seems to be no reason to require dismissal of a case if the State presents evidence that at least one of the alleged owners did own the property, even if the other did not. It would appear that defendant would be protected from double jeopardy by the fact that he had already been tried for larceny of the property from both alleged owners, even if only one of the alleged owners owned the property. But we are bound to follow the law, going back to at least 1878.

118 S.E. 6, 7 (1923). Most recently, our Supreme Court cited *Hill* in *State v. Ellis*, __ N.C. __, __, 776 S.E.2d 675, 678 (2015). The Court did not overrule *Hill* or suggest that its holding is no longer binding precedent in the fatal variance context, as is the case here. *Id.* at __, 776 S.E.2d at 678. In fact, in *Ellis*, our Supreme Court carefully distinguished between cases raising the issue like the one addressed by *Ellis*, the "facial sufficiency of the underlying criminal pleading" and the issue raised here, whether "a fatal variance exist[s] between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial[.]" *Id.* at __, 776 S.E.2d at 678. Our Supreme Court discussed *Hill* as part of its explanation of this distinction:

According to defendant, this Court's decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by "Lee Samuel and others" while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler. *Id.* at __, 776

S.E.2d at 678. Thus, if the State fails to present evidence of a property interest of some sort in both of the alleged owners, there is a fatal variance between the indictment and the proof. *See id.* at __, 776 S.E.2d at 678.

This Court recently summarized the types of property interest that constitute a "special property interest," which, if proven, are consistent with a larceny indictment's allegation of ownership:

According to well-established North Carolina law, "the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). In other words, "the allegation and proof must correspond." *Id.* "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." [*State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971).] "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *State v. Mason*, 35 N.C. 341, 342 (1852).

However, if it can be shown that the person named in the indictment, though not the actual owner of the stolen item, had a "special property interest" in the item, then the defect in the indictment will not be fatal. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) ("The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance." (citation omitted)).

Our Courts have evaluated circumstances in which a special property interest has been established. *See e.g.*

State v. Adams, 331 N.C. 317, 331, 416 S.E.2d 380, 388 (1992) (spouses have a special property interest in jointly possessed property, though not jointly owned); *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454-55 (1978) (a "bailee or a custodian" has a special property interest in items in his or her possession); *State v. Salters*, 137 N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000) (parents have a special property interest in their children's belongings kept in their residence, but "that special interest does not extend to a caretaker of the property even where the caretaker had actual possession")[, *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000)]; *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it).

Conversely, our Courts have established situations in which a special property interest does not exist. *See e.g. State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (owner of a residence did not have a special property interest in a gun kept in his linen closet, but owned by his father); *State v. Downing*, 313 N.C. 164, 167-68, 326 S.E.2d 256, 258-59 (1985) (the owner of a commercial building did not have a special property interest in items stolen from that building as the items were actually owned by the business that rented the building); *Craycraft*, 152 N.C. App. at 214, 567 S.E.2d at 208-09 (landlord did not have a special property interest in furniture he was maintaining after evicting the tenant-owner).

Gayton-Barbosa, 197 N.C. App. at 135-36, 676 S.E.2d at 590-91 (brackets omitted).

Here, the larceny indictment alleges that the stolen property belonged to "Andy Stevens and Manna Baptist Church[.]" But the evidence at trial simply does not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. All of the evidence tends to show that he dealt with the property only in his capacity as an employee of Manna Baptist Church. Pastor Stevens testified that he was employed as the pastor of Manna Baptist Church and lived on the

church property, and the entirety of the evidence relevant to his interest in the property, if any, was as follows:

[Prosecutor:] On August 19th of 2012, did you arrive at the church for Sunday services?

[Pastor Stevens:] I did.

[Prosecutor:] And upon entering the church that day, what did you observe?

[Pastor Stevens:] We had normal services in the morning. It wasn't until at the end of the service that we were aware that some of the equipment was missing.

[Prosecutor:] Okay. And how was it that you became aware of that?

[Pastor Stevens:] The sound man was trying to record the message and had to divert back to the pulpit [microphone] because the lapel [microphone] was not picking up and at the close of the service, we found that the receiver was missing.

[Prosecutor:] Okay. Were there any other items besides the receiver that were missing?

[Pastor Stevens:] Yes, sir. There were some microphones and some audio cords.

[Prosecutor:] Where are those generally stored in your church?

[Pastor Stevens:] Usually at the front. The cords are usually at the front or in the baptistery changing area in the back and there are also a couple by the sound system.

[Prosecutor:] And how many microphones and cords were missing?

[Pastor Stevens:] I know that there [were] three -- three, maybe four microphones and probably a similar amount of cords.

[Prosecutor:] Do you know what the value or have an estimate as to what the value of those items were?

[Pastor Stevens:] We estimated about five hundred dollars.

. . . .

[Prosecutor:] Were you able to recover any of the items that were taken?

[Pastor Stevens:] No, sir.

[Prosecutor:] Has the church had to replace those items?

[Pastor Stevens:] We have. We replaced the receiver.

Pastor Stevens testified that "we" had the church service, discovered the missing items, reported this to the police, estimated the value of the items, and replaced the receiver. He does not state who is included in the term "we," although from context he seems to be referring to the entire congregation in regard to having the church service, to himself and the "sound man" in regard to discovering the missing items, and probably to himself and various other persons as to the estimation of value and the replacement of the receiver. In any event, he never identifies any sort of special property interest in the items stolen and he clearly identifies himself as an employee of Manna Baptist Church.

Based upon our Supreme Court's opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, 368 N.C. at __, 772 S.E.2d at 444 ("[W]e hold 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, and the line of cases from the Court of Appeals that has held otherwise is overruled."). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance. In *State v. Greene*, our Supreme Court quoted *State v. Jenkins*, 78 N.C. 478, 479-80 (1878), in support of the rule that an employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property:

"The property in the goods stolen must be laid to be either in him who has the *general* property or in him who has a *special* property. It must [in] all events be laid to be in some one [sic] who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no *property*, his possession is the possession of his master."

The Court then gave the following example:

"A is the general owner of a horse; B is the special owner, having hired or borrowed it, or taken it to keep for a time; C grooms it and keeps the stable and the key, but is a mere servant and has no property at all; -- if the horse be stolen, the property may be laid to be either in A *or* B; but not in C although he had the actual possession and the key in his pocket." (Emphasis added). *State v. Jenkins*, *supra* at 480. *Accord*, *State v. Allen*, 103 N.C. 433, 435, 9 S.E. 626, 627 (1889).

Greene, 289 N.C. at 584, 223 S.E.2d at 369 (brackets omitted). Based upon the example given by our Supreme Court in *Jenkins*, Pastor Stevens was in the position of C, the groom who cared for the horse, while Manna Baptist Church is in the position of A, the owner. Even if Pastor Stevens had actual possession of the property, he had no ownership interest in it. *See id.*, 223 S.E.2d at 369.

In *Greene*, the indictment alleged that the defendant stole "one Ford Diesel Tractor and one set of Long Brand Boggs of one Newland Welborn and Hershel Greene[.]" *Id.*, 223 S.E.2d at 369 (ellipsis omitted). But the evidence showed that "Welborn had legal title to the tractor and that Greene had legal title to the disk boggs and had loaned them to Welborn, who was using them on his tractor for his farming." *Id.*, 223 S.E.2d at 369. The defendant argued that there was a fatal variance because "alleging a property interest in both Greene and Welborn automatically means that the allegation is that they are joint owners." *Id.* at 585, 223 S.E.2d at 370. Our Supreme Court rejected this argument because the State's evidence showed that both alleged owners had either legal title or a special ownership interest in the property: "Welborn was the bailee or special owner of the disk boggs, and Greene had legal title to them." *Id.* at 585-86, 223 S.E.2d at 370. Our Supreme Court also noted that in the indictment, "the order in which the property was listed corresponded to the order that the title holders of the respective pieces of property were listed"; that is, Welborn owned the tractor, and Greene owned the disk boggs. *Id.* at 586, 223 S.E.2d at 370.

> In this case, the State's evidence did not show that Pastor Stevens had any special property interest in the stolen items. As noted above, the evidence showed that they belonged solely to Manna Baptist Church and Pastor Stevens dealt with the property only as an employee of the church. Although both *Jenkins* and *Hill* are very old cases, they have been followed by our courts for many years, and this Court is not at liberty to disregard them. Based upon these binding precedents, the State must demonstrate that both alleged owners have at least some sort of property interest in the stolen items. In addition, possession by an employee or servant of the actual owner is not a type of special property interest which will support this indictment.
>
> Following *Greene* and *Hill*, we hold that a fatal variance exists because the evidence showed that the stolen property belonged to the church only. *See id.* at 584, 223 S.E.2d at 369; *Hill*, 79 N.C. at 658-59.
>
> III. Conclusion
>
> We . . . . vacate defendant's conviction for larceny after breaking or entering. Because the trial court consolidated these convictions for sentencing, we remand this case to the trial court for resentencing.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 530-34.

IV. Additional Issues

In the interest of judicial economy, we will also address defendant's two remaining issues. Defendant contends that (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict regarding the larceny charge. *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 528.

i. (5). Sufficiency of the evidence

[3] "The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002). Defendant argues that the trial court erred by denying his motion to dismiss the larceny charge because the "State failed to present sufficient evidence that [defendant] took the missing items."

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (citations and quotation marks omitted).

> Evidence that raises only a strong suspicion without producing any incriminating circumstances does not reach the level of substantial evidence necessary for the denial of a motion to dismiss. Just as in [a prior case], the most the State showed was that defendant had been in an area where he could have committed the crime charged.

State v. Hamilton, 145 N.C. App. 152, 158, 549 S.E.2d 233, 237 (2001) (citations, quotation marks, and brackets omitted).

The State's evidence showed that Manna Baptist Church had Wednesday evening services on 15 August 2012 which ended at about 9:00 pm. The next morning, the church secretary discovered the church had been left unlocked, and she locked it before she left. On the next Sunday, 19 August 2012, Pastor Stevens discovered that some audio equipment was missing from the church. The missing items were 4 microphones, one set of sound system wires, a music receiver, and one pair of headphones. Some of the computer equipment had been moved around. There were no signs of forced entry to the church. No fingerprints or DNA evidence were taken from the computer equipment or the cabinet in which the sound equipment had been stored. However, one officer found a wallet in the baptistery changing area and defendant's license was in the wallet. None of the stolen equipment was ever

located, either outside near the church or through checking with local pawn shops.

Two days later, Detective Jessica Woosley looked up the name on the driver's license and discovered that it was defendant and that he was incarcerated in Cleveland County on an unrelated matter. She met with him at the Cleveland County jail. When he entered the interview room, defendant said, "[T]his can't possibly be good. What have [I] done now that I don't remember?" Detective Woosley read defendant his *Miranda* rights, and he asked for an attorney but continued to speak to her. He saw the name of Manna Baptist Church on a folder and told her he had been at the church and he had "done some things" that night but did not recall all of what he had done. He recalled that the door to the church was open and he went in to get a drink of water.

Defendant's evidence showed that at the time of the alleged crimes, he was almost 51 years old and was on two heart medications, a medicine for stress disorder, a medicine for diabetes, and "high psychotropic drug[s]" for bipolar condition. On the night of 15 August 2012, defendant had been living with Ms. Deaton. She asked him to leave, so he left, taking a duffel bag of his clothing which he later "dumped . . . in a ditch" because it was too heavy. He arrived at a friend's house at about 10:00 pm, but around midnight, he was asked to leave that house as well. He left, still walking, and around 2:00 am he walked down Burke Road and saw Manna Baptist Church. He testified that he saw a "sliver of light" coming from the church because the door was not fully closed. He went in to get a drink of water and to pray. He left the church around dawn. He started to have chest pains and called 911; he met the ambulance at the Shanghai Fire Department.

Emergency medical technician Calvin Cobb responded to the call. He testified that he found defendant sitting on the back of a responding vehicle from the fire department. He was very sweaty and asked for a ride to town. He told Mr. Cobb he had been removed from Ms. Deaton's house and wandered all night. Mr. Cobb determined that defendant's medical condition was not critical but he needed medical care and he was transported to Cleveland Regional Medical Center. Defendant was not carrying a backpack or duffel bag and he had nothing in his pockets. Defendant's evidence neither helps nor hurts the State's case. At the most, "[i]t simply explains [defendant's] presence at the scene[.]" *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976).

The State's evidence shows that defendant entered Manna Baptist Church at the relevant time and that items were stolen from the church

sometime between Wednesday, 15 August and Sunday, 19 August 2012. The stolen items were never found. Defendant argues that the State's case relies entirely upon circumstantial evidence of defendant's opportunity to take the items, since the evidence shows only that he was in the church. The State's evidence fails to show a motive for defendant to take the sound equipment. It fails to show how defendant could have carried or disposed of these rather large items during the night of August 15 while he was walking down the road. *See*, *e.g.*, *Minor*, *id.* at 75, 224 S.E.2d at 185 ("The most the State has shown is that defendant had been in an area where he could have committed the crimes charged. Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do. The trial judge should have allowed the motion for judgment as of nonsuit at the close of defendant's evidence.").

In *Minor*, the defendant was convicted of "possession of a controlled substance, to-wit, marijuana, for the purpose of distribution, and with manufacturing and growing marijuana." *Id.* at 68, 224 S.E.2d at 181. Both Minor and a co-defendant, Ingram, were charged with various crimes based upon marijuana plants growing in an isolated corn field. *Id.* at 68-69, 224 S.E.2d at 181-82. When they were stopped and arrested near the field, Minor was riding a car owned and driven by Ingram. *Id.* at 69, 224 S.E.2d at 182. Police found two guns, some wilted marijuana leaves and some grains of fertilizer in the car; only Ingram was charged for possession of the weapons but both defendants were charged regarding the marijuana. *Id.* Ingram had secured the consent of the landowner to use the field where the marijuana was growing. *Id.* The State's evidence also showed that Minor had assisted in preparing the land for "a garden" in the same area. *Id.* at 70, 224 S.E.2d at 182. The Supreme Court summarized the evidence against Mr. Minor:

> About all our evidence shows is (1) that defendant Minor had been a visitor at an abandoned house leased or controlled by co-defendant Ingram; (2) that the marijuana field was 100 feet away from the house but obscured by a wooded area; (3) that the marijuana field was accessible by three different routes; (4) that on the date of Minor's arrest he was on the front seat of a Volkswagen automobile owned and operated by Ingram, where some wilted marijuana leaves were found on the left rear floorboard and one marijuana leaf was found in the trunk.

Id. at 74-75, 224 S.E.2d at 185.

The State seeks to distinguish *Minor* by arguing that "the facts in this case are distinguishable from *State v. Minor*. *Minor* involved actual or constructive possession of narcotics." The State is correct that the defendant in *Minor* was charged with possession of narcotics, but that factual difference is not controlling. In *Minor*, the State was relying solely upon evidence that the defendant was in a particular place at a particular time to show he possessed marijuana; here, the State is relying solely upon evidence that defendant was in Manna Baptist Church during a four-day time period when the stolen items were taken to show he possessed those items and removed them. The evidence against the defendant in *Minor* was stronger than here, since Mr. Minor was at least in a vehicle where some fresh marijuana was found, and he was riding with the person with control of the property upon which the marijuana was growing. *Id.* at 69, 224 S.E.2d at 182. Here, the State is relying on defendant's presence alone to show he took and carried away the sound equipment, since the "elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985.) Like *Minor*, the State's evidence shows that defendant was "in an area where he could have committed the crimes charged," but beyond that, we also must "sail in a sea of conjecture[.]" *Minor*, 290 N.C. at 75, 224 S.E.2d at 185.

In *Campbell SC I*, the Supreme Court held that "the State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship [with intent to commit a larceny therein.]" *Campbell SC I*, 368 N.C. at 88, 772 S.E.2d at 444-45. In so concluding, the Supreme Court explained:

> Defendant was charged under N.C.G.S. § 14-54.1(a) with wrongfully breaking or entering Manna Baptist Church *with intent to commit a larceny therein*. To meet its burden, the State must offer substantial evidence that defendant broke or entered the building with the requisite criminal intent. In *State v. Bell* we explained:
>
> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the [building]. . . . However, the fact that a felony was actually committed after the [building] was entered is not necessarily proof

> of the intent requisite for the crime of [larceny]. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony . . . is not required in order to sustain a conviction of [larceny]."
>
> 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (second alteration in original) (citations omitted).
>
> Here evidence showed that defendant unlawfully broke and entered Manna Baptist Church late at night. *See State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976) ("It is well established that the mere pushing or pulling open of an unlocked door constitutes a breaking."). Defendant did not have permission to be inside the church and could not remember what he did while there, and Pastor Stevens found defendant's wallet near the place where some of the missing equipment previously had been stored. Considered in the light most favorable to the State, this evidence was sufficient to take the case to the jury on the question of defendant's intent to commit larceny when he broke and entered Manna Baptist Church. Therefore, the trial court properly denied defendant's motion to dismiss the breaking or entering charge for insufficient evidence.

Campbell SC I, 368 N.C. at 87-88, 772 S.E.2d at 444.

Our Supreme Court's holding in *Campbell SC I* does not preclude our conclusion that there was insufficient evidence of larceny, as the Supreme Court's holding does not go to the element at question, whether there was sufficient evidence that defendant took and carried away the property of another -- the sound equipment. While our determination of this issue is unnecessary since we have concluded that defendant's conviction for larceny must be vacated due to a fatal variance between the indictment and evidence, we note this determination in the alternative and to resolve the remaining issues in this case.

ii. (6.) Unanimous verdict

[4] Defendant's last argument is that the trial court erred by instructing the jury it could find the defendant guilty of larceny if it determined he "took property belonging to another." Defendant contends that since he was charged with larceny of property belonging to "Andy Stevens and Manna Baptist Church," the instruction was disjunctive because the jury could have found

> four possible verdicts: 1) guilty of larceny of the property of Andy Stevens; 2) guilty of larceny of the property of Manna Baptist Church; 3) guilty of larceny of the property of both Andy Stevens and Manna Baptist Church; or 4) guilty of larceny of the property of Andy Stevens in the view of some jurors, while guilty of larceny of the property of Manna Baptist Church in the view of others.

The State simply argues that the instructions were not disjunctive since they did not identify an alleged owner of the properly taken, but only instructed general that larceny is taking property of "another." But Defendant's argument on a disjunctive verdict addresses essentially the same problem as his argument above, in Issue (4), that there was a fatal variance between the evidence presented and the indictment. We need not address this issue further since we have ruled in defendant's favor on Issue (4) and vacated the larceny conviction.

V. Conclusion

We have elected to invoke our discretion under Rule 2 to address defendant's arguments regarding fatal variance for the reasons above, and we hold that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence presented regarding ownership of the property. We remand for entry of judgment in accord with this opinion and resentencing solely on the remaining breaking and entering offense.

VACATED AND REMANDED.

Judge ARROWOOD concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because Rule 2 is not a mechanism to right all perceived wrongs, but instead, a tool to be used only in rare circumstances, there was substantial evidence of Defendant's guilt, and Defendant has not demonstrated that the larceny instruction had a probable impact on the jury's verdict, I respectfully dissent.

Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate

> division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

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

The North Carolina Supreme Court provided straightforward direction for this Court to conduct a proper assessment of whether we should invoke Rule 2 in this case to determine if a variance existed between the indictment for larceny after breaking or entering, and the evidence presented at trial. *State v. Campbell*, 369 N.C. 599, 799 S.E.2d 600 (2017). In remanding this case, our Supreme Court emphasized Rule 2 should only be utilized "*in exceptional circumstances*." *Id.* at 603, 799 S.E.2d at 602. (emphasis in original). In determining whether this Court should exercise its discretion under Rule 2, we were instructed to look at "the *specific circumstances of individual cases and parties*," including, but not limited to, whether substantial rights are affected, the "*gravity of the offense*[]," and the penalty imposed. *Id.* at 603, 799 S.E.2d at 602-03 (emphasis in original) (citations omitted). Significantly, our Supreme Court stated that "precedent cannot create an automatic right to review." *Id.* at 603, 799 S.E.2d at 603.

The majority, however, delves into an exhaustive discussion of "Cases Addressing Rule 2 Review of Fatal Variance Issues," and bases its decision on the purported similarities of this case to *State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009). While the Supreme Court cited *Gayton-Barbosa* as a case that engaged in an appropriate Rule 2 analysis, the majority has declined to engage in the individualized, case-specific analysis directed by *Campbell*.

The question is not whether a "defendant has presented a viable argument of a fatal variance and insufficiency of the evidence" as the majority has stated. The fact that there may be a variance is not determinative. The majority places the cart before the horse: because there is a variance, we must invoke Rule 2. Under the majority's analysis, there would never be a case in which a variance existed and this Court could decline to exercise its discretion. Such a result seems contrary to the text of Rule 2, and the Supreme Court's view of Rule 2 as a rare and exceptional judicial tool.

In *Campbell*, the Supreme Court set forth three factors for us to consider when determining whether or not we should use our discretion and invoke Rule 2: (1) whether substantial rights are affected, (2) the

"gravity of the offense," and (3) the penalty imposed. Each of these factors is addressed below.

While a deficient indictment certainly may affect substantial rights of a defendant, "contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *State v. Williams*, 368 N.C 620, 623, 781 S.E.2d 268, 271 (2016) (citation and quotation marks omitted).

An indictment must set forth

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, 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(a)(5) (2017). "An indictment . . . is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense[,] . . . protect[s] him from subsequent prosecution for the same offense[, and] . . . enable[s] the court to know what judgment to pronounce in the event of conviction." *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citations omitted). An indictment is "sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." N.C. Gen. Stat. § 15-153 (2017).

This is not a case in which Defendant is alleging a jurisdictional defect in the indictment. Further, Defendant has not asserted that the indictment failed to allege information sufficient to enable him to prepare a defense, or afford him double jeopardy protection. In essence, Defendant complains that the indictment sets forth too much information based upon the State's evidence at trial.

Moreover, "a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction." *Gayton-Barbosa*, 197 N.C. App. at 134, 676 S.E.2d at 590. It is important to note that in *Gayton-Barbosa*, the case so heavily relied on by the majority, the defendant was charged with two felony assaults, felony breaking or entering, felony larceny, first degree kidnapping, and possession of a firearm by a convicted felon. *Id.* at 131, 676 S.E.2d at 588. The indictment

for felony larceny incorrectly named the owner of the stolen firearm, but the defendant failed to adequately preserve the issue for appellate review. This Court stated that "it is difficult to contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that *lacked adequate evidentiary support*, particularly when leaving the error in question unaddressed has double jeopardy implications." *Id.* at 135, 676 S.E.2d at 590 (emphasis added).

Here, it is uncontroverted that the larceny indictment alleged ownership of the stolen property in Manna Baptist Church along with a second purported owner, Pastor Andy Stevens, while the evidence presented only established ownership in Manna Baptist Church. Defendant's complaint over what boils down to an indictment-related issue involves "less serious defects," *State v Brice*, ___ N.C. ___, ___, 806 S.E.2d 32, 36 (2017), and not substantial rights. One could argue it is one of those "unnecessary technicalities which tend to obstruct justice." *Williams*, 368 N.C. at 623, 781 S.E.2d at 271 (citation and internal quotation marks omitted).

The indictment charging Defendant with larceny after breaking or entering does not implicate jurisdictional concerns, lack of adequate notice, or double jeopardy exposure. The evidence at trial showed that a purported owner listed in the indictment was the actual owner of the property stolen. Defendant's substantial rights were not affected, thus the invocation of Rule 2 is not warranted based on this factor.

Similarly, the second and third factors do not support a Rule 2 review by this Court. After a Cleveland County jury found Defendant guilty of breaking or entering a house of worship and larceny after breaking or entering, the trial court consolidated the charges for judgment, and Defendant was sentenced to a presumptive-range sentence that included special probation. Larceny-related offenses cause serious, negative impacts to our communities, and a single felony conviction can be detrimental for defendants. However, it cannot be said that the "gravity" of this offense and the punishment involved are such that we should suspend appellate rules. Therefore, pursuant to the facts and circumstances of this case, I would not employ Rule 2 to suspend the appellate rules in order to reach the merits of this case.

Additional Issues

The majority finds that the trial court erred in denying Defendant's motion to dismiss and in instructing the jury. Both arguments involve the larceny after breaking or entering conviction. I respectfully disagree on both issues.

Evidence presented at trial tended to show that Pastor Andy Stevens arrived at Manna Baptist Church on the morning of August 19, 2012. At the end of service that day, he noticed some of the sound equipment was missing. Stevens estimated the value of the equipment was approximately $500.00. While looking through the building, a wallet was located with various sound equipment near the front of the church. The wallet contained Defendant's social security card and North Carolina driver's license. The incident was investigated by the Cleveland County Sheriff's Department.

Defendant was incarcerated in the Cleveland County Detention Center on an unrelated charge at the time the initial report was received by the detective division. Detective Jessica Woosley went to the jail to interview Defendant, and as he was being escorted to meet the detective, Defendant stated, "[T]his can't possibly be good. What have [I] done now that I don't remember?" Detective Woosley read Defendant his *Miranda* rights, and he requested an attorney. Detective Woosley ceased questioning, but Defendant pointed to her "Manna Baptist Church" case file that was on the desk, and stated that he remembered being there while on a spiritual journey, but could not remember what had taken place.

Defendant testified at trial that he entered Manna Baptist Church on the night the incident occurred and took a bottle of water. Defendant admitted that he had a black duffle bag with him that night, but he dumped the duffle bag in a ditch because it was "too heavy and just too cumbersome . . . to carry all the way to where [he] was going."

A Cleveland County jury found Defendant guilty of breaking or entering a house of worship and larceny pursuant to breaking or entering. As stated above, Defendant received a sentence of Special Probation.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. J. 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. L. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In making its determination, the trial court must consider all evidence

admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (citation omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations, quotation marks, and brackets omitted).

A defendant may be properly convicted of larceny where the evidence establishes that the defendant has taken the property of another, carried it away, without consent of the owner, and with the intent to deprive the owner of the property permanently. *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002) (citation omitted). When viewed in the light most favorable to the state, there was substantial evidence that Defendant committed larceny pursuant to breaking or entering Manna Baptist Church. Defendant admitted he was in the church at or near the time the property was stolen, and could not recall what had taken place while he was there. Further, the jury could reasonably infer that he left either in haste, or while preoccupied, because his wallet was found in the church in an area where some of the sound equipment was located. Also, Defendant admitted to abandoning a duffle bag around the time the incident occurred because it was too heavy and too cumbersome. This circumstantial evidence, together with Defendant's statements at the jail facility that "this can't possibly be good" and "[w]hat have [I] done now that I don't remember," allowed the trial court to determine that there was in fact a reasonable inference of Defendant's guilt, and it was for the jury to determine if Defendant was guilty. Thus, I would find no error as there was sufficient evidence of larceny.

Finally, Defendant asserts that the trial court's disjunctive instruction was erroneous because it violated jury unanimity. The majority

declines to address this argument, stating that "Defendant's argument on a disjunctive verdict addresses essentially the same problem as his argument . . . that there was a fatal variance[.]" While I agree with this statement, I disagree with the result.

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C.R. App. P. 10(a)(2). "To have an alleged error reviewed under the plain error standard, the defendant must specifically and distinctly contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation and quotation marks omitted). *See also State v. Boyd*, 222 N.C. App 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013) (per curiam) (plain error review applies to an unpreserved error concerning a jury instruction for which there was no evidence).

To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Defendant here has not argued prejudice, and cannot establish prejudice.

The trial court instructed the jury that in order to find Defendant guilty of felony larceny,

> the State must prove six things beyond a reasonable doubt.
>
> First, that the defendant took *property belonging to another*;
>
> Second, that the defendant carried away the property;
>
> Third, that *the victim did not consent* to the taking and carrying away of the property;
>
> Fourth, that at the time of the taking, the defendant intended to deprive *the victim* of its use permanently;
>
> Fifth, that the defendant knew he was not entitled to take the property;

> And sixth, that the property was taken from a building after a breaking or entering.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took and carried away *another person's property* without the *victim's* consent from the building after a breaking or entering – and in this case, [] an entry -- knowing that he was not entitled to take it and intending at the time of the taking to deprive the *victim* of its use permanently, it would be your duty to return a verdict of guilt.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

Even if we assume there was an error in the instruction, Defendant has not and cannot demonstrate "that, absent the error, the jury probably would have returned a different verdict. . . . In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. The inclusion of 'Andy Stevens' in the indictment along with the purported error in jury instructions, "under the facts of this particular case, make no difference at all in the result." *Boyd*, 222 N.C. App at 173, 730 S.E.2d at 201. Manna Baptist Church was listed on the indictment, and the evidence at trial showed it was the owner of the property.

Conclusion

For the reasons stated herein, Rule 2 is a tool to be used only in rare circumstances, and should not be invoked in this case. Furthermore, there was substantial evidence of Defendant's guilt, and Defendant has failed to demonstrate that the larceny instruction had a probable impact on the jury's verdict. Defendant received a fair trial free from prejudicial error, and the jury's verdict should be upheld.

STATE v. COLEY

[257 N.C. App. 780 (2018)]

STATE OF NORTH CAROLINA
v.
ROBERT LINDSEY COLEY, JR.

No. COA17-470

Filed 6 February 2018

1. Appeal and Error—notice of appeal after verdict but before entry of judgment—writ of certiorari

Where defendant gave oral notice of appeal in open court after the jury returned its verdict but before the entry of judgment by the trial court, his right to appeal was lost based on his failure to comply with Rule of Appellate Procedure 4(a). In its discretion, the Court of Appeals granted defendant's petition for writ of certiorari and considered the merits of his argument.

2. Drugs—possession with intent to sell or deliver marijuana—11.5 grams packaged in 2 sandwich bags, digital scale, and loose sandwich bags—issue for jury

The evidence in defendant's trial for possession with intent to sell or deliver marijuana—which established that defendant's vehicle contained 11.5 grams of marijuana packaged in two sandwich bags, a digital scale, and 23 other loose sandwich bags—was sufficient for the trial court to deny defendant's motion to dismiss and submit the issue to the jury.

Appeal by defendant from judgment entered 12 September 2016 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Laura H. McHenry and Assistant Attorney General Kristen Jo Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

DAVIS, Judge.

In this appeal, we once again address the quantum of proof necessary for a defendant to be lawfully convicted of possession with intent to sell or deliver marijuana. The evidence at trial established that the defendant's vehicle contained 11.5 grams of marijuana packaged in

two sandwich bags, a digital scale, and 23 other loose sandwich bags. Because we conclude that the evidence — when viewed in the light most favorable to the State — was sufficient for a reasonable juror to have found him guilty of this offense, we affirm the defendant's convictions.

Factual and Procedural Background

The State introduced evidence at trial tending to establish the following facts: On 29 May 2015, Officer Miles Costa of the Nashville Police Department was driving his patrol vehicle on the east side of Nashville, North Carolina when he noticed expired tags on a car being driven by Robert Lindsey Coley, Jr. ("Defendant"). After verifying that the vehicle's registration was expired, Officer Costa pulled over Defendant's car and approached the driver's side.

Defendant told Officer Costa that he did not have his driver's license with him and that he could not find his registration card. While speaking to Defendant, Officer Costa smelled the odor of marijuana and asked him to exit the vehicle. Officer Costa then asked Defendant if he had any marijuana in the car, and Defendant responded that there was some in the glove compartment. Defendant was placed in handcuffs while Officer Costa conducted a search of the vehicle. He found a sandwich bag containing 8.6 grams of marijuana in the glove compartment. Upon returning to his patrol vehicle to weigh the marijuana, Officer Costa was informed by Defendant that there was also a digital scale in the center console of the car.

By this time, another officer had arrived on the scene, and the two officers searched the vehicle together. They found a digital scale, another sandwich bag containing 2.9 grams of marijuana, and two partially smoked marijuana cigars in the center console. Thirteen Dutch Masters cigar wrappers, along with one unopened package of cigars, were discovered elsewhere in the car. The officers found a box of sandwich bags in the backseat that had been opened along with 23 loose sandwich bags strewn throughout the vehicle.

Defendant also had over $800 in cash on his person. He informed the officers that he had just cashed his paycheck, and Officer Costa found a pay stub in the vehicle.

Defendant told the officers that he kept the scale in his car to ensure that he actually received from his sellers the precise amount of marijuana that he had purchased so as to avoid being "ripped off." He further stated that the sandwich bags were in his vehicle because "his drug dealers were cheap and . . . [h]e had to provide his own bags."

Defendant was indicted by a Nash County grand jury on 5 October 2015 on the charges of possession with intent to sell and deliver marijuana and possession of marijuana paraphernalia. A jury trial was held beginning on 29 August 2016 before the Honorable Quentin T. Sumner.

Officer Costa testified on direct examination, in pertinent part, as follows:

> [PROSECUTOR]: Now, I want to talk about your law enforcement experience and training. You testified that this substance was marijuana. Have you had any particular training in the identification of marijuana?
>
> [OFFICER COSTA]: Yes, ma'am.
>
> [PROSECUTOR]: Please explain that training for us.
>
> [OFFICER COSTA]: We -- we go through a -- we go to a control room, controlled area, controlled classroom and marijuana's presented to us in big amounts, small amounts. And the smell, we're allowed to smell it. We're allowed to touch it. We're allowed to feel it. Everything like that.
>
> . . . .
>
> [PROSECUTOR]: . . . Are you familiar with how marijuana is commonly sold?
>
> [OFFICER COSTA]: Yes, ma'am.
>
> [PROSECUTOR]: Tell me about that.
>
> [OFFICER COSTA]: Marijuana is, majority of the time, commonly sold in your nickel bags or your dime bags.
>
> [PROSECUTOR]: Tell me what exactly is a nickel bag?
>
> [OFFICER COSTA]: A nickel bag is .5 grams of marijuana. Usually costs, depending on the grade of marijuana, $5. A dime bag would be $10 and that is a -- that's one gram of marijuana.
>
> [PROSECUTOR]: And in selling those quantities, how are they typically packaged? Or how is the marijuana typically packaged?
>
> [OFFICER COSTA]: They're packaged in a sandwich bag.

. . . .

> [PROSECUTOR]: Tell me why you chose to charge the Defendant with possession with intent to sell or deliver versus just possessing the marijuana?
>
> [OFFICER COSTA]: Yes, ma'am; the -- with the amount of marijuana and the two individual bags, normally if somebody is going to have a large amount of marijuana, they're going to have it one [sic] bag. The two - - two separate bags, the amount of marijuana, the sandwich bags all over the vehicle, the drug scale[.]

. . . .

> [PROSECUTOR]: Now, you said that you took the amount, the way it was divided and packaged and the sandwich bags and the scale as factors that went towards your charging. Now, [Defendant] offered an explanation that [Defendant's counsel] has presented to the jury. Was that explanation not sufficient enough to deter you from charging the possession with intent to sell or deliver?
>
> [OFFICER COSTA]: Yes, ma'am. The explanation did not make any sense to me. I've never heard it before coming from anybody else. Normally, people who have marijuana inside of the vehicle do not have several sandwich bags inside of the vehicle.

At the close of the State's evidence, Defendant moved to dismiss the charge of possession of marijuana with intent to sell or deliver based on insufficiency of the evidence. The trial court denied his motion.

During Defendant's case-in-chief, the following exchange occurred between Defendant and his attorney:

> [DEFENDANT'S COUNSEL]: What's the deal with the sandwich bags?
>
> [DEFENDANT]: The dealers who I was dealing with they just wouldn't have them, they wouldn't supply them. They would say they don't want to risk having them and stuff like that. They just wouldn't have them, so I would use it to what I would pick a week [sic] to put them into the bag.

> . . . .
>
> [DEFENDANT'S COUNSEL]: Now, why did you have -- also found in your car was a scale. Why did you have the scale?
>
> [DEFENDANT]: To make sure I was getting what I was purchasing. I mean, people that I'm dealing with, it's not like it's a pre-packaged product where I'm going to know exactly what I'm getting is what they're telling me. So I would check it to make sure that it is what they say it is, the amount wise.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: Why did you have two bags?
>
> [DEFENDANT]: One of them I actually had forgotten about. . . .
>
> [DEFENDANT'S COUNSEL]: Why -- how did you forget about a bag of marijuana?
>
> [DEFENDANT]: It just wasn't good quality and I ended up buying something else and I guess I just forgot it was in there.

Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court once again denied his motion. On 30 August 2016, the jury convicted him of both charges. The trial court consolidated the convictions and sentenced Defendant to a term of imprisonment between 6 and 17 months, suspended the sentence, and placed him on supervised probation for 18 months. Defendant gave oral notice of appeal in open court prior to the entry of the judgment.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether we possess jurisdiction over this appeal. Rule 4(a) of the North Carolina Rules of Appellate Procedure states, in pertinent part, as follows:

> (a) Manner and time. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by:

(1) giving oral notice of appeal at trial . . . .

N.C. R. App. P. 4(a).

Here, Defendant gave oral notice of appeal in open court after the jury returned its verdict but prior to the entry of judgment by the trial court. Thus, because he did not give notice of his appeal following entry of the judgment, his right to appeal has been lost based on his failure to comply with Rule 4(a). *See State v. Robinson*, 236 N.C. App. 446, 448, 763 S.E.2d 178, 179 (2014) (right of appeal lost where Defendant "gave notice of appeal in open court following the jury's verdict, but failed to give notice of appeal following entry of the trial court's final judgment"), *aff'd as modified*, 368 N.C. 402, 777 S.E.2d 755 (2015).

Defendant has filed a petition for writ of *certiorari* requesting appellate review of his convictions in the event that his notice of appeal is deemed by this Court to be defective. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court may, in its discretion, grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action. . . ." N.C. R. App. P. 21(a)(1).

Here, the State does not contend that it was misled by Defendant's defective notice of appeal and acknowledges that it is within this Court's discretion to allow the petition. *See State v. Springle*, __ N.C. App. __, __, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (quotation marks, ellipsis, and citation omitted)).

In our discretion, we elect to grant Defendant's petition for writ of *certiorari* and proceed to address the merits of his argument. *See Robinson*, 236 N.C. App. at 448, 763 S.E.2d at 180 (granting defendant's petition for *certiorari* where oral notice of appeal was given after jury verdict but prior to entry of judgment).

II. Denial of Motion to Dismiss

[2] Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the possession with intent to sell or deliver marijuana charge. His primary contention is that the quantity of marijuana found in his vehicle was too small to allow this charge to be submitted to the jury.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177

(citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "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[.]" *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).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Pursuant to N.C. Gen. Stat. § 90-95, "the offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance." *State v. Blakney*, 233 N.C. App. 516, 519, 756 S.E.2d 844, 846 (citation omitted), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 204 (2014). We have held that while "intent to sell or deliver may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010) (brackets, quotation marks, and citation omitted). Such intent "may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (citation omitted), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). Although the "quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount." *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted).

It is instructive to examine prior cases from our appellate courts on this issue. In *Blakney*, the defendant's vehicle contained 84.8 grams of marijuana packaged in a number of containers, including "two sandwich bags, four 'dime bags,' and five other types of bags." *Blakney*, 233 N.C. App. at 520, 756 S.E.2d at 847. Additionally, a box of sandwich bags, a digital scale, and a "large amount of cash" were discovered in the car. *Id.* at 517, 756 S.E.2d at 845. We held that the evidence was sufficient to survive a motion to dismiss, concluding as follows:

> [T]he manner in which the marijuana was packaged (such as four "dime bags") raised more than an inference that defendant intended to sell or deliver the marijuana. Further, the presence of items commonly used in packaging and weighing drugs for sale — a box of sandwich bags and [a] digital scale[ ] — along with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana, as opposed to merely possessing it for his own personal use[.]

Id. at 520, 756 S.E.2d at 847.

State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984), involved 27.6 grams of marijuana recovered from the defendant's jacket. *Id.* at 139, 321 S.E.2d at 564. The marijuana "was packaged in seventeen separate, small brown envelopes known in street terminology as 'nickel or dime bags.' " *Id.* at 140, 321 S.E.2d at 564. The defendant in that case argued that the amount of marijuana at issue was too small to raise an inference that he intended to sell or deliver the drugs. *Id.* at 139, 321 S.E.2d at 564. In ruling that the evidence was sufficient to survive a motion to dismiss, we stated that the "[d]efendant's argument would be persuasive except for the evidence of how the 27.6 grams of marijuana was packaged." *Id.* at 139-40, 321 S.E.2d at 564.

Similarly, in *State v. Yisrael*, __ N.C. App. __, 804 S.E.2d 742 (2017), we held that sufficient evidence supported a possession with intent to sell or deliver charge where the defendant possessed a total of 10.88 grams of marijuana packaged in three separate baggies — one "dime bag" and two larger bags. *Id.* at __, 804 S.E.2d at 743. The defendant in Yisrael was also carrying $1,504 and in possession of a stolen handgun. *Id.* at __, 804 S.E.2d at 745-46.

We determined that "[t]his quantity of illegal drugs and its packaging . . . ; the large amount of unsourced cash on [the defendant's] person; and the stolen and loaded handgun [are] sufficient to support a reasonable inference that [the defendant] intended to sell or deliver the marijuana he admittedly possessed . . . ." *Id.* at __, 804 S.E.2d at 747; *see also State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (holding that "[t]he jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials" where 219 grams of marijuana were packaged in 16 small envelopes and 28 empty envelopes were found nearby).

Conversely, in *Wilkins* and *Nettles* we held that small quantities of drugs unaccompanied by evidence that the substances were packaged for sale were insufficient to raise an inference of intent to sell or deliver. The defendant in *Wilkins* possessed 1.89 grams of marijuana contained in three small bags and $1,264 in cash. *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. Regarding the packaging, this Court stated that "[w]hile small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer." *Id.* at 732, 703 S.E.2d at 810. We concluded as follows:

> Had defendant possessed more than 1.89 grams of marijuana, or had there been additional circumstances to consider, we may have reached a different conclusion; however, given the fact that neither the amount of marijuana nor the packaging raises an inference that defendant intended to sell the drugs, the presence of the cash as the only additional factor is insufficient to raise the inference.

Id. at 733, 703 S.E.2d at 810 (citation omitted).

Nettles involved the discovery of four to five crack cocaine rocks weighing 1.2 grams in the defendant's vehicle. *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 175. The police also seized a safety pin from the defendant's living room. *Id.* at 102, 612 S.E.2d at 173. Although "officers testified that a safety pin typically is utilized by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises." *Id.* at 107, 612 S.E.2d at 177. In ruling that there was insufficient evidence of an intent to sell or deliver, we noted the absence of any testimony "that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs." *Id.* at 107, 612 S.E.2d at 176. Ultimately, we concluded that even "[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Id.* at 107, 612 S.E.2d at 177.

Thus, in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, our courts have placed particular emphasis on the amount of drugs discovered, their method of packaging, and the presence of paraphernalia typically used to package drugs for sale. Moreover, our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor — by itself — supports an inference of

possession with intent to sell or deliver. With these principles in mind, we now turn to the evidence in the present case.

As noted above, Defendant's vehicle contained a total of 11.5 grams of marijuana contained in two sandwich bags. Additionally, a digital scale and an open box of sandwich bags were found along with 23 loose sandwich bags. Viewed in isolation, the relatively small quantity of marijuana discovered in the vehicle would not be enough to support an inference that Defendant possessed the drugs with the intent to sell or deliver. *See State v. Wiggins*, 33 N.C. App. 291, 294, 235 S.E.2d 265, 268 (holding that discovery of 215.5 grams of marijuana was, by itself, insufficient to survive a motion to dismiss), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977). However, given the additional presence of the digital scale and the large number of sandwich bags found in Defendant's vehicle, we are satisfied that the State's evidence was sufficient to create a question for the jury. Despite Defendant's testimony that he only utilized the scale and sandwich bags in connection with his own personal marijuana use, a rational jury could have found his explanation to lack credibility.

Even assuming that this case can be characterized as a close one, we have held that "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *Yisrael*, __ N.C. App. at __, 804 S.E.2d at 747 (brackets, quotation marks, and citation omitted). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

Conclusion

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

NO ERROR.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
DARYL LEE CROMARTIE, DEFENDANT

No. COA17-350

Filed 6 February 2018

1. Evidence—hearsay—explaining subsequent conduct—identity and motive

Where the trial court admitted an officer's testimony, for the purpose of explaining the officer's subsequent conduct, concerning defendant's alleged assault of his girlfriend, and then later instructed the jury that the testimony could be considered evidence of motive and identity, the error in admitting the testimony as evidence of defendant's identity and motive was harmless. In light of the ample evidence to convict defendant, there was not a reasonable possibility of a different outcome.

2. Constitutional Law—double jeopardy—lesser-included offenses from same facts

Entry of judgment on defendant's convictions for common law robbery and the lesser-included offenses of non-felonious larceny and simple assault, which arose out of the same facts as the robbery, violated defendant's right to be free from double jeopardy. Defendant received the lowest possible sentence in the mitigated range, so the Court of Appeals did not remand for resentencing but did arrest judgment on his convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences.

3. Indictment and Information—resisting a public officer—"by running away on foot"

There was no fatal variance between the indictment charging defendant with resisting a public officer—which specified that defendant resisted "by running away on foot"—and the evidence at trial, which tended to show that defendant fled on a stolen moped from pursuing officers, went behind a Dollar General Store, and was found approximately 15 to 20 feet from the moped when an officer regained sight of him.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 7 September 2016 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 17 October 2017.

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

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

MURPHY, Judge.

Daryl Lee Cromartie ("Defendant") appeals from judgment entered upon his convictions for attaining habitual felon status, common law robbery, misdemeanor larceny, fleeing to elude arrest, resisting a public officer, and simple assault. Defendant argues the trial court erred by: (1) admitting Deputy Snyder's prejudicial and inadmissible hearsay into evidence; (2) failing to arrest judgment for the larceny and assault convictions; and (3) failing to dismiss the charge of resisting an officer where no evidence satisfied the allegation in the indictment. For the reasons discussed, we hold the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence, and did not err by denying Defendant's motion to dismiss the resisting a public officer charge. The trial court, however, did err by failing to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault.

I. Background

Defendant was arrested on 14 December 2015 and indicted by a Duplin County Grand Jury on 21 March 2016 on charges of misdemeanor fleeing to elude arrest with a motor vehicle, resisting, obstructing or delaying a public officer, common law robbery, felony larceny, and simple assault. A Duplin County Grand Jury additionally indicted Defendant for attaining habitual felon status on 31 May 2016.

Defendant's trial began on 6 September 2016. The evidence at trial tended to show that after assaulting his girlfriend on 14 December 2015, Defendant stopped a man on a moped, pulled the man off the moped and assaulted the man, and then drove away on the man's moped. Responding law enforcement officers quickly located Defendant, who then fled from the officers on the moped. During the pursuit, Defendant drove the moped behind a Dollar General store and out of the view of a pursuing sheriff's deputy. When the Deputy regained sight of Defendant, Defendant was standing approximately 15 to 20 feet from the moped, which was overturned and lying in a ditch. Defendant was arrested.

On 7 September 2016, the jury returned verdicts finding Defendant guilty of misdemeanor fleeing to elude arrest, resisting, obstructing, or delaying a public officer, common law robbery, non-felonious larceny, and simple assault. Following the jury verdicts, Defendant pleaded guilty to attaining habitual felon status. The trial court consolidated all of the offenses and entered a single judgment sentencing Defendant in the mitigated range to a term of 58 to 82 months imprisonment. Defendant gave notice of appeal in open court.

II. Analysis

A. Hearsay

[1] On appeal, Defendant first contends the trial court erred in admitting testimony from Deputy Sheriff Steven Snyder over his objections. Defendant claims the challenged testimony was inadmissible hearsay and that its admission was prejudicial to his case. We disagree that Defendant was prejudiced by the challenged testimony.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). But, even if the trial court admits hearsay in error, "[t]he erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the burden is on the defendant to show prejudice." *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citations omitted); *see* N.C.G.S. § 15A–1443(a) (2015). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation omitted).

Under the North Carolina Rules of Evidence, "[h]earsay is not admissible except as provided by statute or by [the] rules." N.C.G.S. § 8C-1, Rule 802 (2015). " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). "When evidence of such statements by one other than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

The testimony at issue in this case concerned Defendant's alleged assault of his girlfriend prior to the events giving rise to the charges in this case. Deputy Snyder testified that he was on a dayshift patrol on 14 December 2015 when a female at a gas station flagged him down.

Deputy Snyder recalled that the woman ran to his car, crying hysterically, and told him that she had just been assaulted. Defendant objected to the testimony, claiming it was hearsay. The trial court, however, overruled Defendant's objection and instructed the State to "[l]ay a foundation for the purpose of the call in reference to the stop." Deputy Snyder then continued to explain the situation. When the State inquired whether the woman identified her assaulter to Deputy Snyder, Defendant objected on hearsay grounds. Over Defendant's objection, Deputy Snyder was allowed to testify that the woman told him the name of her assaulter. The name she gave Deputy Snyder was Defendant's name. Deputy Snyder also testified that he asked the woman where Defendant was heading when Defendant left the gas station. Overruling another hearsay objection by Defendant, the trial court allowed Deputy Snyder to testify that the woman told him "[Defendant] flagged down a white pickup and was heading North on 117." When local units arrived at the gas station, Deputy Snyder left heading north on the lookout for Defendant.

Defendant now admits that it initially appeared the testimony was elicited to explain Deputy Snyder's subsequent conduct, which Defendant recognizes to be a valid purpose. Indeed, "[w]e have held statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000) (quotation omitted). Yet, Defendant contends the trial court ultimately admitted the evidence for substantive purposes when it instructed the jury that the testimony could be considered evidence of motive and identity. The trial court's instructions were as follows:

> Evidence has been received tending to show that [D]efendant assaulted his girlfriend at the time that the crime was committed in this case. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, and that [D]efendant had a motive for commission of the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

Upon review of the jury instructions, it appears the trial court was attempting to limit the consideration of the evidence in accordance with N.C.G.S. § 8C-1, Rule 404(b), which states:

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

However, in doing so, the trial court changed the nature of the evidence from nonhearsay, when the testimony is considered solely to explain Deputy Snyder's subsequent conduct, to hearsay, when the testimony is considered as proof of identity and motive. That is because in order for the jury to consider the challenged testimony as evidence of identity and motive, the jury would have to consider the testimony for the truth of the matter asserted, even though the testimony did not directly concern the crimes charged in this case. Thus, while the challenged testimony was admissible to explain Deputy Snyder's subsequent conduct, it was error for the trial court to admit the testimony as evidence of Defendant's identity and motive. When the testimony is considered for the truth of the matter asserted, it is hearsay.

Nevertheless, the trial court's admission of the challenged testimony for purposes of proving identity and motive was harmless error. To show prejudice, Defendant must show that "there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) (citations omitted).

Defendant contends the challenged testimony was "highly prejudicial" in this case because the crux of his defense was that the State failed to provide sufficient evidence of his intent in taking the moped. Defendant asserts that, absent the testimony, there was no evidence of his motivation for taking the moped or that he intended to keep the moped. Defendant further asserts that the jury was much less likely to doubt that he intended to permanently deprive the victim of the moped after learning that he assaulted his girlfriend and was running away from her. We disagree.

Absent the challenged testimony, there was ample evidence for the jury to convict Defendant of the charged offenses. Specifically, evidence was presented that the victim, the owner of the moped, was stopped by a man standing in the road blocking his way. The man approached the victim and grabbed hold of the front of the moped. The victim testified that the man began to ask him questions about the moped and stated, "I like that scooter[ ]" and "I need to get me one." When the victim attempted

to back up to go around the man, the man, who still had hold of the front of the moped, reached over the handlebars, grabbed the victim by the coat collar, and pulled the victim off of the moped. The moped fell to the ground and the man beat the victim and slung him around on the road. A struggle ensued. Eventually, the man was able to break free from the victim and took off on the moped. When asked to describe what the man looked like, the victim identified Defendant, pointing to him in the courtroom and stating, "[t]hat's him right there[.]" Furthermore, testimony was given that deputies spotted Defendant on the moped shortly thereafter and pursued Defendant until he crashed the moped in a ditch.

Given the ample evidence in this case, there is not a reasonable possibility of a different outcome even if the challenged testimony had not been admitted at trial. Thus, the trial court did not commit prejudicial error when it admitted the testimony as evidence of Defendant's identity and motive.

B. Double Jeopardy

[2] Defendant also argues the trial court erred by failing to arrest judgment on his convictions for non-felonious larceny and simple assault. Defendant now contends this error amounts to a violation of his right to be free from double jeopardy.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). Yet, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1 (2017). Particularly relevant to this case, this Court has stated that,

> [t]he constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived. To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. Failure to raise this issue at the trial court level precludes reliance on the defense on appeal. Simply put, double jeopardy protection may not be raised on appeal

> unless the defense and the facts underlying it are brought first to the attention of the trial court.

State v. White, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (quotation marks and citations omitted).

In this case, Defendant moved to dismiss all charges at the close of the State's evidence, only specifically arguing against the resisting a public officer charge. Defendant then renewed "the same motions to dismiss for the same reasons[ ]" at the close of all of the evidence. Defendant also later moved to set aside the verdicts on the basis that they were "against the greater weight of the evidence." Defendant, however, never argued a double jeopardy violation to the trial court. As the double jeopardy issue was never raised to the trial court, Defendant has not preserved the issue for review on appeal.

Nevertheless, recognizing his possible error below, Defendant asserts on appeal that, if the issue was not preserved for appeal, we should invoke Rule 2 to reach the merits of the issue or we should determine whether he received ineffective assistance of counsel. To prevent manifest injustice to Defendant in this case, we choose to invoke Rule 2 and address the merits of Defendant's argument. *See* N.C. R. App. P. Rule 2 ("To prevent manifest injustice to a party, . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.").

"Under the Double Jeopardy Clause, when one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense." *State v. Schalow*, __ N.C. App. __, __, 795 S.E.2d 567, 579 (2016) (citations omitted), *disc. review allowed*, __ N.C. __, 796 S.E.2d 791 (2017). This Court has held that larceny is a lesser included offense of common law robbery. *State v. White*, 322 N.C. 506, 517 n.1, 369 S.E.2d 813, 819 n.1 (1988) (reaffirming the Court's prior holding that larceny is a lesser included offense of common law robbery) (citing *State v. Young*, 305 N.C. 391, 393, 289 S.E.2d 374, 376 (1982)). Likewise, assault is a lesser included offense of common law robbery. *See State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 268 (2001) ("Our appellate courts have stated several times that the crime of common law robbery includes an assault on the person."). Upon review, it is clear the trial court erred in sentencing Defendant for the non-felonious larceny and simple assault convictions in this case because those offenses arose out of the same facts as the common law robbery. As a result, the

entry of judgment on the common law robbery conviction and the lesser included non-felonious larceny and simple assault convictions violated Defendant's right to be free from double jeopardy.

The State does not contest that the convictions do not violate double jeopardy, and in fact concedes that larceny and assault are lesser included offenses of common law robbery. Instead, the State, assuming there was a double jeopardy violation, argues Defendant was not prejudiced by the violation because all convictions were consolidated for judgment and Defendant received a single sentence. In fact, Defendant received the lowest possible sentence that he could have received in the mitigated range. Therefore, although typically "[w]hen the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing," *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015), we do not remand for resentencing where Defendant has already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offenses probably influenced the defendant's sentence. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (remanding for resentencing when one or more, but not all, of the convictions consolidated for judgment have been vacated because conviction for two or more offenses influences adversely to a defendant the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment). We would only remand after arresting judgment if "we were unable to determine what weight, if any, the trial court gave to each of the separate convictions. . . ." *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990). Here, Defendant received the lowest possible sentence and we need not remand for resentencing.

Nevertheless, the State's argument ignores the collateral consequences of the judgment. Our Supreme Court has stated, "[t]hat the offenses were consolidated for judgment does not put to rest double jeopardy issues, because the separate convictions may still give rise to adverse collateral consequences." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citations omitted). The proper recourse in this case is for us to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences. *See State v. Jaynes*, 342 N.C. 249, 276, 464 S.E.2d 448, 465 (1995) (arresting judgment on two lesser included larceny convictions), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). We arrest judgment on the larceny and assault convictions.

C. Motion to Dismiss

[3] In his last argument on appeal, Defendant argues the trial court erred in denying his motion to dismiss the resisting a public officer charge because of a fatal variance between the indictment and the evidence. We disagree. In the light most favorable to the State, the direct and circumstantial evidence demonstrates that Defendant continued to elude Deputy Boyette on foot after the moped overturned.

"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). "In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (citation omitted). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility . . . . Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Blizzard*, 169 N.C. App. 285, 289-90, 610 S.E.2d 245, 249 (2005) (quotation omitted).

"The elements of resisting an officer are that a person 'willfully and unlawfully resisted, delayed or obstructed a public officer in discharging or attempting to discharge a duty of his office." *State v. Shearin*, 170 N.C. App. 222, 223, 612 S.E2d 371, 380 (2005) (quoting N.C.G.S. § 14-223). We have "previously recognized that an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102-103 (2014), *disc. review denied*, __ N.C. __, 775 S.E.2d 852 (2015) (quotation omitted).

Here, the indictment for resisting an officer specified that Defendant resisted "by running away from Cody Boyette on foot." The evidence at trial tended to show that Deputy Boyette was in hot pursuit of Defendant when Defendant went behind the Dollar General. At some point between when Defendant went behind the store and when Deputy Boyette arrived behind the store, Defendant traversed approximately 15 to 20 feet from the stolen and overturned moped. It is a reasonable inference that Defendant covered this distance on foot. Therefore, contrary to the analysis set forth in the dissent, there was sufficient evidence presented to the jury to find that Defendant ran away from Deputy Boyette on foot, as alleged in the indictment. The trial court did not err by denying Defendant's motion to dismiss for a fatal variance.

III. Conclusion

For the reasons discussed, we hold the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence, and did not err by denying Defendant's motion to dismiss the resisting a public officer charge. The trial court, however, did err by failing to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault.

NO ERROR IN PART, ARRESTED IN PART.

Judge BRYANT concurs.

Judge ARROWOOD concurs in part and dissents in part.

ARROWOOD, Judge, concurring in part, dissenting in part.

I concur in that portion of the majority opinion that holds that the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence. I also concur in the finding that the trial court committed error by failing to arrest judgment on defendant's convictions for non-felonious larceny and simple assault.

I dissent from that portion of the majority opinion that finds that the trial court did not err in denying defendant's motion to dismiss the charge of resisting a public officer. I believe that there is a fatal variance between the charge alleged in the indictment and the State's evidence at trial, thus, I vote to reverse the conviction for resisting a public officer.

"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). Furthermore,

> [i]t is well established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment" and that "[t]he State's proof must conform to the specific allegations contained" therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). Thus, "a fatal variance between the *allegata* and the *probata*" is properly the subject of a motion to dismiss for insufficiency of the evidence to sustain a conviction. *State v. Nunley*, 224 N.C. 96, 97, 29 S.E.2d 17, 17 (1944). The rationale for this rule is "to insure that the defendant is able to prepare his defense against the crime with which

> he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because "[i]n order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* (citation omitted). This Court has previously recognized that "an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414 S.E.2d 65, 67 (1992).

State v. Henry, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102-103 (2014), *disc. review denied*, __ N.C. __, 775 S.E.2d 852 (2015).

Defendant moved to dismiss all charges at the conclusion of the State's evidence and specifically argued that the charge of resisting a public officer should be dismissed because the evidence of how defendant resisted the officer was "completely different from the indictment[.]" This is the same argument presented on appeal relating to the third essential element of the offense.

The indictment in this case alleged that defendant resisted a sheriff's deputy "by running away from [the deputy] on foot[]" while the deputy was attempting to arrest defendant for larceny. A review of the record, however, reveals no evidence that defendant ran away from the deputy on foot. The sheriff's deputy named in the indictment, Cody Boyette, testified that as he was pursuing defendant, defendant pulled into a Dollar General store parking lot and went behind the business. Deputy Boyette lost sight of defendant for three or four seconds and when he regained sight of defendant, "[Deputy Boyette] saw the moped was overturned close to a ditch and [defendant] was *standing* approximately 15 to 20 feet away from it." (Emphasis added). Deputy Boyette then got out of his vehicle, drew his firearm and pointed it at defendant, and told defendant to get on the ground several times. After Deputy Boyette instructed him to get on the ground five or six times, defendant complied. Deputy Boyette then approached defendant and placed handcuffs on him.

Both the State and the defense elicited additional testimony from Deputy Boyette to clarify defendant's movements after he crashed the moped in the ditch. In response to the State's initial questioning, Deputy Boyette reiterated that "[defendant] was standing 15 to 20 feet away

[from the moped], and that's where he was at whenever I arrived from the pursuit." The following exchange took place:

> Q. So did he leave from the moped and got to that 15 to 20 feet and then he stopped; is that correct?
>
> A. Whenever I actually got out and drew my firearm, he had come to a complete stop.
>
> Q. But before then he had not?
>
> A. Yeah. By the time I laid eyes on him, he never moved any further or any less from the time I got there. He was looking for somewhere else to go.
>
> Q. So he fled on foot from that up until that 15 to 20 feet before you drew your weapon; is that correct?
>
> A. Yes, ma'am.

During cross-examination by the defense, Deputy Boyette again testified about the end of his pursuit of defendant. The following exchange took place:

> Q. And when you exited your patrol vehicle, where was -- where was [defendant]?
>
> A. If the -- let's see, he was -- from the point of the moped, he was probably about 10 or 15 feet east of the moped.
>
> Q. Okay. And was he walking?
>
> A. He was standing still at that point in time.
>
> Q. Okay. And then what happened?
>
> A. Like I said, I got out of my vehicle, I drew my firearm on Mr. Cromartie, and was commanding him to get down on the ground.
>
> Q. So after you got out, he didn't move?
>
> A. He was standing still, but he was looking around as if he was trying to find somewhere else to run to. It was a big, open spot in the back of Dollar General. It was a parking lot and a ditch.
>
> Q. So once you got out of the vehicle, he didn't move?
>
> A. Well he was standing still and he was looking for somewhere to go. Reason I drew any firearm, he had

> just robbed somebody and stole something, based off the traffic I heard. And there was also people around from where they heard us coming through town, so for my own safety and the safety of others, that's why I had my firearm out.
>
> Q. Did he run away from you?
>
> A. No, sir.
>
> . . . .
>
> [Q.] You also supervised or gave the magistrate information about the resisting a public officer, and it said that he did resist, delay, and obstruct Boyette, a public officer by running away from deputy on foot.
>
> A. He had got off the moped and started to run and stopped once I actually approached him.
>
> Q. Okay. So once you ordered him to stop, he stopped?
>
> A. Yes.

During redirect-examination by the State, Deputy Boyette added that "[defendant] had already traveled away from the moped and he was standing in the area, but he was moving. He wasn't proceeding to any other location, but he was looking around trying to find somewhere else to go." In response to the defense's question on recross-examination as to how defendant was standing in one area and moving, Deputy Boyette explained that "[defendant] was standing still but moving his body."

I believe it is clear from the evidence that defendant did not run away from Deputy Boyette once Boyette regained sight of defendant behind the Dollar General. The evidence is that defendant was standing still approximately 15 feet from the moped. In response to defendant's argument that this creates a fatal variance with the indictment, which states defendant "[ran] away from Cody Boyette on foot[,]" the State does not assert there is any direct evidence of defendant running from Deputy Boyette on foot. Instead, the State argues that viewing the evidence in the light most reasonable to the State, the evidence that defendant was approximately 15 feet away from the moped supports an inference that defendant ran from Deputy Boyette after crashing the moped in the ditch. Given the testimony from Deputy Boyette, the State's only witness on this charge, I do not think such an inference may be reasonably inferred.

Because an indictment from resisting an officer must "indicate generally how [the] defendant resisted the officer[,]" *Henry*, 237 N.C. App. at 322, 765 S.E.2d at 103, I would find that there is a material variance between the State's proof and the indictment. Therefore, I vote to reverse the conviction for resisting a public officer by running away from him on foot.

THE STATE OF NORTH CAROLINA
v.
KENNETH VERNON GOLDER, DEFENDANT

No. COA16-987

Filed 6 February 2018

1. Indictment and Information—couched in language of statute—unlicensed bail bonding—exact manner of violation

The indictment charging defendant with unlicensed bail bonding in violation of N.C.G.S. § 58-71-40 was couched in the language of the statute and therefore was sufficient to confer jurisdiction upon the trial court. There was no requirement that the indictment specify the exact manner in which defendant violated section 58-71-40.

2. Appeal and Error—waiver of appellate review—no motion to dismiss

Defendant waived appellate review of his argument that the evidence of aiding and abetting was insufficient to sustain his convictions stemming from the falsification of court records because he failed to make the appropriate motion to dismiss at trial.

3. Appeal and Error—waiver—narrow objection at trial—broadened on appeal

Where defendant made a narrow objection at trial to the sufficiency of the evidence of obtaining property by false pretenses (that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment), he could not broaden his argument on appeal to say that the evidence was insufficient because he did not obtain anything of value. He waived the new theory by not arguing it before the trial court.

4. Crimes, Other—unlicensed bail bonding—discussing cases with court clerk—false entries of motions to set aside bond forfeitures

The State presented sufficient evidence to support defendant's conviction for unlicensed bail bonding in violation of N.C.G.S. § 58-71-40. Defendant admitted at trial that he was not a licensed bondsman, and a former clerk of the Wake County Clerk's Office testified that defendant sent him a list of defendant's clients' names and case information and paid him to enter false information into the electronic court files to create the illusion that motions to set aside bond forfeitures had been filed.

Appeal by defendant from judgments entered 12 October 2015 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Anne Bleyman, for defendant-appellant.

BERGER, Judge.

Kenneth Vernon Golder II ("Defendant") appeals the trial judgments of obtaining property by false pretenses, accessing a government computer, altering court records, and unlicensed bail bonding. Defendant has challenged both the indictment and sufficiency of the evidence for his unlicensed bail bonding conviction, as well as the sufficiency of the evidence for the aiding and abetting theory of criminal liability and the obtaining property by false pretenses conviction. After careful review of Defendant's assignments of error, we find Defendant received a fair trial free from error.

Defendant has also petitioned this Court for a writ of certiorari seeking review if we were to find service of his notice of appeal to be deficient, and we see no need to grant this petition. It is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010) (citation omitted). The State has entered no objection to any lack of service and has participated in this appeal, thereby waiving service of Defendant's notice of appeal. *See Hale v. Afro-American Arts International*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993).

Factual & Procedural Background

In September 1999, Kelvin Ballentine ("Ballentine") joined the Wake County Clerk's Office ("Clerk" or "Clerk's Office") where he was employed in various capacities until 2013. Ballentine was the Bond Forfeiture Clerk from 2006 until 2008, when he joined the estates division of the Clerk's Office. As Bond Forfeiture Clerk, Ballentine worked with the bail bondsmen in Wake County and, in agreement with several bondsmen, began a scheme in 2006 by which he would use his access to the State's automated Civil Case Processing System ("VCAP") to enter false data into the system in exchange for cash. Specifically, Ballentine agreed to enter data into VCAP that would show motions to set aside bond forfeitures had been filed with the Clerk, even though no motions were in fact filed.

When a defendant fails to appear on their court date, any posted bond is considered forfeited and is recorded as such by the clerk. After notification of forfeiture from the Clerk, the bondsman has 150 days to either bring the defendant client into custody or dispute liability for the bond.

Monies collected from bond forfeitures go to the county board of education. A motion to set aside a bond forfeiture must be filed with the Clerk and served upon the school board. The board has twenty days to file an objection to the motion, otherwise it is automatically granted and the bondsman is relieved of liability for the bond. Ballentine knew that the Wake County School Board ("School Board"), if no physical set aside motion was filed, would have "no way of knowing" it should contest the motion and the bondsman's liability would be relieved automatically.

In 2007, Ballentine met with Defendant at his bonding company office to discuss this scheme. The two men reached an agreement where Defendant would provide a list of cases, with case numbers, names of the defendant clients and bond amounts, and then Ballentine would enter fictitious motions to set aside into the VCAP system. For these fictitious entries, Ballentine would be paid between $500.00 and $2,000.00 in cash.

This scheme continued from 2007 until November 2012. During that time, Defendant would send his case list through text message to Ballentine. Defendant would then generally drop an envelope of cash into Ballentine's vehicle through a window left cracked for this purpose, although Defendant occasionally paid Ballentine in person.

In 2012, Ballentine decided he could no longer assist Defendant and ended their scheme. In 2013, the Clerk received information regarding irregularities in several bond forfeiture cases and, in conjunction with the Administrative Office of the Courts, the State Bureau of Investigation and the Wake County District Attorney's Office, began an investigation. Many of the questionable cases had no physical set aside motions in the Clerk's files, and neither the State, nor the School Board, had copies of the motions and notices that should have been in their files.

Ballentine could only make entries into VCAP through his username, thereby leaving digital fingerprints showing a pattern of unauthorized entries of set aside motions with no corresponding physical copies. Ballentine was confronted, relieved of his duties with the Clerk's Office, and he eventually made a full disclosure to the State Bureau of Investigation. Of at least 300 cases impacted by Ballentine's fictitious entries, 137 were associated with Defendant and these had an aggregate value of $480,100.00.

On February 25, 2014, Defendant was indicted for the felonies of obtaining property by false pretenses worth $100,000.00 or more, in violation of N.C. Gen. Stat. § 14-100; unlawfully accessing a government computer, in violation of N.C. Gen. Stat. § 14-454.1; and unlawfully altering court records, in violation of N.C. Gen. Stat. § 14-221.2. Defendant was also indicted for the misdemeanors of a bail bonding violation, pursuant to N.C. Gen. Stat. § 58-71-95; and unlicensed bail bonding, pursuant to N.C. Gen. Stat. § 58-71-40. Defendant was tried before a jury in Wake County Superior Court starting on October 5, 2015. The trial court dismissed the bail bond violation during trial.

On October 12, 2015, the jury found Defendant guilty of obtaining property valued below $100,000.00 by false pretenses, unlawfully accessing a government computer, unlawfully altering court records, and unlicensed bail bonding. Defendant was sentenced to individual terms of imprisonment running consecutively totaling from thirty-five months to forty-three months, including forty-five days imprisonment for the unlicensed bail bonding conviction, and $480,100.00 in restitution for the obtaining property by false pretenses conviction. Defendant filed written notice of appeal on October 21, 2015, but this notice was not served on the State. As discussed above, the State waived the required service of Defendant's notice by participating in this appeal without objection.

Analysis

Defendant has asserted two classifications of assignments of error in this appeal. His first classification contests the validity of the indictment

charging Defendant with unlicensed bail bonding, a misdemeanor. In his second classification of assignment of error, Defendant argues that the State did not introduce sufficient evidence at trial to sustain the convictions. Defendant asserts that the trial court erred in failing to dismiss (1) the charges of obtaining property by false pretenses, accessing a government computer, and altering court records because the State failed to present sufficient evidence that Defendant aided and abetted Ballentine; (2) the charge of obtaining property by false pretenses because the State failed to show Defendant obtained anything of value; and (3) the charge of unlicensed bail bonding because the State failed to show Defendant acted in the capacity of a bail bondsman. We will take each in turn.

I. Indictment

[1] Defendant was indicted, tried, and convicted for unlicensed bail bonding in violation of N.C. Gen. Stat. § 58-71-40. Defendant argues that the indictment charging him with unlicensed bail bonding was fatally defective, and that the trial court erred in failing to grant Defendant's motion to dismiss that charge based upon the faulty indictment. Defendant specifically argues that count of the indictment was fatally defective because (1) no definite acts of unlicensed bail bonding were alleged in the indictment, and because (2) this count of the indictment did not assert facts supporting every element of a criminal offense, and Defendant's commission thereof, with sufficient precision to apprise Defendant of the conduct that was the subject of the accusation. We disagree.

"Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time . . . ." *State v. Collins*, 221 N.C. App. 604, 610, 727 S.E.2d 922, 926 (2012) (citation, quotation marks, and brackets omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *Id.* (citation and quotation marks omitted).

In North Carolina, a criminal pleading must generally contain, in pertinent part: (1) the identification of the defendant; (2) a "separate count addressed to each offense charged"; (3) the county in which the offense took place; (4) the date, or range of dates, during which the offense was committed; (5) a "plain and concise factual statement in each count" that supports every element of the offense and the defendant's commission thereof; and (6) the "applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated." N.C. Gen. Stat. § 15A-924(a)(1)-(6) (2015). For an indictment charging the offense to be valid, it

> must charge all the essential elements of the alleged criminal offense. If the charge is a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute. The two purposes of an indictment are to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; and to put the defendant on reasonable notice so as to enable him to make his defense.

Collins, 221 N.C. App. at 610, 727 S.E.2d at 926 (citations, quotation marks, brackets, and ellipses omitted).

In the case *sub judice*, the count of the indictment here at issue stated:

> And the jurors for the State upon their oath present that on or about and between January 2, 2008 through and until November 21, 2012, in Wake County, the Defendant named above unlawfully and willfully did *act in the capacity of*, *and performed the duties*, *functions*, *and powers of a surety bondsman and runner*, *without being qualified and licensed* to do so. This act was done in violation of N.C.G.S. 58-71-40.

(Emphasis added).

"As a general rule, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 724 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (citation and quotation marks omitted). The indictment here charged a violation of N.C. Gen. Stat. § 58-71-40, which states in relevant part that "[n]o person shall *act in the capacity of* a professional bondsman, surety bondsman, or runner or *perform any of the functions*, *duties*, *or powers prescribed for professional bondsmen*, *surety bondsmen*, *or runners* under this Article *unless that person is qualified and licensed* under this Article." G.S. § 58-71-40(a) (2015) (emphasis added). The language of the indictment is plainly couched in the language of the statute. It is sufficient to clearly identify the crime being charged, apprise Defendant of this charge against him allowing preparation for trial, and preclude the State from putting Defendant in jeopardy more than once for the same crime. *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citation omitted).

Although Defendant contends in his brief that this indictment was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly violated Section 58-71-40, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have been unable to identify any such authority in our own research. *See State v. Miranda*, 235 N.C. App. 601, 606-07, 762 S.E.2d 349, 353-54 (2014) (finding no requirement that allegations of the exact manner in which a statute was violated be included in an indictment charging a statutory offense). Therefore, the indictment was not fatally defective, but gave the trial court jurisdiction to charge the jury, record the verdict, and enter judgment on Defendant's violation of Section 58-71-40.

II. Sufficiency of the Evidence

In Defendant's second classification of assignment of error, he asserts that the State introduced insufficient evidence to sustain Defendant's convictions. First, he argues that the evidence of his aiding and abetting Ballentine was insufficient to sustain the convictions of obtaining property by false pretenses, accessing a government computer, or altering court records. Second, he argues that the evidence was insufficient to sustain the obtaining property by false pretenses conviction because Defendant allegedly received no property or thing of value. And third, he argues that the evidence of Defendant acting in the capacity of a bail bondsman was insufficient to sustain his unlicensed bail bonding conviction. We take each assignment of error in turn, and ultimately find Defendant's arguments unavailing. We affirm the judgment of the trial court because not only did Defendant fail to preserve his right to appellate review of the alleged error, but also sufficient evidence was introduced to sustain the convictions for which appellate review was preserved.

"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, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*,

300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In making its determination, the trial court must consider all [competent] evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (citation omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations, emphasis, quotation marks, and brackets omitted).

A. Aiding & Abetting

[2] Defendant has challenged the sufficiency of the evidence used to convict him of several felonies because the State allegedly failed to prove he aided and abetted Ballentine in the commission of these felonies. A defendant is guilty of a crime based upon an aiding and abetting theory if the State proves beyond a reasonable doubt that "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

Aid or active encouragement, or the communication of the intent to assist, in the commission of the crime is sufficient to show aiding and abetting. *Id.* (citation omitted). "The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *Id.* (citation omitted). "When there is evidence that the individual knew about and aided in the offense, or shared the intent and was in a position to aid and encourage, the matter should go to a jury." *State v. Sink*, 178 N.C. App. 217, 221, 631 S.E.2d 16, 19, *writ denied*, *disc. review denied*, 360 N.C. 581, 636 S.E.2d 195 (2006) (citation omitted).

However, Defendant has argued a theory on appeal that was not argued before the trial court, and "where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) (citations, quotation marks, and brackets omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)). "[A] defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C.R. App. P. 10(a)(3) (2017). Defendant made no motion to dismiss for this count, whether a general objection to the sufficiency of the evidence or a specific objection to the State's 'aiding and abetting' theory of criminal liability.

"[I]f a defendant fails to move to dismiss the action, . . . defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.* Therefore, "an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2017). Defendant has not argued plain error.

"[M]atters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005) (citations and quotation marks omitted). Because Defendant made several specific arguments when moving the trial court to dismiss certain charges, but did not challenge the State's aiding and abetting theory, he has waived appellate review of this alleged error. We therefore do not reach the merits of Defendant's argument on this issue, and his assignment of error is overruled.

B. Obtaining Property by False Pretenses

[3] Defendant has challenged the sufficiency of the evidence for his obtaining property by false pretenses conviction. "Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another

person pursuant to N.C. Gen. Stat. § 14-100(a)." *State v. Barker*, 240 N.C. App. 224, 229, 770 S.E.2d 142, 146 (2015) (citation and brackets omitted). If the value of what is obtained is greater than $100,000.00, then the violation is a Class C felony; if less, then a Class H felony. N.C. Gen. Stat. § 14-100(a) (2015).

As stated above, arguments made before the trial court as the basis for a motion to dismiss must be consistent with arguments made on appeal, because "where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived." *Hernandez*, 227 N.C. App. at 608, 742 S.E.2d at 829 (citations, quotation marks, and brackets omitted). Furthermore, a "specific reference to one element of the offense [will] remove[ ] the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer 'apparent from the context.' " *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *disc. review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017) (quoting N.C.R. App. P. 10(a)(1) (2015)).

In *Walker*, this Court explained further that

> [a] specific reference to one element contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence. *See, e.g.*, *State v. Glisson*, [___ N.C. App. ___, ___,] 796 S.E.2d 124, 127, [(2017)] (holding that the defendant's challenge to the sufficiency of the evidence was preserved because the trial court referred to the challenge as a "global" and "prophylactic" motion to dismiss, thereby making apparent that the trial court considered the sufficiency of the evidence as to all elements of each charged offense); *State v. Pender*, ___ N.C. App. ___, ___, 776 S.E.2d 352, 360 (2015) (holding that while the defense counsel presented a specific argument addressing only two elements of two charges, counsel also asserted a general motion to dismiss which "preserved [the defendant's] insufficient evidence arguments with respect to all of his convictions"); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that the trial counsel's presentation of a specific argument addressed only five charges, but the general motion to dismiss preserved the arguments regarding the other charges on appeal). A general motion to dismiss requires the trial court to consider the sufficiency of

> the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review.

Id.

Here, Defendant's argument on appeal specifically focuses on element four, whether Defendant obtained property or anything of value. It must be noted initially that Defendant was paying Ballentine $500.00 or more to alter court records. From this it can be inferred, and it was for the jury to decide, that what was obtained had value, at least to Defendant. However, this was not the objection made to the trial court.

At the close of all evidence, Defendant made a narrow objection to the sufficiency of the evidence to support this charge by arguing "that essentially the numbers are off." This is the same objection Defendant made at the close of the State's evidence, although Defendant also argued before he introduced his own evidence that elimination of contingent future interest in property does not fulfill the obtaining 'property' requirement. However, all that our law requires is that "the defendant obtain[ ] or attempt[ ] to obtain anything of value." *Barker*, 240 N.C. App. at 229, 770 S.E.2d at 146 (citation and brackets omitted). 'Anything' is the most broad term one can use to define the class of valuable items that could satisfy this element, and that factual determination was for the jury.

When Defendant argued at the close of all evidence that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment, he narrowed the scope of his objection, and that objection is all that would be reviewable by this Court. As in *Walker*, Defendant "failed to broaden the scope of his motion when he renewed it following the close of all the evidence," and therefore "failed to preserve the issue[ ] of the sufficiency of the evidence as to the other elements of the charged offense[ ] on appeal." *Walker*, ___ N.C. App. at ___, 798 S.E.2d at 532.

The indictment alleged a value of $480,100.00, to which Defendant objected and argued that the "total dollar amount is $63,000.00." It would appear from the record that Defendant was attempting to have the crime charged in the indictment reduced from a Class C felony to a Class H felony. The jury convicted Defendant of the latter Class H felony.

Defendant cannot now argue that the evidence was insufficient because there was *no* thing of value. Similar to our review of Defendant's argument on the sufficiency of the State's aiding and abetting evidence, Defendant's failure to argue the specific theory on appeal that was

argued to the trial court has waived his right to appellate review on this issue.

C. Unlicensed Bail Bonding

[4] Defendant has challenged the sufficiency of the evidence for his conviction for unlicensed bail bonding. Section 58-71-40 states that "[n]o person shall [(1)] act in the capacity of a professional bondsman, surety bondsman, or runner or perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners under this Article[,] [(2)] unless that person is qualified and licensed under this Article." N.C. Gen. Stat. § 58-71-40(a) (2015). This same Article 71 makes any violation of any provision under this Article, unless otherwise provided, a Class 1 misdemeanor. N.C. Gen. Stat. § 58-71-185 (2015).

Here, Defendant admitted in his testimony at trial, and does not challenge in this appeal, that he would not be qualified to be licensed and has never applied to be licensed as a bondsman in North Carolina. He contests whether there was sufficient evidence that he "acted in the capacity of" or "performed the functions, duties, or powers" of a bondsman.

"[T]he Commissioner of Insurance has the 'full power and authority to administer the provisions' of Article 71, [which regulates] 'Bail Bondsmen and Runners.' " *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 319, 749 S.E.2d 469, 472 (2013), *appeal dismissed*, *disc. review denied*, 367 N.C. 532, 762 S.E.2d 461 (2014) (quoting N.C. Gen. Stat. § 58-71-5 (2011)). At trial, the Compliance Section Supervisor of the Agent Services Section of the Department of Insurance ("Department") testified on behalf of the State. She explained that the Department has interpreted Article 71, the governing statutes, to prohibit an unlicensed person from, *inter alia*, screening potential bond clients; negotiating the terms of and receiving the initial premium paid for a bond; discussing motions and petitions with court staff that relate to a bond forfeiture; relaying messages regarding these same motions and petitions to court staff on behalf of the bondsman; and apprehending, or even being present or assisting in apprehending, a defendant client who has missed a required court appearance.

Although "an agency's interpretation is not binding," "[w]e give great weight to an agency's interpretation of a statute it is charged with administering[.]" *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citations and quotation marks omitted). In line with the interpretation of the Department, the trial court instructed the jury that "a bail bondsman or runner may discuss motions to set aside [a bond forfeiture] with court staff while an

unlicensed employee of a bail bondsman may not." It went on to instruct that if the jury found from the evidence that Defendant had acted in the capacity of a bail bondsman without being qualified or licensed to do so, it would be the jury's duty to return a verdict of guilty.

Ballentine testified that he knew Defendant from working as the clerk overseeing bond forfeitures for the Wake County Clerk's Office. He further testified that Defendant would send him a list of defendant-clients' names, along with their case information and bond amounts being forfeited, and place an envelope of cash in Ballentine's vehicle. The evidence showed that Ballentine was being compensated for entering false information into the electronic court files to create the illusion that motions to set aside bond forfeitures had been filed. This was done to relieve Defendant's liability for bonds forfeited due to his defendant-clients' failures to appear in court. The electronic file systems would automatically grant these motions to set aside if no objection was filed by the State or the county Board of Education. Neither the State nor the Board of Education would receive notice, and, therefore, have no opportunity to object because no physical motions were ever filed. Each fictitious motion to set aside about which Ballentine and Defendant communicated was granted automatically, and Defendant's liability was released. Sufficient relevant and direct evidence, that a reasonable mind might accept as adequate, was introduced at trial from which the conclusion that Defendant had acted in the capacity of a bondsman without being licensed to do so could be reached.

Defendant has argued that, although Ballentine was court staff, he and Defendant were not discussing *actual* motions to set aside, merely discussing *false entries* that motions to set aside had been filed. This argument is unconvincing because the crime focuses on the matter being addressed and whether whomever is addressing that matter is licensed to do so. Therefore, whether or not the motions to set aside were real or fictitious has no bearing on whether the Defendant discussed a specific bond with a member of the Clerk's Office, thereby acting in the capacity of a bail bondsman. The trial court did not err in denying Defendant's motion to dismiss, and this assignment of error is overruled.

Conclusion

We have carefully reviewed Defendant's assignments of error and have found that either Defendant waived appellate review for the alleged error, or that no error was committed. Defendant's indictment charging the statutory offense of unlicensed bail bonding had no errors, and sufficient evidence was introduced to allow Defendant's guilt for this charge

to be decided by the jury. Defendant's failure to object waived review of the sufficiency of the aiding and abetting theory evidence because no motion to dismiss was made. Defendant's motion to dismiss the obtaining property by false pretenses charge was based upon a substantially different argument in the trial court than the argument made here, and Defendant thereby waived our review of this charge. Therefore, we find no error in the judgment of the trial court.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
STEPHEN PAUL GOMOLA, DEFENDANT

No. COA17-438

Filed 6 February 2018

Homicide—involuntary manslaughter—failure to give instruction—self-defense—defense of others—unlawful act

The trial court erred in an involuntary manslaughter case by declining to include a jury instruction on self-defense/defense of others because it deprived the jury of the ability to decide whether defendant's participation in an altercation was lawful.

Appeal by Defendant from judgment entered 26 February 2016 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 17 October 2017.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant-Appellant.

DILLON, Judge.

Stephen Paul Gomola ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of involuntary manslaughter on the

theory that he committed an unlawful act which proximately caused the death of Stephen Johnson (the "Decedent"). Defendant argues that the trial court committed reversible error by refusing to give a jury instruction on "defense of others" as an affirmative defense to the unlawful act Defendant allegedly committed. We agree and order that the judgment be vacated and remand this matter for a new trial.

I. Background

In July 2013, Defendant was at a waterfront bar with friends in Morehead City. Defendant was involved in an altercation with approximately eight other individuals at the bar, including the Decedent. The altercation lasted only a few seconds, but resulted in the death of the Decedent.

A surveillance video shows a partial view of the bar where the altercation took place. The video shows several individuals positioned along a railing at the bar overlooking a marina. The video shows Defendant standing next to his friend Jimmy. Jimmy is shown holding a drink in each hand and engaging in conversation with one or more individuals who were off-camera. Jimmy testified that the conversation began after he saw a patron throw a beer bottle over the railing into the water and that when he politely asked the patron not to do it again, the Decedent shoved Jimmy. The video shows Jimmy being pushed backwards by someone off-camera and then Defendant and another individual moving past Jimmy toward the person off-camera who had shoved Jimmy. The video does not show the rest of the altercation. Approximately 6-8 seconds later, the video shows patrons trying to locate the Decedent, who had fallen into the water.

There was conflicting evidence regarding the role Defendant and other patrons played in the altercation. Several patrons testified that during the portion of the altercation which took place off-camera, Defendant "shoved," "pushed," or "flipped" the Decedent over a railing into the water. Other testimony suggested that Defendant's role in the altercation was limited to an initial shove right after his friend Jimmy was shoved and that the Decedent fell over the railing or was pushed over the railing by a different individual.

In any event, the Decedent did not resurface. An autopsy revealed that the Decedent had a blood alcohol concentration of .30 or more at the time of his death. The stated cause of death was drowning while incapacitated due to head trauma, with alcohol intoxication as a contributing factor.

The trial court instructed the jury that it could find Defendant guilty of involuntary manslaughter if it found beyond a reasonable doubt that (1) Defendant acted unlawfully, and that (2) Defendant's unlawful act proximately caused the victim's death. The trial court further instructed the jury that the underlying "unlawful act" allegedly committed by Defendant was the crime of participating in an "affray," defining this crime as "a fight between two or more persons in a public place so as to cause terror to the public." *In re May*, 357 N.C. 423, 426, 584 S.E.2d 271, 274 (2003) (citing *State v. Wilson*, 61 N.C. 237, 237-38 (1867)). Defendant requested an additional instruction on self-defense or defense of another in order to negate the "unlawful act" element of the offense. The trial court declined to give the requested instruction.

The jury convicted Defendant of involuntary manslaughter, and the trial court sentenced him to 16-29 months imprisonment and fined him $10,000. Defendant timely appealed.

II. Analysis

On appeal, Defendant contends that the trial court erred when it refused his request to give the jury a "defense of others" instruction. We agree.

Our Supreme Court defines involuntary manslaughter as "the unintentional killing of a human being, without malice, proximately caused by [either] (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Wingard*, 317 N.C. 590, 600, 346 S.E.2d 638, 645 (1986) (quoting *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984)).

In the context of involuntary manslaughter, our Supreme Court has held that a defendant's unlawful or negligent act is *a proximate cause* of the victim's death if the act "is a cause that produced the result in continuous sequence and without which [the death] would not have occurred." *State v. Cole*, 343 N.C. 399, 416, 471 S.E.2d 362, 370 (1996) (citation omitted). Our Supreme Court has further explained that a defendant is criminally culpable even if his unlawful act "[is] not [] the immediate cause of death. [A defendant] is legally accountable if the direct cause is the natural result of the criminal act. [Even though] [t]here may be more than one proximate cause[,] . . . criminal responsibility arises when the act complained of caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377-78, 271 S.E.2d 277, 279 (1980) (citations omitted).

Here, the jury was instructed that it could convict Defendant of involuntary manslaughter if the jury determined that Defendant committed

the unlawful act of "affray" and that Defendant's act was a proximate cause of the Decedent's death. The jury was correctly instructed on the crime of "affray," as defined by our Supreme Court, as "a fight between two or more persons in a public place so as to cause terror to the public." *May*, 357 N.C. at 426, 584 S.E.2d at 274 (citing *Wilson*, 61 N.C. at 237 (1867)). And the jury was correctly instructed that Defendant's act was a "proximate cause" of the Decedent's death if the jury determined that the act was "a cause without which the [Decedent's] death would not have occurred . . . [and] th[at] [D]efendant's act need not have been the only cause, nor the last nor nearest cause[,] [but that it] is sufficient if [Defendant's act] occurred with some other cause acting at the same time which in combination with caused the death of the [Decedent]."

We conclude that the above instructions were warranted as there was evidence from which the jury could conclude that Defendant unlawfully participated in an affray and that his participation was a proximate cause of the death of the Decedent.

However, Defendant argues that the trial court committed reversible error by refusing to give *his* requested instruction on self-defense or "defense of others" as an affirmative defense to the crime of affray.[1] Defendant contends that the evidence, *when viewed in the light most favorable to him*, shows that his participation in the fight was limited to a single shove. Defendant further contends that his single shove was legally justified because he was defending his friend, and the shove was therefore not "unlawful," though it may have resulted in others becoming aggressive and resulted in another person directly forcing the Decedent into the water. For the reasons stated below, we must agree. Specifically, it is *reasonably possible* that the jury determined that Defendant participated in the affray; that his participation was a proximate cause – though maybe not the final cause – of the Decedent's death; and that, if given the opportunity, the jury would have determined that Defendant's participation was lawful because he acted reasonably in defense of his friend Jimmy. Indeed, the video evidence only shows Defendant deliver a single shove immediately after his friend Jimmy was shoved; the video does not show the rest of the affray.

Our Supreme Court has previously sanctioned the use of self-defense by a defendant as an appropriate defense when the defendant has been accused of unlawfully participating in an affray, stating as follows:

---

1. Specifically, defense counsel stated that Defendant sought an "instruct[ion] on self-defense or defense of another as far as the misdemeanor instruction [on the crime of affray] goes."

> If a person be without fault in bringing on an affray, he may [act] in self-defense if it is necessary, or appears to him to be necessary[.] . . . The reasonableness of his apprehension is for the jury to determine from the circumstances as they appeared to him. This defense cannot be invoked when a person aggressively and willingly enters into a fight without legal excuse or provocation. And in exercising the right of self-defense one can use no more force than was or reasonably appeared necessary under the circumstances[.]

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986) (citations omitted). And our General Assembly has provided that a person "is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself *or another* against the other's imminent use of unlawful force," N.C. Gen. Stat. § 14-51.3(a) (2013) (emphasis added), and that a person who uses force as permitted by N.C. Gen. Stat. § 14-51.3(a) is "justified in using such force and is immune from civil or criminal liability for the use of such force[.]" N.C. Gen. Stat. § 14-51.3(b).

Accordingly, where, as here, the State prosecutes a defendant for involuntary manslaughter based on the theory that the defendant committed an "unlawful" act – rather than based on a theory that the defendant committed a "culpably negligent" act – the defendant is entitled to all instructions supported by the evidence which relate to the unlawful act, including any recognized affirmative defenses to the unlawful act. *See Calhoun v. Highway Comm'n*, 208 N.C. 424, 424, 181 S.E. 271, 272 (1935) (noting that a defendant is entitled to a specific jury instruction if it is a correct statement of the law and is supported by the evidence presented at trial).

In determining whether the instruction is supported by the evidence, the evidence must be viewed in the light most favorable *to the defendant*. *See State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (holding that in determining whether an instruction on self-defense must be given, "the evidence is to be viewed in the light most favorable to the defendant"). Further, our Supreme Court has instructed that "[w]hen supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case[.]" *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974).

Here, there was conflicting evidence as to how the Decedent ended up in the water and the level to which Defendant participated in the affray. Indeed, when viewed in the light most favorable to the State, the evidence shows that Defendant unlawfully assaulted the Decedent, knocking the Decedent into the water. However, other evidence *supports* Defendant's argument that instruction on defense of others was warranted: For example, there was evidence that Jimmy "absolutely felt threatened" when the Decedent shoved him; that Defendant immediately advanced toward the Decedent in response to the Decedent's shove; that the Decedent punched and kicked Defendant; that another person pushed Defendant into the Decedent, "who eventually fell into the water"; and that Defendant only struck the Decedent one time.

Taking the evidence in the light most favorable to Defendant, as we *must* do, we conclude that Defendant was entitled to the "defense of others" instruction to supplement the "affray" instruction. Specifically, based on the evidence *viewed in the light most favorable to Defendant*, the jury could have determined that Defendant's participation in the affray was limited to one or a few pushes or blows at the beginning, thrown merely to protect his friend Jimmy who had just been assaulted by the Decedent. The jury could have determined that Defendant's push was a proximate cause in the chain that resulted in the Decedent going over the railing 6-8 seconds later. And based on these determinations, the jury would still have been bound to convict Defendant based on the instructions as given: Defendant engaged in a fight that involved a number of people and his participation was a proximate cause leading to the Decedent's death. However, had the jury also been given the "defense of others" instruction, the jury may have determined that Defendant's involvement in the affray – though a proximate cause of the Decedent's death – was lawful because Defendant merely used the force necessary to protect his friend from an ongoing assault. *See In re Wilson*, 153 N.C. App. 196, 198, 568 S.E.2d 862, 863 (2002) (citing *State v. Herrell*, 107 N.C. 944, 946-47, 12 S.E. 439, 440 (1890) ("A claim of self-defense may be used to defeat a charge of affray where the [] defendant is without fault in provoking, engaging in, or continuing a difficulty with another.").

We take no position as to whether Defendant did, in fact, act lawfully. Again, there was considerable evidence in the record showing that Defendant acted unlawfully. Specifically, several witnesses testified to their individual recollections of the event: "[Defendant was] punching [the Decedent] until he fell over the side [into the water]"; "I saw [Defendant] hit the [Decedent] five or six times"; "[I] saw [Defendant] punch another man multiple times in the face and the chest or stomach

and then grab him by the knees and throw him over the railing into the water"; Defendant was the person who pushed the Decedent into the water; and Defendant "flip[ped] somebody over the railing[.]" However, when Defendant's evidence, taken as true, is sufficient to show that he acted lawfully in self-defense or in defense of another, the instruction "must be given even though the State's evidence is contradictory." *Moore*, 363 N.C. at 796, 688 S.E.2d at 449; *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence.").

Accordingly, we hold that the evidence presented at trial, viewed in the light most favorable to Defendant, was sufficient to warrant the instruction of the jury on the issue of defense of others. Thus, the trial court's failure to give the instruction was error. We further hold that there is a reasonable possibility that had this error not been committed, a different result would have been reached at trial. *See Dooley*, 285 N.C. at 166, 203 S.E.2d at 820 ("[T]he trial court's failure to include [an instruction on self-defense] in its final mandate to the jury was prejudicial error [that] entitle[d] defendant to a new trial."). There were contradictory witness accounts of the altercation, the first trial ended with a deadlocked jury, and the prosecutor argued in closing that self-defense/defense of others was irrelevant.

We note the State's argument that self-defense is not a defense to involuntary manslaughter based on *State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980). However, the State's argument is misplaced. The issue in the present case is *not* whether self-defense/defense of others is necessarily an affirmative defense to the crime of involuntary manslaughter, but rather whether it is an affirmative defense to the crime of affray – the "unlawful act" that the State used as the basis for the involuntary manslaughter charge. In any event, the Supreme Court in *Ray* specifically provided that the result in that case "should not be read as casting any doubt on the validity of earlier decisions of . . . the Court of Appeals[,]" and limited its holding to an issue involving erroneous submission of lesser included offenses to the jury. *Ray*, 299 N.C. at 167, 261 S.E.2d at 799. In *Ray*, our Supreme Court highlighted two cases from our Court which illustrate the relationship between self-defense and involuntary manslaughter: *State v. Walker*, 34 N.C. App. 485, 238 S.E.2d 666 (1977) and *State v. Spinks*, 39 N.C. App. 340, 250 S.E.2d 90 (1979). Both *Walker* and *Spinks* involved situations where the trial court submitted the charge of involuntary manslaughter to the jury based on an "unlawful act" of the defendant.

In *Spinks*, the defendant was convicted of involuntary manslaughter based on the unlawful act of pointing a gun. Our Court recognized that "an intentional pointing of a gun violates the statute only if it is done without legal justification," concluding that "if the jury found that the defendant acted in self-defense they *could not have found her guilty of involuntary manslaughter*[.]" *Spinks*, 39 N.C. App. at 343, 250 S.E.2d at 93 (emphasis added). Our Court acknowledged that the trial court erred when it instructed the jury that the "defendant's act was unlawful," because it took the opportunity away from the jury to decide whether the defendant's pointing of the gun was, in fact, lawful. *Id.*

In *Walker*, our Court found no error where the trial court instructed the jury that the defendant's act was unlawful because it was clear from the form of the jury charge that the jury had specifically considered and rejected the defendant's theory of self-defense – and had therefore determined that the defendant's act was unlawful – *before* considering the charge of involuntary manslaughter. *See Walker*, 34 N.C. App. at 487, 238 S.E.2d at 667.

Thus, these two cases, which we once again emphasize were left undisturbed by the Supreme Court in *Ray*, demonstrate that *Ray* was not intended to prevent a defendant from asserting a recognized affirmative defense to an underlying unlawful act when charged with involuntary manslaughter in order to show that he, in fact, acted lawfully.

We also note our holding in *State v. Alston* that "self-defense, as an *intentional act*, [cannot] serve as an excuse for the negligence or recklessness required for a conviction of involuntary manslaughter" under the culpable negligence prong. *See State v. Alston*, 161 N.C. App. 367, 375, 588 S.E.2d 530, 536 (2003). However, this holding is inapposite to the present case because here, the theory of the State's case is that Defendant *intentionally* committed an unlawful act by participating in an affray. And certainly self-defense/defense of others may serve as an excuse for intentionally participating in a fight. Therefore, one whose participation in a fight proximately causes the death of another is not guilty of involuntary manslaughter unless his participation was unlawful.

III. Conclusion

We hold that, in this case, the lack of a self-defense/defense of others instruction deprived the jury of the ability to decide the issue of whether Defendant's participation in the altercation was lawful. A determination by the jury that Defendant's participation was lawful would have negated the "unlawful act" element of involuntary manslaughter

and would have compelled the jury to return a verdict of "not guilty." Therefore, because the trial court failed to include an instruction on self-defense/defense of others in its final mandate to the jury, Defendant is entitled to a new trial.

NEW TRIAL.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
FALECIA ANN RICHMOND McCASTER

No. COA17-816

Filed 6 February 2018

Probation and Parole—probation revocation—lack of jurisdiction—notice of hearing—violation report

The trial court lacked jurisdiction to revoke defendant's probation without proper prior statutory notice of a hearing and a statement of the violations alleged, pursuant to N.C.G.S. § 15A-1345(e).

Appeal by defendant from judgment entered 23 May 2017 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

TYSON, Judge.

Falecia Ann Richmond McCaster ("Defendant") appeals the trial court's order revoking her probation. The trial court erred in revoking Defendant's probation under these facts. We vacate the order and remand.

I. Background

On 2 November 2015, a jury found Defendant guilty of assault on a law enforcement officer. Defendant was sentenced to five to fifteen

months in prison. Due to her lack of prior record level points and the classification of the offense, Defendant's active sentence was suspended, and she was placed on probation for twelve months. Defendant appealed.

The day after judgment was entered, the trial judge filed an affidavit and petition for involuntary commitment, due to Defendant's behavior in court. The trial court stated that after the judgment was entered, "Defendant refused to complete the intake process," begging the court to allow her to serve her time. She became "hysterical," alleging "a conspiracy against her by law enforcement, judges, the DA, and, at time [sic] her attorney."

On 4 April 2017, this Court issued an opinion finding no error at trial and denying Defendant's motion for appropriate relief. *State v. McCaster*, __N.C. App. __, 797 S.E.2d 711, 2017 WL 1276071 (unpublished). The mandate from that appeal was issued to the Alamance County Superior Court on 24 April 2017.

The Alamance County District Attorney's office sent Defendant a letter on 3 May 2017, ordering her to appear in court on 22 May 2017 for imposition of judgment. Defendant appeared at the hearing, repeatedly refused to accept probation supervision, and asked for time to get her affairs in order prior to reporting to prison. The trial court asked her to meet with the probation officer prior to making any decisions regarding actively serving a prison term.

Later that day, Defendant's counsel reported to the court that Defendant had not met with the probation officer, as instructed. Defendant allegedly "cursed the courtroom" and threw spices and garlic upon the floor. At around 5:00 that evening, Defendant was sitting in the courtroom, without her attorney. The trial court instructed Defendant to report to the probation officer by 9:30 the next morning, and if she was not there, the court would issue an order for her arrest. Defendant told the judge a warrant would not be necessary, as she would report to the sheriff.

On 23 May 2017, Defendant timely appeared in court, and the matter was held over until her attorney arrived. Once her counsel arrived, Defendant again refused to be placed on probation supervision multiple times. She again alluded to a possible conspiracy against her, stating "You want me – for Mr. Barber to take my money and they beat me. I'm a widow." After Defendant continued to refuse probation, the trial court revoked her probation.

The trial court's written order stated: "The Defendant refused to be processed for probation and stated that she did not want to be on

probation in open court, therefore [sic] was violated and probation revoked." The order also indicated the revocation was based upon Defendant's "willful violation of the condition(s) that [she] not commit any criminal offense . . . or abscond from supervision."

On 24 May 2017, the trial court filed a supplement to its previous order, and made the following findings of fact:

> 4. The Court reviewed the judgment with the defendant at 10:38 and ordered defendant to report to the probation office (in the courthouse). The defendant did not report. The court advised the defendant if she refused probation, she would have to serve her active sentence.
>
> 5. At 12:04 defendant's attorney, Jeff Connolly, returned to the courtroom without the defendant and reported defendant is refusing to serve probation.
>
> 6. Defendant appeared in court on May 23, 2017, about 10:38. The Court advised defendant it was in a jury trial and to report at 12:15. Defendant's counsel was present. The Court reiterated to defendant that if she refused probation, the active sentence would be imposed.
>
> 7. At 12:33 the defendant appeared and affirmed she did not report to probation and said, "You can put me in jail." The Court again asked her if she was certain she did not want to be on probation and she said "I have refused probation a hundred times and I am refusing it now."
>
> 8. It being obvious that the defendant was refusing to serve probation, the active sentence was instituted.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court lacked jurisdiction to revoke her probation and violated her right to due process by revoking her probation without providing notice of a scheduled hearing or a filed violation report. Defendant also asserts her right to counsel was violated and that the trial court erred by not holding a competency hearing prior to her revocation hearing.

IV. Standard of Review

"A trial court must have subject matter jurisdiction over a case in order to act in that case." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007)). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation and quotation marks omitted).

"Further, an appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *Satanek*, 190 N.C. App. at 656, 660 S.E.2d at 625. We review subject matter jurisdiction as a question of law, *de novo*. *State v. Taylor*, 155 N.C. App. 251, 260, 574 S.E.2d 58, 65 (2002).

V. Revocation of Probation

Defendant first argues the trial court lacked jurisdiction to conduct a probation revocation hearing because it failed to provide Defendant with adequate notice, including a written statement of the violations alleged. Under these facts, we agree.

A defendant's consent is not required for the court to suspend an active sentence and to order a convicted defendant to undergo probation supervision instead. N.C. Gen. Stat. § 15A-1341(c) (1995), *repealed by* 1995 N.C. Sess. Laws 429, secs. 1, 5 (effective 1 January 1997) (eliminating a defendant's right to elect to serve a prison sentence in lieu of submitting to probation). Because Defendant had zero prior record level points, and was convicted of a Class I felony, the court was only authorized to sentence her to community punishment, which it correctly did when her active sentence was suspended and she was placed on probation. N.C. Gen. Stat. §§ 14-34.7(c)(1), 15A-1340.17(c) (2017).

As is required by statute, prior to revocation of probation, a court must hold a hearing, unless waived by probationer, and must provide prior "notice of the hearing and its purpose" at least twenty-four hours in advance, unless waived. N.C. Gen. Stat. § 15A-1345(e) (2017). This statutory notice must also include a statement of the violations alleged. *Id.* "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a

second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted).

The State argues Defendant waived her right to prior statutory notice by voluntarily appearing before the court and participating in her revocation hearing. *See State v. Gamble*, 50 N.C. App. 658, 660, 274 S.E.2d 874, 875 (1981). However, unlike the probationer in *Gamble*, Defendant had not been and was not served with an order for arrest prior to her hearing. *See id.*

Defendant re-appeared in court as instructed by the judge the previous day. While Defendant's multiple and repeated objections to probation are documented, the court did not indicate the purpose of the hearing was to revoke Defendant's probation, nor provide her with notice of any statement of her alleged violations, or seek her waiver of same, contrary to the mandate of N.C. Gen. Stat. § 15A-1345(e).

Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lacked jurisdiction to revoke her probation. In light of our holding, it is not necessary to address Defendant's other issues on appeal.

VI. Conclusion

Absent jurisdiction, a court is without authority to act. *Satanek*, 190 N.C. App. at 656, 660 S.E.2d at 625. The State failed to provide prior and proper statutory notice to Defendant to revoke her probation. Without proper notice, it lacked jurisdiction to do so and its order must be vacated. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (citation and quotation marks omitted).

While the trial court had no authority to conduct a revocation hearing under these facts, it was not without recourse to compel a recalcitrant defendant. A violation report could have been filed and an arrest warrant could have been issued, to provide Defendant with proper notice. *See State v. Brown*, 222 N.C. App. 738, 739-40, 731 S.E.2d 530, 531 (2012) (violation report filed for absconding after defendant failed to report to probation officer after initial sentence).

Alternatively, the trial court could have found Defendant in contempt of court pursuant to N.C. Gen. Stat. § 5A-11(a)(3) (2017) ("[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution) or N.C.

Gen. Stat. § 5A-11(a)(9a) ("[w]illful refusal by a defendant to comply with a condition of probation").

Regardless of Defendant's statements and protests, the trial court could have simply ordered Defendant be accompanied by a law enforcement or probation officer to register and implement probation supervision.

The trial court erred by revoking Defendant's probation without proper prior statutory notice of a hearing and without a violation report filed. Without proper jurisdiction to hear Defendant's probation revocation, the trial court's order is vacated. *See Crawford*, 167 N.C. App. at 779, 606 S.E.2d at 377. This cause is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
WILLOUGHBY HENEREY MUMMA

No. COA17-481

Filed 6 February 2018

1. Criminal Law—first-degree murder—aggressor doctrine—control—no visible injuries—text message

The trial court did not commit plain error in a first-degree murder case by instructing the jury on the aggressor doctrine where there was sufficient evidence presented at trial that defendant sent multiple text messages to a friend saying he was going to kill his wife, gained control of a knife and started stabbing his wife, and had no visible injuries aside from a few scratches.

2. Evidence—inflammatory photographs—decedent's body—harmless error if any

The trial court did not err in a first-degree murder case by sending alleged inflammatory photographs of decedent wife's body to the jury deliberation room over defendant's objection. Defendant failed to establish that he was prejudiced in light of the overwhelming evidence of his guilt, including at least 170 or more photographic exhibits admitted into evidence without objection, a pathologist's

testimony that the victim was struck in a defensive posture, and defendant's text messages to his friend stating that he was going to kill his wife.

3. Criminal Law—prosecutor's argument—failure to intervene ex mero motu—prosecutor's personal opinion—inconsistencies in defendant's testimony

The trial court did not err in a first-degree murder case by declining to intervene ex mero motu during the State's closing argument, where defendant contended on appeal that the prosecutor injected his personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. The challenged portions of the prosecutor's argument, when taken in context of his entire argument, drew reasonable inferences based on defendant's inconsistent statements. Further, the prosecutor's statement that he would "respectfully disagree" if the jury found that defendant acted in self-defense was not so grossly improper as to render the trial and conviction fundamentally unfair.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 10 June 2016 by Judge Marvin P. Pope, Jr., in Swain County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

Meghan Adelle Jones for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence presented at trial that defendant was the aggressor, the trial court did not err in instructing the jury on the aggressor doctrine. Assuming *arguendo* the trial court erred in allowing the jury to review photographs of the deceased victim during jury deliberations over defendant's objection, this error was harmless where defendant has not established that he was prejudiced thereby. Lastly, where the prosecutor's closing argument was not so grossly improper as to render defendant's trial and conviction fundamentally unfair, the trial court did not err when it declined to intervene *ex mero motu* during the prosecutor's closing argument, and we find no prejudicial error in the judgment of the trial court.

On 9 November 2011, defendant Willoughby Mumma was with his wife Amy Chapman at their home in Bryson City, North Carolina. Amy's twenty-year-old son, Christopher Robinson, who lived with Amy and defendant, came home around 5:30 p.m. that evening where he encountered defendant and Amy, drinking and taking pills.

At around 8:00 p.m., Amy drove to a store where she purchased six alcoholic beverages. She returned home within twenty to twenty-five minutes.

While Amy was gone, defendant and his friend, Dewayne Bradley, had the following conversation via text message:

> 8:11 p.m., defendant: "I'm goin 2 kil her."
> 8:11 p.m., defendant: "I'm goin 2 kil her."
> 8:12 p.m., Bradley: "Please don't."
> 8:13 p.m., defendant: "Im going 2 I cant take."
> 8:13 p.m., Bradley: "Man just walk down the road."
> 8:13 p.m., defendant: "Do you have ne lime?"
> 8:14 p.m., Bradley: "Noooooo, just chill."
> 8:15 p.m., defendant: "No im over it I can't take no more I luv u bro."
> 8:16 p.m., Bradley: "Please lessen to me"
> 8:17 p.m., defendant: "Im sorry I have 2"
> 8:20 p.m., Bradley: "Man ill come and get 2morr, my word"
> 8:21 p.m., defendant: "Line will get rid of the body"

Around 9:45 p.m., defendant and Amy began arguing over an alarm clock radio. Robinson went into the bedroom and told them to stop arguing. According to defendant, Amy was intoxicated and "got meaner as the night went on."

At 11:16 p.m., defendant called Bradley multiple times and repeatedly called Bradley into the early morning hours of 10 November 2011. At 11:52 p.m., defendant texted Bradley duplicate text messages stating, "I need u 2 call me now GD."

At 9:30 a.m. the next morning, Robinson woke up and walked past defendant sitting on the couch in the living room, texting on his cell phone. Robinson went into the bedroom to look for Amy and get a cigarette. Robinson saw blankets all over the bedroom floor and a quarter-sized spot of blood on the bed. Robinson initially thought Amy may have hit defendant; she would get angry when she drank, and he had seen

Amy hit defendant before. Defendant told Robinson to get out of the room. Robinson asked where Amy was, and defendant told him she was at work. Defendant was pacing back and forth from the living room to the kitchen, acting "like things [were not] right."

Defendant told Robinson to get ready for school. Bradley and his wife arrived to pick up Robinson for school. Bradley went into the house while Robinson got in the car. Defendant showed Bradley Amy's body on the closet floor. Bradley left immediately, got in his car, and told his wife and Robinson to lock the car doors. Defendant tried to get in the car with them, but Bradley ordered him out of the car. As they drove away, defendant ran into the woods. Bradley told Robinson that his mother was dead. He pulled into a driveway down the street, called 911, and waited for the police to arrive.

Law enforcement responded to the 911 call and discovered Amy's body in the bedroom closet. At some point later that day, Jennifer Jones, Bradley's ex-girlfriend, sent defendant a text asking, "What did you do?" Defendant responded, "I kild her." Law enforcement officers located defendant down the road from the residence in a field containing briars, weeds, and tall grasses. He was taken into custody at 5:18 p.m. with scratches on his arms and legs.

When law enforcement interviewed defendant later that day, defendant stated that both he and Amy were drug addicts and that on the night of 9 November 2011, they had been drinking and had also taken about thirty Klonopin pills each. Defendant stated that Amy tried to stab him with his pocketknife, at which point he took the knife from her, pushed her to the floor, sat on top of her, and stabbed her in the neck because she bit him. He stabbed her in the eye when she tried to scream for Robinson to help her. The knife blade broke off in her eye. Defendant stated that he "blacked out," "freaked out," and "killed her." Later, at trial, defendant would testify that he "had to end that fight. She was trying to get the knife back."

On 11 November 2011, Dr. Sam Davis, a pathologist at Harris Regional Hospital, performed an autopsy on Amy's body. Dr. Davis opined that the cause of death was "exsanguination, or bleeding to death" "due to stab wounds on her neck and eye." Amy had one stab wound in the upper right eyelid, perforating the eyeball, one stab wound in the left anterior neck, and two stab wounds to the anterior right neck, with one wound perforating the external jugular vein. Dr. Davis testified at trial about defensive wounds on the backs of her hands as "a textbook appearance of being stuck in a defensive posture. . . . [S]he was not striking, but rather [was] being struck."

On 22 November 2011, defendant was indicted for first-degree murder. Defendant filed a "Notice of Defenses" for accident, diminished capacity, and voluntary intoxication, and later amended his notice to include only diminished capacity and voluntary intoxication. Thereafter, defendant filed a "3rd Amended Notice of Defenses" for self-defense and voluntary intoxication.

The case came on for trial during the 23 May 2015 session of Swain County Superior Court, the Honorable Marvin P. Pope, Jr., Judge presiding. The jury returned a verdict of guilty of second-degree murder, and the trial court entered judgment and imposed a sentence of 180 to 225 months imprisonment. Defendant appeals.

On appeal, defendant contends the trial court (I) violated a statutory mandate or committed plain error by giving erroneous jury instructions on self-defense; (II) erred by sending inflammatory photographs of the decedent's body to the jury deliberation room; and (III) erred by failing to intervene and stop the prosecutor from making improper closing arguments.

I

[1] Defendant first argues that the trial court erroneously instructed the jury on self-defense when all the evidence showed that Amy was the aggressor. Defendant also contends that this issue is "preserved for review as a matter of law," despite his failure to object to the jury charge at trial. We disagree and review for plain error. *See State v. Juarez*, 369 N.C. 351, 357–58, 794 S.E.2d 293, 299–300 (2016) (reviewing for plain error the defendant's challenge to the trial court's jury instruction on the aggressor doctrine of self-defense where the defendant did not object to the instruction as given at trial).

Rule 10 the North Carolina Rules of Appellate Procedure provide that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(2) (2017). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

"An individual is the aggressor if he 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Effler*, 207 N.C. App. 91, 97, 698 S.E.2d 547, 551 (2010) (quoting *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978)). "It is undisputed that '[a] person is entitled under the law of self-defense to harm another only if he is "without fault in provoking, engaging in, or continuing a difficulty with another." ' " *Id.* at 98, 698 S.E.2d at 552 (quoting State v. Stone, 104 N.C. App. 448, 451–52, 409 S.E.2d 719, 721 (1991)). "This Court has repeatedly held that 'where the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense." *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 278 (2013) (quoting *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010)).

"[T]he judge has the duty to instruct the jury on the law arising from all the evidence presented." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985)). "In instructing the jury with respect to a defense to a criminal charge, 'the facts must be interpreted in the light most favorable to the defendant." *State v. Holloman*, 369 N.C. 615, 625, 799 S.E.2d 824, 831 (2017) (quoting *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979)). It is considered error to charge the jury on the aggressor doctrine where "the record . . . discloses *no* evidence tending to show that the defendant brought on the difficulty or was the aggressor[.]" *Vaughn*, 227 N.C. App. at 203, 742 S.E.2d at 279 (emphasis added) (quoting *State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951)).

In the instant case, defendant challenges the following portion of the jury instructions:

> If the defendant voluntarily and without provocation entered the fight, the defendant could be considered the aggressor, unless the defendant thereafter attempted to abandon the fight. . . .
>
> . . . .
>
> The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

Contrary to defendant's assertion otherwise and far from "no evidence," *see id.* (citation omitted), there was sufficient evidence presented at trial that defendant was the aggressor. For example, a DVD

recording of defendant's 10 November 2011 interview with law enforcement officers was played for the jury in which he described how Amy came at him with the knife, he took the knife away from her, and proceeded to get on top of her and stab her in the neck and then in the eye to keep her from screaming for help. Based on this account to law enforcement, defendant became the aggressor after he gained control of the knife and then proceeded to get on top of Amy and stab her. Even though the jury also heard evidence—defendant's testimony—that Amy kept trying to regain control of the knife, defendant not only maintained control of the knife throughout the remainder of the fight, but he also continued the fight until Amy was killed.

This Court has previously noted that "the lack of injuries to [the] defendant, compared to the nature and severity of the wounds on [the victim] at his death, [was] sufficient evidence from which a jury could find that [the] defendant was the aggressor or that [the] defendant used excessive force." *State v. Presson*, 229 N.C. App. 325, 330, 747 S.E.2d 651, 656 (2013). Here, too, defendant had no visible injuries aside from a few scratches which defendant admitted he sustained after running through the woods the next morning. In contrast, Amy sustained stab wounds to the eye and the neck, as well as lacerations on her back, shoulder, lip, cheek, temple, hands, and fingers. Furthermore, the pathologist who performed the autopsy on Amy testified that "[t]his [was] a textbook appearance of being stuck in a defense position. . . . This is simply a classic example of defensive wounds . . . . [S]he was not striking, but rather being struck."

Defendant's text messages to Bradley prior to Amy's killing also provide sufficient evidence from which a jury could find that defendant was the aggressor. From 8:11 p.m. until 8:21 p.m., defendant sent multiple text messages stating he was going to kill Amy, even asking for lime (or "line," as defendant's referred to it) to help dispose of the body. As such, the jury could reasonably infer and find that defendant's testimony was not credible and that instead of fending off an attack from Amy, he instead instigated the fight with her in order to kill her, as he stated earlier via text message he wanted to do. Accordingly, the trial court did not err in instructing the jury on the aggressor doctrine where sufficient evidence supported the instruction. Defendant's argument is overruled.

II

[2] Defendant next argues the trial court erred by sending inflammatory photographs of the decedent's body to the jury deliberation room, over defendant's objection, in violation of N.C. Gen. Stat. § 15A-1233.

Defendant contends that sending the exhibits to the deliberation room without his consent constitutes error and that considering the number and content of the photographs, as well as the amount of time the jury viewed them, he was prejudiced by this error. We disagree.

Whether the trial court has violated a statutory mandate is reviewed *de novo*. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

"Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2015). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Chapman*, 359 N.C. 328, 350, 611 S.E.2d 794, 812–13 (2005) (quoting *State v. Blakeney*, 352 N.C. 287, 309–10, 531 S.E.2d 799, 816 (2000)).

In *State v. Cunningham*, the North Carolina Supreme Court noted that "[a]lthough the defendant did not object to the sending of the exhibits to the jury room, he did not consent to it as required by the statute." 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996). However, the Supreme Court concluded that "[i]n light of the strong evidence against the defendant, letting the jury have these items of evidence in the jury room could not have affected the outcome of the trial[,]" and "[a]ssuming this was error, it was harmless." *Id.* (citation omitted).

In the instant case, defendant filed a pretrial "Motion to Exclude Photographs" and also objected to the jury's request to see all photographic evidence during deliberations, although he did acknowledge that the decision was "in the Court's discretion":

> [Defendant's attorney]: Your Honor, I know it's in the Court's discretion, but I would object. I'd prefer for them to rely on the testimony and recollection.
>
> THE COURT: Well --
>
> [Defendant's attorney]: I mean, I know it's in your discretion, Your Honor.
>
> THE COURT: In my discretion, I'm going to allow them to have all the photographs that have been introduced into evidence.
>
> [Defendant's attorney]: Yes, Your Honor.

However, even if defendant "did not consent to [the jury's request] as required by the statute[,]" assuming it was error, it was harmless where defendant has failed to establish that he was prejudiced in light of the overwhelming evidence of defendant's guilt. *See id.* (citation omitted).

At trial, there were at least 170 or more photographic exhibits admitted into evidence, many of which were indeed images of the deceased's body or portions thereof. However, those photographs showed the circumstances and position of the deceased's body as it was found at the scene and the photographs of the injuries, including close-up views, were also relevant to show the type, severity, and number of injuries sustained by the deceased. They were necessary to depict the extent and nature of her injuries, as well as the location and position—inside a closet—in which she was found by law enforcement. This photographic evidence was the best evidence to help illustrate the responding officers' testimony. Indeed, defendant did not object to the admission of these photographs into evidence; he only objected to the trial court's decision to allow the photographs into the jury deliberation room. Defendant has not established how he was prejudiced by the trial court's decision to allow the jurors to review photographic exhibits which they had already seen.

In any event, there was more than sufficient evidence for a jury to find beyond a reasonable doubt that defendant committed second-degree murder and did not act in self-defense. Dr. Davis testified that Amy was struck in a defensive posture and that she "was not striking, but rather being struck." According to defendant's own testimony, he obtained control and possession of the knife and proceeded to stab Amy in the eye and the neck. Lastly, defendant's several text messages sent to Bradley prior to the murder also indicated that defendant intended to kill Amy. Defendant stated repeatedly that he was going to kill Amy and asked for lime to help dispose of the body.

Based on all of the forgoing, even if it was error for the trial court to allow the jury to review photographs of the deceased victim during jury deliberations without defendant's consent, this error was harmless where defendant has not established that he was prejudiced thereby. Defendant's argument is overruled.

III

[3] Lastly, defendant contends the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends the prosecutor's closing arguments were grossly improper as they injected the prosecutor's personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998)).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id.

"The scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998) (citation omitted). Closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

In the instant case, defendant challenges the following portions of the prosecutor's argument as "grossly improper":

> But in this case, in this case, from the get-go, from the time you were seated . . . the State unequivocally, without any doubt, does not feel this defendant deserves the legal right to kill Amy Chapman in self-defense. That means he walks.
>
> . . . .
>
> So from the get-go I will say it and will say it until this process is done and will continue to believe that. This defendant does not have the legal right to kill Amy Chapman in self-defense. He doesn't get the opportunity to get any lesser included offense based on self-defense.
>
> . . . .

> [D]oes he have that right? Does he? You're going to make that decision. I've made mine up.
>
> . . . .
>
> [Does] [defendant] have the right to kill Amy Chapman in self-defense? If you want to go back and deliberate and say yes, he did, then you've got to do what you've got to do. You got to do it. I respectfully disagree.
>
> . . . .
>
> It's convenient now, after he's been interviewed and then transcribed that he now changes his story from up on top of her, stabbing her, straddling her. Now they're on the ground and she's grabbing for his groin area and trying to get to the knife.

At this point, defendant objected and the trial court sustained the objection but gave no curative instruction or otherwise instructed the prosecutor not to give his personal opinion.

> . . . [W]hat was his interest in changing his statement to that, to that? One is possibly getting a self-defense instruction. So that's what the law allows him to, based on the evidence that's been presented through his testimony.
>
> . . . .
>
> So we know he intended to kill her, because he's offering self-defense. He's offering self-defense. He got up here and says it was me or her. So what's he saying? I intended to kill her. I intended to do it. I'm proud of it.

The prosecutor then referenced letters defendant wrote to his family:

> Oh, I couldn't say much in my letters. I mean, come on. You're talking to family here. It was an accident. I would hate to see what wasn't an accident, you know.
>
> . . . .
>
> I went at 1:00 a.m. and went and saw [Robinson]. I was checking on him, he's got diabetes. Are you kidding me? Hate to keep using that. . . .
>
> No, it's because you hope he didn't hear anything, and you're making sure he didn't. That's what he was doing.

> That's what he was checking on. Checking on his diabetes, give me a break.

Error will not be found "in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction *fundamentally unfair*." *State v. Allen*, 360 N.C. 297, 306–07, 626 S.E.2d 271, 280 (2006) (emphasis added) (citing *Call*, 349 N.C. at 419–20, 508 S.E.2d at 519). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Smith*, 359 N.C. 199, 218, 607 S.E.2d 607, 621 (2005) (alteration in original) (quoting *State v. Kemmerlin*, 356 N.C. 446, 470, 573 S.E.2d 870, 887 (2002)).

In the instant case, the challenged portions of the prosecutor's closing argument—and to which defendant did not object at trial—when taken in context of his entire argument, draw reasonable inferences based on defendant's inconsistent statements and point out those inconsistencies in defendant's testimony. The prosecutor's asides such as "Are you kidding me?" and "give me a break" and "come on," do not reflect the prosecutor's personal opinion, but rather point out inconsistencies in defendant's testimony. Further, with regard to the prosecutor's statement that he would "respectfully disagree" with the jury if they decided to deliberate and find that defendant killed Chapman in self-defense, even if this argument was improper, it was not so grossly improper as to render the trial and conviction "fundamentally unfair" and warrant the trial court's intervention *ex mero motu*. *See State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690 (1986) (finding that it was not so grossly improper for the trial court to decline to intervene *ex mero motu* where the prosecutor argued that he "probably wouldn't [tell the truth] either" if he "was in [the defendant's] shoes"); *cf. State v. Walters*, 357 N.C. 68, 102–05, 588 S.E.2d 344, 363–66 (2003) (finding the prosecutor's argument improper where he compared the defendant to Adolf Hitler, over the defendant's objection, by imploring the jury to "stand up to evil" like Winston Churchill did "when he stood up to Hitler," but also finding that the "necessary showing of prejudice was not met").

Accordingly, where the prosecutor's argument was not so grossly improper as to render defendant's trial and conviction fundamentally unfair, the trial court did not err when it declined to intervene *ex mero motu* during the prosecutor's closing argument. Defendant's argument is overruled.

NO PREJUDICIAL ERROR.

Judge DILLON concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the Majority Opinion's holding that the trial court did not commit prejudicial error in sending photographs of the decedent's body to the jury room over defendant's objection.

N.C. Gen. Stat. § 15A-1233(b) (2017), in pertinent part, provides: "Upon request by the jury *and with consent of all parties*, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." (Emphasis added.)

In the present case, on 19 June 2016, the jury retired to deliberate at 10:05 a.m. At 10:56 a.m., the jury asked a question regarding punishment. The court properly instructed them that punishment was not a matter for them to consider, whereupon the jury took their morning break. Immediately upon the jury's return from the morning break at 11:21 a.m., the jury asked for all the photographs to be sent to the jury room. Defendant objected. In spite of this objection, the court stated that, in its discretion, it was going to permit the photographs to be sent to the jury room.

At approximately 11:31 a.m., the court had the approximately 179 photographs that were admitted into evidence sent to the jury room. Many of these photographs were from the autopsy to which defendant had previously objected. The jury took a lunch recess from approximately 12:26 p.m. until 1:58 p.m. Approximately two hours later, the jury indicated it was deadlocked 11-1. The court then gave an *Allen* charge and permitted the jury to take a 15 minute break. After deliberating an additional 45 minutes, the jury returned a verdict of guilty of second-degree murder. The objected to photographs were the only exhibits in the jury room during the deliberations.

Allowing the jury to receive the photographs in the jury room over defendant's objection was error. *See State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984). The issue thus becomes whether the error was prejudicial.

N.C. Gen. Stat. § 15A-1443(a) (2017), in pertinent part, provides: "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." The burden is on the defendant to establish this prejudice. *See State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981).

When considering the circumstances of this case in their entirety, including: the large number of photographs (179), the fact that many of the photographs were graphic, the fact that only the photographic evidence was taken to the jury room, the fact that the improper photographs were in the jury room for almost the entire deliberation, and, particularly noteworthy, the facts that the jury was deadlocked to the extent that an *Allen* charge was necessary and that the court provided instructions and verdict sheets to the jury with various options to find defendant guilty, I believe defendant has met his burden of establishing there is a reasonable possibility that, had this error not been committed, a different result would have been reached.

Therefore, I vote to reverse this case and remand this matter to Swain County Superior Court for a New Trial.

STATE OF NORTH CAROLINA
v.
TYLER BRYANT PEED, Defendant

No. COA17-743

Filed 6 February 2018

1. Appeal and Error—mootness—willful violation of probation—future adverse consequences

Where the trial court entered an order finding defendant in willful violation of his probation, defendant's appeal challenging the trial court's jurisdiction to consider whether he violated his probation was not moot even though he already had served the entire sentence assigned for revocation. Defendant would be subject to adverse consequences in the future based on the trial court's order, such as an aggravating factor in a future criminal proceeding.

2. Probation and Parole—improper probation extension—substance abuse program

The trial court erred by revoking defendant's probation where the violation occurred during an improper 12-month extension to give defendant time to complete a substance abuse program. N.C.G.S. § 15A-1342(a) and N.C.G.S. § 15A-1343.2(d), which allow extensions for completion of medical or psychiatric treatment, do not authorize extensions for completion of substance abuse programs

Appeal by Defendant from judgment entered 12 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for the Defendant.

DILLON, Judge.

Tyler Bryant Peed ("Defendant") appeals from the trial court's judgment revoking his probation. Defendant's probation had been extended to allow Defendant time to complete one of the conditions of his probation. His probation was revoked for a violation which occurred during the extension. On appeal, Defendant contends that the trial court did not have jurisdiction to revoke his probation because the extension was not statutorily authorized. After careful review, we reverse.

I. Background

In 2013, Defendant received thirty (30) months of supervised probation in lieu of an active sentence in connection with a felony conviction. In February 2016, approximately four days before his probation was to expire, the trial court entered an order extending Defendant's probation for 12 months, with Defendant's consent. The purpose of the extension was to allow Defendant "to complete Substance Abuse Treatment[.]"

During the 12-month period of extension, Defendant violated probation. A hearing was held to determine whether Defendant's probation should be revoked based on the violation. During the hearing, Defendant moved to dismiss, arguing that the extension of his probation period was not authorized by statute. The trial court denied the motion. Defendant

then admitted to willfully violating probation. The trial court revoked Defendant's probation. Defendant timely appealed.

II. Justiciability

[1] The State contends that Defendant's appeal is moot because he has already served the entire sentence assigned for revocation, leaving no controversy left to be redressed.

Defendant, however, argues that his appeal is not moot, as there are potentially adverse consequences that he may endure as a result of the order revoking his probation. Indeed, our Supreme Court has stated that a criminal appeal is not moot, though the sentence has been served, where the "mere fact of conviction may result in various adverse consequences to the individual[.]" *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 756 (2006). Defendant cites a potential adverse consequence of the trial court's order that the "willful violation of the conditions of probation imposed pursuant to a suspended sentence" may be considered in a future criminal proceeding as an aggravating factor during sentencing. N.C. Gen. Stat. § 15A-1340.16(d)(12)(a) (2015). And, here, the trial court did find that Defendant willfully violated his probation.

The State, though, contends that the appeal is still moot because Defendant is *not* contesting the trial court's finding that he willfully violated his probation, only that the trial court lacked jurisdiction to revoke his probation. And, so the State's argument goes, it is only the fact that a defendant has willfully violated a condition of probation, and *not* the fact that a defendant's probation has been revoked, which may be used as an aggravating factor in a future criminal matter. The State cites as authority our holding in *State v. Posey*, ___ N.C. App. ___, 804 S.E.2d 580 (2017). We, however, hold that our *Posey* decision is distinguishable.

In *Posey*, the defendant's probation was revoked for a willful violation of a condition. We considered the defendant's appeal after he had served his time. As Defendant has done here, the defendant in *Posey* argued that his appeal was not moot because the order revoking his probation could be used against him as an aggravating factor in a future criminal proceeding. We held, though, that the appeal was still moot because the defendant was *not* challenging the trial court's finding that he had willfully violated his violation, but only the trial court's jurisdiction to revoke his probation:

> [T]he fact that [the defendant's] probation was revoked, in and of itself, does not trigger the application of N.C. Gen. Stat. § 15A-1340.16(d)(12a) [which allows a prior willful

> violation of a probation condition to be considered as an aggravating factor]. The only part of the trial court's judgment that could have any future detrimental effect is the finding that [the defendant] was in willful violation of his probation, a finding that [the defendant] does not challenge. *And, clearly, the trial court acted within its authority in entering its finding of willfulness*, notwithstanding that it may have erroneously [revoked the defendant's probation].

Id. at ___, 804 S.E.2d at 581-82 (emphasis added).

This present matter is distinguishable from *Posey* because Defendant challenges the trial court's jurisdiction, not only to revoke his probation, but to even consider whether he willfully violated a condition of his probation. That is, unlike the defendant in *Posey*, Defendant here essentially argues that he was not even on probation when he committed his alleged violation.

Accordingly, with the revocation order in place, Defendant will be subject to potential adverse consequences in the future since that order contains a determination that Defendant willfully violated his probation. However, if we agree with Defendant's argument that his probation period had, in fact, already ended before he allegedly committed the act found by the trial court to constitute a willful violation, then the trial court's finding of a willful violation would be vacated. Therefore, Defendant's appeal is not moot. We now turn to the *merits* of Defendant's argument on appeal.

III. Analysis

[2] Defendant essentially argues that the trial court lacked jurisdiction to find that he had violated his probation because his probationary period was unlawfully extended. Specifically, Defendant contends that the reasoning the trial court used to extend his probation was not authorized by the governing statutes. We agree.

"[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Bryant*, 361 N.C. 100, 102, 637 S.E.2d 532, 534 (2006)).

In order to extend an individual's probationary period, the trial court must have statutory authority; absent such authority, any orders extending probation are void. *See State v. Gorman*, 221 N.C. App. 330, 335,

727 S.E.2d 731, 734 (2012). Here, the trial court extended Defendant's probation based on Defendant's consent. There are two statutes which authorize the trial court to extend the period of probation based on a defendant's consent, both of which authorize an extension to allow the defendant to complete/continue "medical or psychiatric treatment ordered as a condition of" the probation, namely N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1343.2(d).[1]

Neither N.C. Gen. Stat. § 15A-1342(a) (2015) nor N.C. Gen. Stat. § 15A-1343.2(d) (2015) expressly authorize a trial court to extend a defendant's period of probation to allow him time to complete a "substance abuse program," as was done in this case. The State argues, though, that the completion of Defendant's "substance abuse program" is a permissible reason for the trial court to extend Defendant's probation as a continuation of "medical or psychiatric treatment." For the following reasons, we must disagree.

This is a question of statutory interpretation: Both N.C. Gen. Stat. § 15A-1342(a) and N.C. Gen. Stat. § 1343.2(d) authorize a trial court to extend a defendant's period of probation (with the defendant's consent) to allow a defendant time to complete "medical or psychiatric treatment." Did the General Assembly intend to authorize the trial court to extend the period of probation under these sections for the purpose of allowing the defendant additional time to complete "substance abuse treatment"? In other words, did the General Assembly intend for "substance abuse treatment" to be a type of "medical or psychiatric treatment"? In deciding this question, we are guided by our Supreme Court's directive that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts . . . are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Redmond*, ___ N.C. ___, ___, 797 S.E.2d 275, 279 (2017).

We conclude that the General Assembly did not intend for a probation condition to complete "substance abuse treatment" to be synonymous with (or a subset of) a probation condition to complete "medical or psychiatric treatment." Specifically, N.C. Gen. Stat. § 15A-1343, which

1. These statutes also allow the trial court to extend the probation period *with a defendant's consent* to allow the defendant more time to complete making restitution. However, restitution is not an issue in the present case. Also, another statute, N.C. Gen. Stat. § 15A-1344 (2015) authorizes a trial court to extend the probation period without a defendant's consent if good cause is shown. However, here, neither party argues that N.C. Gen. Stat. § 15A-1344 applies and, further, the trial court did not make any finding of good cause shown, but rather rested its authority on the basis of Defendant's consent.

enumerates the conditions of probation which may be imposed, lists "substance abuse . . . treatment" *separately from* "medical or psychiatric treatment." N.C. Gen. Stat. § 15A-1343(a1) (2015) (listing "[s]ubstance abuse assessment, monitoring, or treatment" as a permissible "intermediate probation" condition); N.C. Gen. Stat. § 15A-1343(b1)(2015) (listing "[m]edical or psychiatric treatment" as a permissible "special condition" of probation).

In sum, the General Assembly enumerates in N.C. Gen. Stat. § 15A-1343 the various conditions of probation available to a trial court to impose, which include separately "substance abuse . . . treatment" and "medical or psychiatric treatment." Based on N.C. Gen. Stat. § 15A-1343, there are situations where a trial court could order a defendant to participate in substance abuse treatment, *or* in medical treatment, *or* in psychiatric treatment, *or* in two of these three types of treatment, *or* in all three types.

The General Assembly further authorizes the trial court to extend the period of probation with the defendant's consent in limited situations. These limited situations enumerated by the General Assembly include 'allowing the defendant more time to complete his medical treatment or to complete his psychiatric treatment. The General Assembly could have also expressly authorized a trial court to extend the probation period to allow a defendant time to complete substance abuse treatment. However, the General Assembly has not done so. We, therefore, must hold that the General Assembly did not authorize the trial court to extend Defendant's period of probation in this case. We reverse the trial court's order revoking Defendant's probation in its entirety, including the trial court's finding that Defendant willfully violated his probation.

REVERSED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
NOUI PHACHOUMPHONE

No. COA17-247

Filed 6 February 2018

1. Sexual Offenses—first-degree sex offense with child—indecent liberties—procedural requirements for child testimony

Although the trial court erred in a first-degree sex offense with a child case by failing to follow N.C.G.S. § 15A-1225.1's procedural requirements when authorizing the child victim's testimony to be taken remotely, defendant failed to demonstrate how the procedural errors prejudiced him.

2. Sexual Offenses—first-degree sex offense with a child—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree sex offense with a child based on insufficient evidence of penetration where the child testified to the penetration and the State presented overwhelming corroborative evidence that defendant digitally penetrated her. The Court of Appeals dismissed defendant's additional challenge based on the State's alleged failure to present evidence that he digitally penetrated the victim within the time frame specified in the indictment, because defendant failed to argue this ground at trial.

3. Indecent Liberties—with child—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of indecent liberties with a child where the State presented substantial evidence that defendant digitally penetrated the child. The same act may support convictions and sentences for both first-degree sex offense and indecent liberties.

4. Criminal Law—prosecutor's argument—prior inconsistent statements

The trial court did not abuse its discretion in a first-degree sex offense with a child case by not intervening ex mero motu during the State's closing argument where defendant failed to demonstrate how the prosecutor's recitation of prior out-of-court statements by the victim and a witness that were inconsistent with their trial testimony rendered the proceedings fundamentally unfair, given the

trial court's later instruction limiting the jury from considering prior inconsistent statements as substantive evidence and the other overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 22 September 2016 by Judge Eric L. Levinson in Cleveland County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Guzman, for the State.

William D. Spence, for defendant-appellant.

ELMORE, Judge.

Noui Phachoumphone (defendant) appeals from a judgment entered after a jury convicted him of first-degree sex offense with a child and of taking indecent liberties with a child. The State's evidence tended to show that, during the evening of 19 August 2014, defendant's sister, Sara, entered defendant's girlfriend's apartment and saw defendant engaging in sexual activities with his girlfriend's six-year-old daughter, Tara.[1]

On appeal, defendant contends the trial court violated N.C. Gen. Stat. § 15A-1225.1's procedural requirements by authorizing Tara's testimony to be taken remotely without holding a recorded evidentiary hearing on the matter or entering an order supporting its decision to allow the State's motion. Defendant also contends the trial court erred by denying his motions to dismiss both charges for insufficient evidence, and by failing to intervene *ex mero motu* when the prosecutor argued to the jury that certain out-of-court statements established substantive evidence of defendant's guilt. We hold that defendant received a fair trial, free of prejudicial error.

I. Background

Prior to August 2014, six-year-old Tara lived in apartment 36 at Chesterfield Apartments in Kings Mountain with her mother and her mother's boyfriend, defendant, who was forty years old. Defendant's sister, Sara, also lived in a nearby apartment at Chesterfield Apartments.

During the evening of 19 August 2014, Sara was outside smoking a cigarette when she noticed defendant, also outside, drinking and "pretty

1. Pseudonyms are used to protect identities and for ease of reading.

intoxicated." A few minutes after Sara saw defendant go into apartment 36, she saw Tara walking outside by herself and then enter the apartment. Sara believed Tara was supposed to be staying with her babysitter at a nearby apartment in Chesterfield Apartments, so she went to investigate. After Sara's knocks on the door to apartment 36 went unanswered, she entered the apartment and saw defendant and Tara lying together in a bed on the living room floor. Exactly what Sara observed is disputed. According to Sara's statements to police immediately after the incident, she saw defendant lying on top of Tara while both were naked, and saw defendant masturbating while rubbing Tara's vagina; however, according to her trial testimony, she merely observed defendant with his pants on but no shirt, Tara's dress halfway off and somewhat up, and defendant with his hands around her. Whatever Sara saw when she entered the apartment, it caused her to became extremely upset, she tried to remove Tara from the apartment, and she got into a heated argument with defendant when he refused to let her take Tara. Sara then called 911.

Sergeant Doug Shockley of the Kings Mountain Police Department responded to the call at Chesterfield Apartments, where a 6-year-old girl was reportedly being held against her will. When he arrived, he met Sara, who was "crying hysterically" and appeared "very nervous and upset." Sgt. Shockley met defendant at the door. Defendant reported that he and Sara did not get along, and she was just trying to cause him trouble. Defendant stated that Tara became frightened that night and came downstairs to sleep beside him on the couch. Sgt. Shockley instructed defendant to wait outside as he spoke with Tara.

When Sgt. Shockley entered the apartment to speak with Tara, he saw her sitting on the couch, clutching a pillow, and "crying hysterically, shaking." According to Sgt. Shockley, Tara immediately stated: " 'I don't know why he did this to me.' " Tara clarified: " '[Defendant], I don't know why he was laying on top of me. He was rubbing me down there' " and then Tara "pointed toward . . . her genital area." Sgt. Shockley then contacted Detective Sergeant Lisa Proctor, who instructed that Sara, Tara, and defendant be taken into the police station for questioning.

During Sara's police interview, she reported that when she entered the apartment, defendant was "totally naked" and masturbating while playing with Tara. During Tara's interview, she reported that defendant "was naked," "had gotten on top of her," "taken her clothes off," and "touched her in her cootie with his hands."

The next day, Tara was examined by Dr. Christopher Cerjan, a pediatrician at Shelby Children's Clinic. During the exam, Tara reported to

Dr. Cerjan that defendant "took [her clothes] off," "touched her with . . . his hands," and "pointed to her groin." Dr. Cerjan discovered that Tara had very little hymen tissue, which he opined was abnormal for a six-year-old and that a penetrating injury was the only possible cause. He also found redness inside Tara's vaginal area, indicating that the penetration likely occurred within the preceding forty-eight hours.

Near the end of the first day of trial, the State called Tara to testify. Because she was unresponsive, the court decided to excuse the jury for the evening and start fresh the next day. On day two, the State directly examined Tara for nearly two-and-a-half hours but was unable to elicit any helpful testimony about the incident. Tara demonstrated that she understood the difference between a truth or a lie, but either did not respond at all or merely shook her head "yes" or "no" to several questions. Tara was unwilling to say defendant's name but did indicate that something happened between her and defendant, that it happened to her body, and appeared to indicate by confirming when the State pointed to this location on a bear used for demonstrative purposes, that it happened between her legs. Tara confirmed that "this [was] the right spot on [her] body where [she was] hurt." However, Tara was largely unresponsive when asked to provide any further details. The State then called Sara to testify.

Sara's trial testimony differed from her prior statements to police. Sara testified that when she entered the apartment, she saw defendant "laying on . . . the bed on the floor in the living room, and [Tara] next to him." "What [she] . . . clearly it didn't look appropriate. So immediately [she] told [Tara] to get up and come with [her]." She testified that defendant "had his pants on but he was shirtless," and Sara only "saw [Tara]'s dress halfway off and somewhat up. And [defendant] . . . had his hands around her but that, that was it." She explained: "I mean . . . from that moment, I just reacted and I called out [Tara's] name to come with me. And when [defendant] heard, they just stood up and that's when the . . . argument started." When pressed by the State during direct, Sara stated that at the time she gave her recorded police interview, she was "drunk," "upset," "mad," and "wasn't thinking clearly. . . ." Sara further stated that "it was dark," she "didn't see anything" but "jumped to conclusion [sic]," and "might have exaggerated" during the police interview. Sara admitted that in her prior recorded statement, she told police that she saw defendant "totally naked with his private part out and [masturbating] while he was playing with [Tara]," but stated at trial that she "said it out of anger," "exaggerated it a little bit," and "that's not what happened."

At the start of the third day of trial, the State filed a motion under N.C. Gen. Stat. § 15A-1225.1 to allow Tara's testimony to be taken remotely, arguing that Tara "would suffer and has suffered serious emotional distress by testifying in front of the defendant" and that "this emotional distress has made it difficult for [Tara] to speak, and [Tara]'s ability to communicate with the trier of fact is impaired and thus interferes with the ability of jurors to ascertain the truth." Defense counsel objected on the ground that the motion was untimely filed, and the State never presented an expert to support the motion. After considering the parties' arguments, and its own observation of Tara's prior in-court testimony, the trial court allowed the motion, authorizing Tara's testimony to be taken remotely.

During Tara's remote testimony, she demonstrated what defendant had done to her by inserting her finger through a hole an interpreter had created with her hands. She explained that "it hurt," that no one else had ever touched her that way, and that defendant had undressed her before committing the act.

After the State's presentation of evidence, defense counsel called defendant's brother and defendant to testify. Defendant's brother stated that defendant and Tara had a great relationship, that defendant was "like a father figure to [Tara]," and that defendant was largely responsible for Tara's care when her mother was at work. Defendant's testimony corroborated these remarks from his brother. According to defendant, during the night of the incident, he was watching television and relaxing, drinking a beer, while wearing shorts and a t-shirt. Tara was on the bed, had fallen asleep in shorts and a t-shirt, and he had just covered her with a blanket when Sara came into the apartment. Sara immediately stated " 'I know you been [sic] drinking. I'm taking [Tara]." According to defendant, when he refused to give up Tara, Sara warned " 'I'm going to call the cops and tell them you messing [sic] with her.' " Defendant testified that he never did anything inappropriate with Tara.

At the conclusion of the evidence, defendant unsuccessfully moved to dismiss both charges for insufficiency of the evidence. The jury found defendant guilty as charged. The trial court imposed a prison sentence of 300 to 428 months for the first-degree sex offense with a child count, and a concurrent sentence of 21 to 35 months for the indecent liberties count. The trial court also ordered defendant to register as a sex offender for a period of thirty years, to enroll in lifetime satellite-based monitoring, and to have no contact with Tara for the remainder of his natural life. Defendant appeals.

II. Alleged Errors

On appeal, defendant contends the trial court erred by (1) failing to follow N.C. Gen. Stat. § 15A-1225.1's procedural requirements in authorizing Tara's testimony to be taken remotely, denying his motions to dismiss (2) the first-degree sex offense with a child charge and (3) the indecent liberties charge, and (4) failing to intervene *ex mero motu* when the State argued to the jury that Sara's and Tara's out-of-court statements were substantive evidence of his guilt.

III. Motion for Remote Testimony

[1] Defendant first contends the trial court violated N.C. Gen. Stat. § 15A-1225.1's procedural requirements by failing to (1) "hold a recorded evidentiary hearing," (2) "issue an order," and (3) "include in said order the five requirements set forth in section (d) of the statute." Defendant does not challenge the trial court's ultimate ruling permitting Tara to testify remotely under N.C. Gen. Stat. § 15A-1225.1; rather, he challenges the procedure employed in authorizing her remote testimony. We agree that the trial court erred by failing to follow statutory procedure, but overrule defendant's challenges on the ground that he has failed to demonstrate how any of these alleged procedural errors prejudiced him.

A. Review Standard

We review alleged statutory errors *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Yet "a new trial does not necessarily follow a violation of statutory mandate." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240–41 (2006) (citation omitted). A defendant "must show not only that a statutory violation occurred, but also that [he or she was] prejudiced by this violation." *Id.* (citation omitted); *see also State v. Braxton*, 352 N.C. 158, 178, 531 S.E.2d 428, 439 (2000) ("[E]ven if it be assumed *arguendo* that the jury selection procedure violated the randomness requirement of N.C.G.S. § 15A-1214(a), defendant has not demonstrated on appeal how he was prejudiced *by the procedure*." (emphasis added)); *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999) (holding the trial court erred by failing to follow a statutory mandate but refusing to award a new trial where the "defendant has not met his burden of showing prejudice as a result of the trial court's failure to follow the requirements of N.C.G.S. § 15A-1233(a)").

B. Discussion

Under N.C. Gen. Stat. § 15A-1225.1 (2015), a trial court may authorize a child victim to testify remotely "when [it] determines: (1) That the child witness would suffer serious emotional distress, not by the open

forum in general, but by testifying in the defendant's presence, and (2) That the child's ability to communicate with the trier of fact would be impaired." *Id.* § 15A-1225.1(b). Subsection (c) of the statute provides: "Upon motion of a party . . . and for good cause shown, the [superior] court shall hold a[recorded] evidentiary hearing to determine whether to allow remote testimony." *Id.* § 15A-1225.1(c); *see also State v. Jackson*, 216 N.C. App. 238, 240, 717 S.E.2d 35, 37 (2011) ("Upon a motion for remote testimony, the trial court must 'hold an evidentiary hearing[.]' . . ." (quoting N.C. Gen. Stat. § 15A-1225.1(c) (2009))). Subsection (d) contemplates that a trial court enter an order "allowing or disallowing the use of remote testimony" that "shall state the findings of fact and conclusions of law that support the court's determination." N.C. Gen. Stat. § 15A-1225.1(d). Subsection (d) provides further that "[a]n order allowing the use of remote testimony shall do the following:

> (1) State the method by which the child is to testify.
>
> (2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.
>
> (3) State any special conditions necessary to facilitate the cross-examination of the child.
>
> (4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.
>
> (5) State any other condition necessary for taking or presenting the testimony.

Id.

Both parties cite to two cases in which this Court addressed challenges to a trial court's N.C. Gen. Stat. § 15A-1225.1 authorization to take a child victim's testimony remotely. *See State v. Lanford*, 225 N.C. App. 189, 204–08, 736 S.E.2d 619, 629–31 (2013); *Jackson*, 216 N.C. App. at 240–41, 244–47, 717 S.E.2d 37–38, 40–42. But neither case provides guidance in assessing the procedure employed here. In both *Lanford* and *Jackson*, the State filed a pretrial motion for remote testimony, and the trial court held an evidentiary hearing before trial where it considered testimony from the State's witness(es) concerning whether the child would suffer serious emotional distress and be unable to communicate effectively to the jury. *Lanford*, 225 N.C. App. at 206–07, 736 S.E.2d at 630–31; *Jackson*, 216 N.C. App. at 239, 717 S.E.2d at 37. Here, contrarily, the State filed its motion during trial, after unsuccessfully attempting

to elicit Tara's testimony, and the State never presented any witnesses specifically to testify on whether Tara would suffer serious emotional distress or be unable to communicate effectively to the jury if she testified in defendant's presence. Additionally, the trial court here never entered an order on the motion.

Based on our interpretation of the statutory language, we agree that the procedures employed violated N.C. Gen. Stat. § 15A-1225.1's express requirements. However, "a new trial does not automatically follow a finding of statutory error." *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742–43 (2004). Defendant has failed to demonstrate how he was prejudiced by the particular procedure employed. *See id.* at 407–08, 597 S.E.2d at 743 (requiring a defendant "to show how the identified statutory violation [concerning the jury selection process] prejudiced his case"—that is, how "the aberrant procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached.")

Here, the State had previously called Tara to testify during its case-in-chief for nearly two-and-a-half hours, affording the trial court an opportunity to closely observe her behavior, demeanor, and the effectiveness of her communication while testifying in front of defendant, and providing competent evidence to support its motion. That presentation developed a "record very clear to the Court" that Tara had suffered serious distress by testifying in front of defendant and that her ability to communicate effectively with the jury was "very evident[ly]" impaired. According to the "[c]ourt's observations . . . when [Tara] was in the courtroom for numerous hours, it was apparent," and the trial judge found, that Tara "was consistently frightened in her eyes"; that when the trial judge "looked into [Tara's] eyes, into her face[,]" she "just appeared to be scared"; that Tara "would very, very occasionally smile"; that Tara "articulated that she was, quote, scared herself" and "[h]er affect was consistent with that"; and that Tara "was hugging a bear . . . and was leaning into the person that was holding her on her lap."

Furthermore, the trial court held a lengthy conference on the State's motion, considered both parties' arguments, and explicitly allowed defendant to present evidence on the matter before rendering the required determinations that (1) Tara "would suffer serious emotional distress by continuing to be in the courtroom and in the defendant's presence[ ]" and that (2) "[c]learly [Tara]'s ability to communicate would continue to be impaired." During the conference on the motion, the prosecutor explained that she had met with Tara multiple times before

trial, brought her into the courtroom so Tara could practice answering questions in court, and brought Tara to another court session so she would be familiar with a full courtroom setting. Therefore, the prosecutor explained, she "did not anticipate the level of terror and shutdown that we had when [Tara] testified," which the prosecutor emphasized "was readily apparent to the court." The prosecutor elaborated:

> [Tara], you know, on day one was sobbing and keening and would not state her name the minute she walked in this courtroom.
>
> Yesterday when [Tara] testified, she progressively turned her back away from the defendant. She would not say his name. [Tara] has expressed to her father, to my assistant, to her father's girl friend, to everybody, that she does not want to see [defendant]. And I think that reluctance was very obvious and really impacted [Tara's] ability to testify in front of the jury, which I think has impacted the jury's ability to know and understand the events of this day.
>
> [Tara] refuses to speak in English and said she wanted to speak in Spanish to the extent that she spoke at all, even though she understands and speaks English.

Defendant does not dispute these statements on appeal, argue that good cause did not exist to authorize Tara's remote testimony, or challenge the trial court's substantive ruling in any respect.

The trial court's repeated and indubitable findings and conclusions were supported by competent evidence in light of its own close observation of Tara's behavior and demeanor while testifying in front of defendant for multiple hours, the prosecutor's statements implying that Tara did not fear testifying in the open forum generally but in front of defendant particularly, and the bench conference on the matter. Defendant was afforded an opportunity to present evidence on the State's motion, and to the extent the procedure employed may have prohibited defendant from examining a State witness on the matter, defendant has failed to show how this alleged procedural error prejudiced him. The transcript indicates that Tara demonstrated a fear of defendant and was unable to communicate effectively while testifying in front of him, and the trial court determined that her prior in-court testimony established a "record . . . very clear" that this was the case. Under these particular circumstances, defendant has failed to demonstrate prejudicial error in the hearing procedure employed by the trial court in authorizing the use

of Tara's remote testimony. *See Maryland v. Craig*, 497 U.S. 836, 860 (1990) ("[W]e decline to establish, as a matter of federal constitutional law, any . . . categorical evidentiary prerequisites for the use of the one-way television procedure.").

As to defendant's challenge concerning the trial court's failure to issue an order in allowing the State's motion, defendant similarly has failed to establish prejudice.

In the context of authorizing a courtroom closure, this Court has stated that "[i]n making its [required] findings, the trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Godley*, 234 N.C. App. 562, 565, 760 S.E.2d 285, 288 (citation, internal quotation marks, and brackets omitted), *disc. rev. denied*, 367 N.C. 792, 766 S.E.2d 626 (2014); *see id.* at 566–68, 760 S.E.2d at 289–90 (upholding findings based on the trial court's "opportunity to observe the alleged victim" and the "attitude and demeanor of the victim and the defendant and the general nature and character of the audience" as supported by competent evidence based in part on the "trial court's own observations of the . . . personnel inside the courtroom . . . ."). In this same context, this Court has found competent evidence existed to support a finding that "[t]here existed a particular fragile mental and emotional state of the victim due to the circumstances of the crime" based in large part on the trial court's observation of the victim. *See State v. Rollins*, 231 N.C. App. 451, 456–57, 752 S.E.2d 230, 234–35 (2013). We explained:

> [T]his type of finding of fact is one that the trial court is particularly well-qualified to make, and one that we are not well-qualified to question. The trial judge had the opportunity to observe [the victim], defendant, and the other witnesses during the trial, including [the victim's] demeanor during the State's evidence up to the point of the State's motion. Observations of this sort are something that cannot be captured in a written transcript but are crucial in this particular determination.

Id. We find this reasoning particularly instructive here.

Based on the trial court's two-and-a-half hour observation of Tara's behavior and demeanor while testifying in front of defendant, it had sufficient competent evidence from which to issue its findings on the matter, and defendant does not specifically challenge the propriety of any of those findings; rather, he challenges the method by which the trial

court rendered its findings and conclusions. The requirement that the trial court make written findings and conclusions serves to aid appellate review. While it would have been better practice for the trial court to reduce its oral findings to writing, we hold that those findings are adequate for appellate review, were supported by competent evidence, supported the conclusions, and justified the trial court's ultimate ruling. Accordingly, we overrule this challenge.

As to defendant's challenge that the trial court failed to issue an order reflecting that it considered N.C. Gen. Stat. § 15A-1225.1(d)'s five enumerations, defendant similarly has failed to demonstrate prejudice.

Defendant does not argue that the taking of Tara's remote testimony, from a logistical standpoint, prejudiced him in any respect. *See Garcia*, 358 N.C. at 407–08, 597 S.E.2d at 743 ("[D]efendant . . . has made no attempt . . . to show how the identified statutory violation prejudiced his case. Defendant has not complained that the aberrant [jury selection] procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached."). Moreover, the transcript reflects that the trial court thoughtfully considered N.C. Gen. Stat. § 15A-1225.1(d)'s enumerations.

During the conference on the matter, the following relevant exchange occurred concerning the logistics of taking Tara's testimony remotely:

> [PROSECUTOR]: Mr. Sheppard is here from the [Administrative Office of the Courts] with the equipment, and he has set it up. It had to be somewhere close to the courtroom. So [Tara] will be in a closed room with, I would propose, my assistant and just sitting yesterday as she was in the courtroom, and we will be able to see them and the interpreter. And [Tara] cannot see us but she can hear us. And we can see her and everyone around her and every motion she makes. . . . by remote testimony.
>
> [Tara] will be visible to the court on its monitor and to the courtroom on this monitor just by television. You will be able to see her sitting in that room. Mr. Sheppard's set up the camera in here and in there and the audio equipment. There's a microphone that whoever is questioning her will probably need to use to facilitate the best ability for her to hear us, and she will have a microphone available to her as well. So it will be just like [Tara]'s sitting here except she's in another room visible to us on the screen. You can see and hear everything she does and says.

THE COURT: So you're talking about staying in the courtroom and questioning her from here?

[PROSECUTOR]: Yes, the defendant and counsel staying . . . .

. . . .

THE COURT: Well, I mean, you certainly would have the option of not being present, but [defense counsel], if he wished to be present . . . , by statute it says that he has to be given the opportunity to be physically present with the witness.

. . . .

THE COURT: So with respect to [defense counsel], if it's allowed, then he would have that option of being in [the courtroom] or being in the room with [Tara]. And then the statute talks about making sure there's contact or ability to communicate with [defendant] . . . during that time period. . . .

[DEFENSE COUNSEL]: I don't know how I would communicate with [defendant] unless he's in there with me. It's a little much to walk back and forth . . . .

THE COURT: . . . [T]he statute contemplates that [defendant] would not be physically present with you [in the room with Tara], but we could try to make arrangements, if it's allowed, to be closer. In other words, . . . so the walk maybe isn't quite as far[.] . . . [T]he statute . . . contemplates that . . . you would need to have access to [defendant], to consult with him throughout . . . .

It says, "and has the ability to communicate privately with the defendant during the testimony." So we need to make sure [defendant] is at least close to you.

. . . .

THE COURT: . . . [I]f it's your thinking[, defense counsel,] that . . . you don't wish to be present [in the room with Tara], that's fine. That's your choice. And if you want to question [Tara] from [the courtroom], that's fine. If [defendant] wants to do it from [the courtroom], then he has that option. If he wants [defense counsel] to go into the room

with [Tara] during the entire direct and cross . . . obviously you have got that option. That's your choice.

In terms of where the room is[ ] . . . .

Is there an[adjacent] room . . . where [defendant,] or out in the hallway[,] where [defendant] could sit in a chair, . . . close by?

. . . .

THE COURT: . . . [T]he Deputy is indicating somewhere in the hallway would work, somewhere close by.

. . . .

THE COURT: Just make sure [Tara]'s in the room first, and then [defendant] . . . can head over just a few steps away outside into the hallway.

. . . .

THE COURT: . . . So [the prosecutor] want[s] to have the assistant holding [Tara]? Then are you also intending to have the interpreter there?

[PROSECUTOR]: Yes, sir. I think just from the chairs and the setup, it would be easiest if [the support person] sat in the blue chair and put [Tara] on her lap. So [Tara] would be far enough up that we could see her the best way possible, and then the interpreter could sit or stand next to her[.] . . .

THE INTERPRETER: I probably would sit right behind her.

. . . .

THE COURT: . . . I will allow [Tara] to sit on the [support] person's lap and have the interpreter there.

. . . .

[PROSECUTOR]: Okay. The first thing[ ] . . . logistically we need to know is whether [defense counsel] prefers to stay in [the courtroom], like I am going to do, or prefers to go in the room with [Tara].

[DEFENSE COUNSEL]: I prefer to be in the room with [Tara].

After this conference, the trial court brought out the jury and explained:

> THE COURT: [The prosecutor] wants to recall [Tara], and [she] will be testifying by different means. And I have . . . made arrangements for . . . [defense counsel,] and for [defendant] to be close by . . . , in a remote room where there will be questions and responses. And [defense counsel] will be in the room with [Tara], though [defendant] will not be in the room but very close by. . . .
>
> So we will . . . excuse [defense counsel] and [defendant]. And . . . the [prosecutor is] going to be questioning . . . [Tara] from the courtroom. So [defense counsel] will be present [with Tara] but [the prosecutor is] going to be in the courtroom with us.

As reflected, although the trial court failed to issue a written order, it thoughtfully considered N.C. Gen. Stat. § 15A-1225.1(d)'s enumerations, and defendant does not allege any prejudice resulting from the trial court's consideration or application of those enumerations in its ruling. Accordingly, we overrule this challenge.

IV. Motions to Dismiss

Defendant next contends the trial court erred by denying his motions to dismiss both charges for insufficient evidence. We disagree.

A. Standard of Review

We review *de novo* the denial of a motion to dismiss for insufficient evidence. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). Such a motion "is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged" and "(2) that defendant is the perpetrator of such offense." *Godley*, 234 N.C. App. at 568, 760 S.E.2d at 290 (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted).

"It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *Id.* Further, "[i]f a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is

whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citation omitted).

B. First-degree Sex Offense Charge

[2] Defendant first contends the trial court erred by denying his motion to dismiss the first-degree sex offense with a child charge on the ground that the State presented insufficient substantial evidence that he digitally penetrated Tara.

"A person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2015). " 'Sexual act' means" in relevant part "the penetration, however slight, by any object into the genital . . . opening of another person's body[.] . . ." *Id.* § 14-27.20 (2015). A finger is an "object." *State v. Smith*, 180 N.C. App. 86, 95, 636 S.E.2d 267, 273 (2006) (" 'Any object' in this context includes . . . a finger." (citation omitted)).

During Tara's remote testimony, she demonstrated by inserting her finger into a hole which the interpreter created with her hand, that defendant digitally penetrated her vagina and confirmed that her demonstration showed "what [defendant] did with his finger in [her] body." When asked "[h]ow did that feel physically on your body," Tara replied: "Bad" and then clarified that "[i]t hurt." Tara confirmed that no one "else ever touched [her] the way [defendant] touched [her] in [her] private part." When asked where "[defendant] touched [her] private part and put his finger in it," Tara replied: "In the living room." When asked whether she was clothed, Tara replied that her clothes were off and that defendant had undressed her. Dr. Cerjan performed a genital examination of Tara one day after the incident. He testified that during his examination, he discovered that Tara's hymen was substantially missing, which he opined was irregular for a six-year-old, and that "the only thing that would cause it would be a penetrating injury." He also observed "redness actually in [Tara's] vaginal area . . . behind where the hymen was," which indicated the penetrating injury would have occurred "within the last 48 hours."

Moreover, the State presented overwhelming corroborative evidence from which to reasonably infer that defendant digitally penetrated Tara. Responding officer Sgt. Shockley testified that Tara reported to him that defendant " 'was rubbing [her] down there' " and then "pointed toward . . . her genital area." Det. Proctor testified that Tara reported to him that defendant "had gotten on top of her," "had taken her clothes off

and that [defendant] . . . was naked," and that defendant "had touched her in her cootie with his hands." Dr. Cerjan testified that Tara reported that defendant "took [her clothes] off," "touched her with . . . his hands," and then "pointed to her groin." Accordingly, the trial court did not err in denying defendant's motion to dismiss the first-degree sexual offense with a child charge for insufficient evidence.

Defendant also contends the trial court erred by denying his motion to dismiss this charge because the State failed to present evidence that he digitally penetrated Tara within the time frame specified in the indictment, August 2014. However, at trial, defendant only moved to dismiss this charge on the basis that the State failed to present substantial evidence of penetration, not that the State failed to present evidence that he penetrated Tara during August 2014. Because defendant never moved to dismiss this charge on the ground that there existed a fatal variance between the trial evidence and the indictment, he waived his right to appellate review of this issue. *See State v. Jones*, 223 N.C. App. 487, 495–497, 734 S.E.2d 617, 623–24 (2012) (dismissing alleged indictment variance error as unpreserved where the defendant moved to dismiss for insufficient evidence but not on the grounds of a fatal variance between the trial evidence and indictment), *aff'd*, 367 N.C. 299, 758 S.E.2d 345 (2014). Accordingly, we dismiss this challenge.

C. Indecent Liberties Charge

[3] Defendant next contends the trial court erred by denying his motion to dismiss the indecent liberties charge because the State failed to present sufficient evidence he committed an act of indecent liberties. We disagree.

The essential elements of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1(a) (2015) follow:

> (1) the defendant was at least 16 years of age, (2) he [or she] was five years older than his [or her] victim, (3) he [or she] willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104–05, 361 S.E.2d 578, 580 (1987) (citation omitted).

Defendant only challenges element three: that he took or attempted to take an indecent liberty with Tara. Having concluded above that the

State presented substantial evidence that defendant digitally penetrated Tara, this same act supports the challenged element of this offense. *See State v. Swann*, 322 N.C. 666, 667–78, 370 S.E.2d 533, 539–40 (1988) (holding that the same act may support convictions and sentences for both first-degree sex offense and indecent liberties). Accordingly, the trial court did not err in denying the motion to dismiss the indecent liberties charge for insufficient evidence.

V. Improper Closing Remarks

[4] Defendant next contends the trial court erred by failing to intervene *ex mero motu* when the State argued during its closing argument to the jury impeachment/corroborative evidence as substantive evidence. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel [an appellate court] to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (citation, quotation marks, and brackets omitted). "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Waring*, 364 N.C. at 499–500, 701 S.E.2d at 650 (citation and quotation marks omitted).

"Generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citations and internal quotation marks omitted). During closing argument, a prosecutor "may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue"; however, a prosecutor "may not . . . express his [or her] personal belief as to the truth . . . of the evidence or as to the guilt . . . of the defendant[.] . . ." N.C. Gen. Stat. § 15A-1230(a) (2015). Additionally, arguing corroborative or prior-inconsistent-statements to the jury is error. *See, e.g.*, *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 806 (1980) ("The statement having been offered

only corroboratively, it was improper for the State to allude to it as substantive evidence during closing argument." (citation omitted)); *State v. Tucker*, 317 N.C. 532, 544, 346 S.E.2d 417, 424 (1986) ("Although it was proper to cross-examine defendant concerning his prior convictions on the question of his credibility, these convictions were not admissible as substantive evidence tending to prove his guilt. It was error for the trial court to permit the prosecutor to argue as if they were.").

Here, defendant challenges the following argument the State made to the jury:

> [Defendant] was naked. [Tara] was naked. He was hovering over her playing with himself which his sister demonstrated and the child demonstrated and the sister said with his finger in her vagina. That ladies and gentlemen, is proof beyond a reasonable doubt. It's frankly proof beyond every doubt.

To the extent these statements came solely from Sara's and Tara's out-of-court statements that were inconsistent with their trial testimony, the prosecutor inappropriately recited those statements as substantive evidence. However, "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 136, 711 S.E.2d 122, 146 (2011) (citation and internal quotation marks omitted). To this end, defendant, without citing to any legal authority, advances the following argument: "The [prosecutor] argued to the jury, with the tacit approval of the trial judge, that [Sara's] and [Tara's] out of court statements were sufficient for them to find defendant guilty beyond a reasonable doubt, even 'beyond any doubt.' But for the [prosecutor]'s improper prejudicial closing argument, the jury would have reached a different verdict."

In light of the substantive evidence elicited from Tara's remote testimony, the trial court's later instruction limiting the jury from considering prior-inconsistent-statements as substantive evidence, and the other overwhelming evidence of his guilt, we conclude that defendant has failed to "carr[y] the heavy burden of showing that the trial court erred in not intervening on his behalf." *State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 819 (2008). Accordingly, we overrule this challenge.

VI. Conclusion

Although the trial court failed to follow N.C. Gen. Stat. § 15A-1225.1's procedural requirements, defendant has failed to demonstrate how he

was prejudiced by any of these alleged procedural errors. Because the State presented substantial evidence of the challenged elements of both crimes, the trial court properly denied defendant's motions to dismiss those charges for insufficient evidence. Finally, although the prosecutor erred to the extent it may have argued prior-inconsistent statements to the jury, defendant failed to satisfy his burden of demonstrating how this argument rendered the proceedings fundamentally unfair. Accordingly, the trial court did not abuse its discretion by failing to intervene *ex mero motu* during the State's closing argument.

NO PREJUDICIAL ERROR.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
FREDERICK JOHN SCHUMANN, DEFENDANT

No. COA17-707

Filed 6 February 2018

Constitutional Law—right to counsel—forfeiture by conduct—failure to hire counsel—repeated delays—pro se representation

The trial court did not err in a drug trafficking case by requiring defendant to proceed pro se where defendant forfeited his right to counsel by failing to hire counsel for years, resulting in repeated delays in the case proceeding to trial. The trial court followed the parameters set forth under N.C.G.S. § 15A-1242 in determining that defendant unequivocally elected to proceed pro se.

Appeal by Defendant from judgment entered 1 September 2016 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 14 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

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

HUNTER, JR., Robert N., Judge.

Fredrick John Schumann ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of four counts of trafficking "14 grams or more, but less than 28 grams of opium or heroin" and four counts of trafficking "28 grams or more of opium or heroin." On appeal, Defendant argues the trial court erred by requiring Defendant to represent himself at trial, on the grounds Defendant neither asked to proceed *pro se* nor engaged in the type of misconduct which would result in a forfeiture of Defendant's right to counsel. We disagree.

I. Factual and Procedural Background

On 7 August 2013, a grand jury indicted Defendant for the following offenses: (1) four counts of trafficking more than 28 grams of opium, namely Hydrocodone on 25 February 2013; (2) four counts of trafficking more than 28 grams of opium, namely Hydrocodone, on 22 March 2013; and (3) one count of selling marijuana on 6 March 2013. On 6 April 2016, Defendant was re-indicted on the eight trafficking hydrocodone cases as follows: (1) four counts of trafficking "14 grams or more, but less than 28 grams of an opium derivative, namely Hydrocodone" on 25 February 2013, and (2) four counts of trafficking "28 grams or more of an opium derivative, namely Hydrocodone."

On 12 September 2013, Defendant appeared before Judge Douglas B. Sasser ("Judge Sasser") in Columbus County Superior Court, and signed a waiver of counsel form declaring:

> I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

Defendant "freely, voluntarily and knowingly" waived this right.

On 12 December 2013, Defendant appeared before Judge D. Jack Hooks, Jr., ("Judge Hooks") and signed a second Waiver of Counsel Form. Here, Defendant repeated the declarations he made in his initial September waiver. On that same day, attorney Walter D. Palmer

("Palmer") filed a Notice of Limited Appearance of Counsel limiting Palmer's representation of Defendant to pre-trial case management.

On 16 September 2015, Defendant again appeared before Judge Sasser. Palmer told the trial court, "I previously filed a limited appearance basically through this point. I believe the State's got their labs back and would be ready to set a trial date." Judge Sasser and Defendant then conducted the following exchange:

> THE COURT: You understand that if you want a court-appointed attorney, now is the time to ask for it, otherwise you'll be responsible if this matter does not resolve itself for case management. It's your responsibility to hire an attorney or represent yourself at trial. Now, that should have been the conversation that took place with you back several months ago, if not more than a year ago. Mr. Palmer indicates that matters have not been resolved and it's now ready to go on to trial.
>
> Mr. Schumann, I would certainly recommend you get yourself ready for trial. You have to understand that the Court can't help you. You have to know about how to pick a jury, and how many peremptory challenges, what's required to exercise one, what motions you can make and when to make those motions, who gets opening statement, what is an opening statement, what can I say during a closing argument. A lot of things go into a trial. It's not simple and there's rules that have to be followed, and the rules apply to you the same as they apply to an attorney. Are you going to hire an attorney for trial?
>
> THE DEFENDANT: Yes, sir.

The Assistant District Attorney ("ADA") then advised the trial court the case could come up for trial in the middle of the following year. Judge Sasser then advised Defendant:

> I'll give you two months to get your attorney hired . . . . Mr. Schumann, at 9:00 a.m., November 5 be back in this courtroom . . . and hopefully you got your lawyer with you and then we'll talk to your lawyer about a trial date for your case, give him enough time to get prepared. You need to go ahead and get a lawyer. Don't come back in November saying, I don't have a lawyer yet. You need a lawyer in place. All right? . . . It's to confirm who trial counsel will be for Mr. Schumann.

On 5 November 2015, Defendant again appeared before Judge Sasser. The following exchange occurred:

> THE COURT: [A]ll the way back in September 2013, you indicated you were going to hire an attorney. So we're now over two years later. The State now has lab results and is ready to set this matter for trial, and the attorneys indicated you first made a limited appearance back in December 2013.
>
> You're still not fully retained in this matter, and I want to make sure you understand we're getting ready to set a trial date, and it's your responsibility to either have an attorney -- you said you could afford to hire one - - you've had two years, and in that two years, you've never come back in and said, You know, I lost my job, I just can't do it, I can't afford one, I need court-appointed counsel. Waited two years, and now it's ready for trial.
>
> It's your responsibility to have an attorney, or you understand that you'll be trying the matter yourself? And I would strongly recommend that you not represent yourself in a superior court trial with all that's involved, in jury selection, motions, presenting the evidence, knowing what evidence may be admissible and not admissible. There's a reason we have folks go to law school for years and take exams to be licensed to do this.
>
> So I strongly encourage you now is the time to get a lawyer retained, because if not, then I'll see you back in court - - and you understand for trafficking, I would anticipate with all these charges if convicted by a jury, probably most likely spend the rest of your life in prison.
>
> Do you understand that?
>
> THE DEFENDANT: Yes, sir.

On 10 December 2015, Defendant again appeared before Judge Sasser. Defendant stated, "I had hired Mr. Cartrette and now I'm back to the same boat again. Mr. Palmer didn't want to take the case." Therefore, Defendant told the court, "I need a little bit of time." The trial court responded, "Come back on January 7th. Report back to me and tell me who your lawyer is then, but you need to go ahead - - because that trial's coming up soon[.]" Defendant assured the trial court he understood, and then thanked Judge Sasser.

On 7 January 2016, Defendant was before Judge Sasser again. An attorney named Mr. Byrd was in court that day, and he explained:

> I'm not in a position to make an appearance for Mr. Schumann at this time. He indicated to me that he had spoken with Mr. Cartrette and thought Mr. Cartrette was going to be able to represent him; now understand he can't. I would be asking to come back in February to address that. I haven't had time to look over the case . . .

The trial court then stated, "I will leave it on the unrepresented calendar, set it for February, and hopefully you will be in a position to make an appearance at that time."

Defendant returned to court on 15 February 2016. The trial court told Defendant, "I talked with Mr. Byrd - - in case he is talking with you - - but he has not given - - he is not ready to make an appearance in your case yet." The trial court then stated, "You've got to go ahead and make arrangements to get Mr. Byrd or someone to come back here on March 10th, and we'll be ready to set the trial date on March 10th." Defendant replied, "All right."

The next time Defendant returned to court was 28 March 2016. The presiding judge was Ronald L. Stephens. The State informed the trial court:

> Mr. Schumann did have counsel. Mr. Palmer represented him through our case management calendar. Once that did not come to a non-trial resolution, because Mr. Palmer was on a limited basis, he withdrew leaving Mr. Schumann to find another attorney.
>
> From September up until today's date, I think he has done that, and he can address that more with you. But I've had two attorneys come to me within the last month to two - - the last one coming just last week - - trying to resolve the matter.
>
> . . . .
>
> [T]he State is ready to proceed to trial. I do worry about proceeding with him unrepresented with no counsel just because of the ramifications of his - - of his age and how much time he is looking at, it could amount to a life sentence for him.

The State then told the trial court, "I have communicated with three attorneys." The trial court addressed Defendant:

> [H]ow do you intend to proceed as far as - - as far as your case now? It's on the trial calendar, and that's unfortunate for you on this - - we - - we surely have a process in which it moves along. And I used to say the train is on the track, and frankly - - frankly, it's roaring right along. And I'm not sure who is driving it, because you don't have a lawyer evidently. And the constitution surely allows you to drive your own train; represent yourself. But these are serious charges. And if you are convicted of them, they carry mandatory sentences in which - - anyway, you can get a bunch of time.

Defendant responded by explaining his dealings with various attorneys over the past few months. The trial court then told Defendant, "You can choose your own lawyer, if you would like, if you can afford one. If you can't afford one, the Court will consider appointing you a lawyer; or you can represent yourself. But that's what the constitution gives you the right to do." The trial court went on to explain, "I just need to know today when you have your jury trial whether or not you're going to have a lawyer, you're going to be your own lawyer, or whether or not - - or how you are going to proceed."

The following colloquy occurred:

> THE DEFENDANT: My feelings that I run - - that I need - - I don't know if it's possible, but I need a - - a - - person in the back to - - point me in the directions through this - - this - - this proceedings at this point. Not speaking for me, but just describe - - cross the t's and dotting all the i's. And I - - I - - that kind of a counsel, I - -I was looking to see if I could find - - come up with that kind of counsel.
>
> THE COURT: Well, I mean - -
>
> THE DEFENDANT: But it looks like it's going to a jury trial.
>
> THE COURT: - - the constitution provides you the right to either represent yourself or select somebody to represent you; and that person, with your assistance, will speak for you. So you don't really get standby counsel. You don't get to represent yourself and then get somebody to sit behind you and then - -

> THE DEFENDANT: I'll represent myself, Your Honor.
>
> The attorneys that I've talked to didn't - - they just don't have the time to prepare for this. They've got too many things on their desk that are - -
>
> THE COURT: Well, is it - - is it that, or they just haven't been paid?
>
> THE DEFENDANT: No. It isn't the paying situation.

The trial court then continued the matter off the trial calendar and reset it for the next administrative session of court so the senior resident judge could address Defendant's counsel situation.

On 7 April 2016, Defendant was again before Judge Sasser. The State requested setting the matter on the July trial calendar and asked the court to address Defendant's counsel issue. The trial court stated:

> I'm going to do a standby counsel at this point. I've talked to Mr. Schumann before, and he's indicated he could hire counsel and waived his right to Court-appointed counsel; he wanted to hire an attorney. I clearly told him, and he understood, that if he did not hire counsel, then he would be on his own at trial.
>
> I'm going to give standby counsel. There's a totally different obligation of standby counsel as to retained or Court-appointed counsel. But for the purposes of protecting his rights, his constitutional rights to an attorney, I'll do standby counsel.

The trial court appointed attorney Jim Caviness ("Caviness") to serve as Defendant's standby attorney. The trial court advised Defendant he needed to have an attorney to represent him rather than representing himself, and reminded him he had been advised months ago of the serious nature of the charges. Caviness asked to discuss the situation with Defendant to determine if Defendant could afford an attorney. The trial court stated Defendant should have asked for a court-appointed attorney months earlier, and the case had already been continued numerous times. Additionally, the case had already once been on the trial calendar and subsequently removed due to Defendant's issue with finding counsel. The trial court stated it was not going to start the "process" again because Defendant told the court months earlier he could hire an attorney. The trial court concluded by determining, "He's going to get standby counsel or he's going to hire an attorney, as he told me he could do months ago."

Defendant again explained his dealings with various attorneys to the court. At one point, the trial court interrupted Defendant and stated, "Listen very carefully. You waived originally. You said you were going to hire an attorney back in 2013. It's now 2016." The trial court also reminded Defendant, "I specifically told you that if you wanted Court-appointed counsel - - if you could not afford an attorney, you could apply for Court-appointed counsel. And you told me no, you didn't want it." Defendant responded, "This is not a dollar issue, Your Honor. It's a situation where he had asked for more time to prepare[.]" The trial court then stated, "good news is I'm giving you until July. Be back on June 13th. Get him paid, and get him prepared."

On 5 May 2016, Defendant appeared before Judge Sasser requesting discovery. Standby counsel was also present. The State told the court it provided discovery to two attorneys, including one who returned the discovery to the District Attorney's office. The State continued:

> Mr. Schumann himself came to our office, maybe a couple months ago; we provided discovery for him again, to him personally. He has come back to the office as recently as two weeks ago asking for another copy of discovery.
>
> At some point, the State has complied by giving discovery. I know he has to have discovery to prepare for trial, but I just wanted to put this on the record that the State continues to comply by giving him multiple copies of discovery, and he continues to request more copies of discovery of the same thing.

The trial court ordered Defendant was entitled to a copy of his discovery, but if he needed an extra copy, he would have to pay for it.

On 13 June 2016, Defendant again appeared before Judge Sasser. The trial court asked Defendant if he hired an attorney, and Defendant responded he had not. The trial court then asked Defendant if he was still trying to hire counsel or was he representing himself with standby counsel. Defendant responded he was representing himself. Defendant then complained he was unable to read several of the CDs that came with discovery. The trial court ordered standby counsel to assist Defendant and "make sure that he has the ability to open his discovery on those discs."

On 14 July 2016, Defendant again appeared before Judge Sasser. Standby counsel informed the court Defendant missed his appointment with counsel which had been set for the purpose of assisting Defendant in opening the discovery discs. Standby counsel also reported while he

informed Defendant he could not negotiate a plea, Defendant asked standby counsel to tell the State he was willing to plead if he did not receive time or probation. The State declined Defendant's plea offer. The trial court then stated:

> Mr. Schumann, your trial date is approaching. I have actually got a murder trial that I anticipate going first, but sometimes things fall off, so your case could potentially be reached as soon as basically about a week and a half from now.
>
> I've had you in court numerous times. We've tried to give you a chance to hire an attorney. And I've appointed standby counsel for you. I tried to work out that if you have any kind of discovery issues, you can even work with standby counsel to make sure that they have the ability to open any documents, software, so you can view those. And time continues to pass, months go by, and it seems really that no progress is being made in regards to the case.
>
> . . . .
>
> And I've done everything I possibly can to try to accommodate you, to give you the opportunity to get an attorney, to get assistance. And what I'm seeing is you're not taking advantage of the opportunities the Court is trying to afford you. And later on down the road, the Court will have no problem saying put 12 people in the box, make a decision, and you understand, you might be spending the rest of your life in prison.
>
> . . . .
>
> And I feel confident you understand what's happening, you understand the process, and I'm afraid you're playing a game that is going to hurt you down the road.

Defendant responded by again complaining about discovery. The trial court informed Defendant his discovery issue "would be a potential trial issue" and reminded Defendant his court date was set for 25 July 2016.

Defendant's case came on for trial on 30 August 2016. Defendant appeared *pro se*. Caviness appeared as Defendant's standby counsel. Prior to bringing the jury in, the trial court advised Defendant his mandatory sentence on just one count would be 225 to 279 months' imprisonment. The trial court then stated:

> The State had discussed with you a possible plea which would get it outside the mandatory active range. And basically, if you want to try to talk with the State again and see if there's anything that you can try to work out, that they'll agree to at this point modifying and, you know, reducing and take a lesser-included offense and try to work something out, you can try to work a plea out. But we need to do something quick, because I've got the jurors waiting.

Defendant replied "I understand why lawyers are to be hired. Okay? I really do. . . . As far as having a lawyer goes - - which you told me to go and do - - I have tried my best." Defendant then complained his plea with the State involved spending three years in prison, and he insisted he would only accept a plea with no prison because "I can't do active time." The trial court reminded Defendant going to trial meant "all or nothing," and a conviction would probably mean a life sentence. Defendant replied, "I understand that, Your Honor."

At trial, the State's evidence tended to show Kevin Norris ("Norris"), a deputy with the Columbus County Sheriff's Department, worked with an undercover confidential informant named Jerry Adams ("Adams"). Adams agreed to be an informant in exchange for dismissal of the charges against him. Adams arranged to purchase hydrocodone from Defendant. Norris placed a recording device on Adams. From a position of about 200 to 300 yards away, Norris observed the meeting between Adams and Defendant. After the transaction, Adams turned the drugs over to Norris. Over the next few months, Adams had several more transactions of this nature with Defendant and Norris.

The jury found Defendant guilty of the four counts of trafficking 14 grams or more but less than 28 grams of opium or heroin, and four counts of trafficking 28 grams or more of opium or heroin. The jury failed to reach a verdict on the selling marijuana charge, and so the trial court declared a mistrial. The State subsequently dismissed the charge. The trial court sentenced Defendant to 90 to 120 months' imprisonment for the 25 February 2013 offenses, and a concurrent sentence of 225 to 282 months' imprisonment for the 22 March 2013 offenses. Defendant timely appealed.

II. Standard of Review

Constitutional issues are subject to *de novo* review. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower

tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

III. Analysis

"The right to counsel is one of the most closely guarded of all trial rights." *State v. Graham*, 76 N.C. App. 470, 473, 333 S.E.2d 547, 549 (1985). "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). Defendants are constitutionally "entitled to the assistance of counsel at every critical stage of the criminal process." *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001).

A defendant may voluntarily waive the right to counsel and instead proceed *pro se*. "[W]aiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.' " *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas* at 674, 417 S.E.2d at 476 (citations omitted). A trial court's inquiry will satisfy this requirement if conducted pursuant to N.C. Gen. Stat. § 15A-1242. *Id.* at 674, 417 S.E.2d at 476 (citations omitted). Under N.C. Gen. Stat. § 15A-1242 (2017):

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Defendant first contends he did not unequivocally elect to proceed *pro se*. Defendant argues the trial court did not adhere to the requirements of N.C. Gen. Stat. § 15A-1242 and therefore his constitutional rights to counsel were violated. We disagree.

In 2013, Defendant signed two waivers of assigned counsel which explicitly acknowledged he had been informed of the nature of the charges and the statutory punishment for them.

In his brief, Defendant asserts it was "after he had difficulties finding an attorney who could represent him at trial did [he] give any indication he would represent himself" in March 2016. However, in both September and November 2015, Defendant stated he would be representing himself if he did not have an attorney at the time of trial. On 28 March 2016, Defendant stated "I'll represent myself" after he explained the attorneys he talked to did not have time to prepare. At that point, Judge Stephens asked Defendant if the attorneys declined to represent him because they had not been paid. Defendant denied money was an issue. Due to this exchange, Judge Stephens continued Defendant's case so the senior resident judge could address the issue of counsel.

In November 2015, Judge Sasser reminded Defendant that over the course of two years Defendant had never stated he could not afford an attorney or needed a court-appointed attorney. At the same time, Judge Sasser advised Defendant if he did not have an attorney by the trial date, he would have to represent himself. Judge Sasser also advised Defendant representing himself would involve jury selection, motions, presenting the evidence, knowing what evidence is admissible and "there's a reason we have folks go to law school for years and take exams to be licensed to do this." Finally, Judge Sasser told Defendant he needed to get an attorney because if he were convicted of the trafficking charges, he would most likely spend the rest of his life in prison.

The trial court inquired into Defendant's understanding of the seriousness of the charges on at least two occasions. In both instances, Defendant acknowledged his understanding. The trial court asked Defendant if he was unable to afford an attorney or would like to request a court appointed attorney on at least two occasions. In response, Defendant explicitly stated he could afford to hire an attorney and intended to do so.

During his many appearances before the court, Defendant made numerous excuses for not hiring an attorney, including claiming the attorneys he talked to were unavailable due to insufficient time to prepare or had been arrested. The trial court gave Defendant additional time to work out attorney representation ten times over the course of ten months. The trial court also twice gave Defendant at least three months' notice of a trial date.

Defendant also stated he would represent himself because the attorneys he had contacted needed more time to prepare and the court date set by the judge did not give him enough time. In response, the trial court gave Defendant four additional months to engage an attorney. Even after the trial court gave Defendant four additional months, Defendant came before the court and made the same excuses for why he had not hired an attorney.

The trial court repeatedly counseled Defendant on the seriousness of the charges. Both Judge Sasser and Judge Stephens had lengthy exchanges with Defendant on the need for counsel. Judge Sasser ultimately appointed standby counsel for Defendant in light of the seriousness of the charges.

On 14 July 2016, Judge Sasser told Defendant if he was convicted, he would likely spend the rest of his life in prison. Judge Sasser also told Defendant he still had time to make a plea with the State. Judge Sasser said, "I feel confident you understand what's happening, you understand the process, and I'm afraid you're playing a game that is going to hurt you down the road."

On 30 August 2016, before bringing the jury into the courtroom, Judge Sasser advised Defendant he was looking at a mandatory minimum sentence of 225 to 279 months' imprisonment. Defendant replied, "I understand why lawyers are to be hired. Okay? I really do. . . . As far as having a lawyer goes - - which you told me to go and do - - I have tried my best." Judge Sasser gave Defendant another chance to work out a plea deal and then stated, "I have told you repeatedly this was serious business." Defendant complained the plea deal involved spending three years in prison and insisted he would only accept a plea deal with no prison because "I can't do active time." Judge Sasser reminded Defendant going to trial meant all or nothing, and a conviction probably meant a life sentence. Defendant stated, "I understand that, Your Honor."

The trial court gave Defendant years to find an attorney. At each stage the trial court advised and counseled Defendant about his right to an attorney including his right to appointed counsel. The trial court also repeatedly counseled Defendant on the complexity of handling his own jury trial and the fact the judge would not be able to help him. Finally, the trial court repeatedly addressed the seriousness of the charges and advised Defendant a conviction likely meant a life sentence. Despite this, Defendant proceeded to represent himself at trial.

Defendant's assertion the trial court failed to take any measures to ascertain whether Defendant understood the various difficulties

associated with representing himself is without merit. Our review of the record indicates the trial court advised Defendant he would have to adhere to rules of court and evidence. The trial court also informed Defendant the court would not assist Defendant, and Defendant was facing serious charges which could result in a life sentence upon conviction. The record also indicates Defendant repeatedly expressed his understanding of the trial court's instruction on this issue. We conclude Defendant waived his right to court-appointed counsel.

The State also contends even if Defendant could fairly argue the trial court failed to advise Defendant of his rights in waiving counsel and the hazards of proceeding *pro se*, he forfeited his right to counsel by his conduct. We agree.

Forfeiture of counsel is separate from waiver because waiver requires a "knowing and intentional relinquishment of a known right" whereas forfeiture "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (quoting *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006)). Forfeiture typically occurs when a defendant obstructs or delays the proceedings by refusing to cooperate with counsel or refusing to participate in the proceedings. *See State v. Blakeney*, ___ N.C. App. ___, ___, 782 S.E.2d 88, 94-95 (2016) (citations omitted).

In *Blakeney*, this Court outlined three types of behavior which may result in forfeiture:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights.

Id. at ___, 782 S.E.2d at 94.

Here, Defendant's conduct falls within the first category of forfeiture described in *Blakeney* since Defendant employed "extended delaying tactics." *Id.* at ___, 782 S.E.2d at 94. First, Defendant waived his right to

assigned counsel in 2013. The trial court repeatedly advised Defendant on the seriousness of the charges and informed Defendant a conviction could lead to a life sentence due to Defendant's age. Time after time, Defendant stated he intended to hire his own attorney. Defendant made close to monthly appearances in court over a 10-month period, and consistently told the court he wished to hire his own attorney. During these appearances, the trial court asked Defendant at least twice if he needed appointed counsel. Defendant answered by claiming to have sufficient funds to hire an attorney. Additionally, the trial court continued Defendant's case several times to give Defendant's attorney time to prepare since Defendant claimed the attorneys he met with did not have adequate time to prepare for trial.

Based on the foregoing, we determine Defendant's conduct "result[ed] in the absence of defense counsel [which] constitutes a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006). Under our *de novo* review, we conclude Defendant's failure to hire his own counsel resulted in repeated delays in the case proceeding to trial, and therefore Defendant forfeited his right to court-appointed counsel. We further conclude the trial court followed the parameters set forth in N.C. Gen. Stat. § 15A-1242 in determining Defendant unequivocally elected to proceed *pro se*.

NO ERROR.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LEE SINGLETARY

No. COA17-668

Filed 6 February 2018

Sentencing—resentencing—sex offenses—jurisdiction—date mandate transmitted from appellate division

The trial court had jurisdiction to resentence defendant for multiple convictions for sex offenses on the same day that the mandate from the appellate division was transmitted, as provided under Rule 32 of the N.C. Rules of Appellate Procedure. The Court of Appeals rejected defendant's argument that the mandate issues only when the lower court actually receives it.

Appeal by defendant from judgments entered 23 May 2016 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant.

DIETZ, Judge.

Defendant Christopher Lee Singletary appeals his sentences following multiple convictions for sex offense charges. He contends that, after this Court filed an opinion vacating his original sentence and remanding for resentencing, the trial court improperly resentenced him before this Court issued the mandate.

As explained below, we reject Singletary's argument that the mandate had not issued at the time of resentencing. We hold that the mandate from the appellate division issues on the day that the appellate court *transmits* the mandate to the lower court, not the day when lower court actually *receives* it.

Applying that holding here, the trial court had jurisdiction to resentence Singletary on 23 May 2016. This Court filed its opinion vacating Singletary's sentence and remanding for resentencing on 3 May 2016.

Twenty days later, on 23 May 2016, this Court issued the mandate by transmitting it to the clerk of superior court. Because the mandate issued on 23 May 2016, the trial court had jurisdiction to resentence Singletary that same day. Accordingly, we reject Singletary's jurisdictional argument and affirm the trial court's judgments.

Facts and Procedural History

In 2015, Defendant Christopher Lee Singletary was convicted of multiple sex offenses involving a minor. On appeal, this Court vacated Singletary's sentence and remanded the case for a new sentencing hearing. *State v. Singletary*, __ N.C. App. __, 786 S.E.2d 712 (2016).

This Court filed its opinion on 3 May 2016 and the mandate issued on 23 May 2016, twenty days later. The Guilford County Clerk of Superior Court received this Court's judgment and mandate, and filed it, on 25 May 2016.

On 23 May 2016—the same day this Court issued the mandate and two days before the clerk of superior court received the written copy of the Court's judgment and mandate—the trial court resentenced Singletary. Singletary timely appealed.

Analysis

Singletary contends that the trial court lacked jurisdiction to resentence him because the court had not yet received the certified copies of the judgment and mandate transmitted by this Court. As explained below, we reject this argument.

In general, an appeal from a trial court judgment "removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned *by mandate* of the appellate court." *Woodard v. N.C. Local Governmental Emp. Ret. Sys.*, 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993) (emphasis added). As a result, when this Court issues an opinion instructing a lower court to take further action, the lower court should not take that action until this Court issues its mandate. By issuing the mandate and accompanying judgment, this Court returns jurisdiction to the trial court, which may then proceed with the case in a manner consistent with this Court's ruling. *See* N.C. Gen. Stat. § 15A-1452.

Rule 32 of the Rules of Appellate Procedure describes when and how this Court issues its mandate. The rule provides that a mandate "is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to

the issuing court." N.C. R. App. P. 32(a). The rule further states that this Court "shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk." N.C. R. App. P. 32(b).

Singletary argues that, under Rule 32(a), the trial court could not resentence him until 25 May 2016, the date on which the clerk of superior court *received* the mandate, not 23 May 2016, the day this Court *transmitted* the mandate. We disagree. Rule 32(a) states that the mandate "is issued by its transmittal" from this Court to the lower court. Rule 32(b) then states that this Court "shall enter judgment and issue the mandate . . . twenty days after the written opinion of the court has been filed." Read together, these rules indicate the mandate "issues" on the day this Court transmits it to the lower court, not on the day the lower court receives it.

Here, the Court issued its mandate on 23 May 2016. The trial court resentenced Singletary that same day. Accordingly, we reject Singletary's argument that the trial court lacked jurisdiction to resentence him because the mandate had not yet issued.[1]

Conclusion

For the reasons discussed above, we affirm the trial court's judgments.

AFFIRMED.

Judges BRYANT and DILLON concur.

---

1. Singletary also argues that, as the result of a clerical error, the judgments for some of his offenses do not reflect the appropriate jail credit. In response, the State filed a supplement to the record indicating that Singletary already has served his sentence for those offenses and that he did, in fact, receive the appropriate jail credit, despite the clerical error in the judgment. Accordingly, this issue is moot. *State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009).

STATE OF NORTH CAROLINA
v.
JAMES H. TERRELL, JR.

No. COA17-268

Filed 6 February 2018

1. Search and Seizure—photographs—private search—warrantless search—thumb drive not a single container

The trial court erred by concluding a private citizen's prior viewing of defendant's thumb drive frustrated defendant's expectation of privacy in its entire contents and authorized a police detective to conduct a warrantless search through all of its digital data. The Court of Appeals declined to extend the container analogy applied to a videotape search in *State v. Robinson*, 187 N.C. App. 795 (2007), and held a thumb drive should not be viewed as a single container for Fourth Amendment purposes.

2. Search and Seizure—private-search doctrine—warrantless search—thumb drive—sufficiency of findings of fact—virtual certainty only contraband

The trial court erred by concluding that a detective's warrantless search of defendant's thumb drive did not violate his Fourth Amendment rights. Although the trial court did not make adequate findings of fact concerning the exact scope of a private citizen's and a detective's searches through the thumb drive, its findings established that the detective did not conduct the search with the requisite level of "virtual certainty" that the thumb drive contained only contraband or that his inspection would not reveal anything more than he already learned from the private citizen.

3. Search and Seizure—motion to suppress—probable cause—search warrant—tainted evidence from unlawful search

The trial court's ruling on defendant's suppression motion was reversed and remanded to the trial court to determine whether probable cause existed to issue a search warrant after excising from a detective's warrant application the tainted evidence arising from his unlawful search as required by *State v. McKinney*, 361 N.C. 53 (2006).

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 17 November 2016 by Judge Beecher R. Gray in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

ELMORE, Judge.

James H. Terrell, Jr. (defendant) appeals from a judgment entered after a jury convicted him of possessing a photographic image from secretly peeping, second-degree sexual exploitation of a minor, and twelve counts of third-degree sexual exploitation of a minor. This case presents the issue of how to apply the private-search doctrine to a follow-up police search for one potential contraband image among several other non-incriminating images stored on an electronic storage device. Or, put another way, to what extent the private-search doctrine authorizes police to conduct, without a warrant, a follow-up search for digital data on a privately searched electronic storage device.

Defendant's long-term girlfriend, Jessica Jones, opened defendant's briefcase when he was at work in order to search for information about his housekeeper in the Philippines while he was working overseas on a prior military contract job. Among employment papers and other personal effects, she found three USB flash drives (hereinafter "thumb drives"). Jones plugged each thumb drive into a computer. One of those thumb drives contained data. Jones clicked through its multiple digital file folders and subfolders until she found one subfolder containing images. After scrolling through several non-incriminating images, she saw one image of her nine-year-old granddaughter sleeping without a shirt. Jones believed the image was inappropriate, summoned authorities, and surrendered the thumb drive, which was secured in an evidence locker.

Later, an officer conducted a warrantless search through the images on the thumb drive to locate the granddaughter image. But during his follow-up search, the officer allegedly discovered images of other partially or fully nude minors that Jones never viewed. Using this information to support his warrant application, the officer obtained a search warrant to forensically examine the thumb drive's contents. The

executed search warrant yielded twelve incriminating images located in a different subfolder than the granddaughter image.

Defendant moved to suppress the contents of the thumb drive. He alleged that the officer had conducted an illegal warrantless search. He further sought to suppress the images recovered during the forensic examination under the search warrant as being fruit of the previous unlawful search. Defendant's motion was denied. The trial court determined that Jones's private viewing of the thumb drive effectively frustrated defendant's expectation of privacy in its contents and, thus, the officer's warrantless search was lawful under the private-search exception to the warrant requirement and did not violate defendant's Fourth Amendment rights.

On appeal, defendant contends the trial court erred by denying his motion to suppress the thumb drive's contents because the search warrant executed was based on illegally obtained evidence from the officer's warrantless search. He contends the trial court erred by concluding that Jones's prior search through the thumb drive effectively frustrated his expectation of privacy in its entire contents, thereby authorizing the officer to search, without a warrant, through all of the images on that device. He further contends the trial court's finding that the officer viewed incriminating images that Jones never viewed necessarily establishes that his subsequent search unconstitutionally exceeded the scope of Jones's earlier one.

We ultimately hold that the trial court reversibly erred by concluding that the officer's warrantless search was lawful under the private-search doctrine and, therefore, did not violate defendant's Fourth Amendment rights. However, because the record is insufficient for us to determine whether the trial court would have determined that the search warrant executed was supported by probable cause without the tainted evidence obtained during the officer's unlawful search, we remand this matter to the trial court to determine the validity of the search warrant.

I. Background

During their long-term relationship, James H. Terrell, Jr. (defendant) and Jessica Jones had lived together for over ten years and had two children together. Jones also had a daughter from another relationship, Cindy, who has a daughter, Sandy.[1]

1. Pseudonyms are used to protect identities.

Defendant served in the United States Marine Corps and after he left service, he began working various overseas military contractor jobs. When he returned from one such job in the Philippines in February 2013, he resumed living with Jones until January 2014.

On 13 January 2014, while defendant was at work, Jones searched his belongings for information about his housekeeper in the Philippines. She opened his briefcase and discovered, among employment paperwork and other personal effects, that it contained three USB thumb drives.

Jones plugged each thumb drive into a home computer. Two of the thumb drives were blank, but the third thumb drive, which was purple in color, contained data. On the purple thumb drive, Jones found a subfolder containing images and scrolled through various non-incriminating images until she discovered an image of her nine-year-old granddaughter, Sandy, that was taken the day after Thanksgiving. In the image, Sandy was sleeping, partially nude from the waist up with her breasts exposed (hereinafter "the granddaughter image"). Once Jones saw the granddaughter image, she stopped scrolling through the images and unplugged the thumb drive. Jones sought counsel from her preacher, who recommended contacting authorities. Jones also informed her daughter, Cindy, who is Sandy's mother, and Cindy expressed her desire to press charges.

That evening, Jones and Cindy brought the purple thumb drive to the Onslow County Sheriff's Department and reported to Detective Lucinda Hernandez that it contained the granddaughter image. Detective Hernandez did not ask to see the granddaughter image or open the thumb drive to view it but secured the thumb drive in an evidence locker.

The next day, Detective Eric Bailey was assigned to the case. He reviewed Detective Hernandez's report, and then interviewed Jones and Cindy, who also reported to him that the thumb drive contained the granddaughter image. After the interview, Detective Bailey decided to examine the thumb drive to verify their report. At Detective Bailey's request, the thumb drive was removed from the evidence locker, and a crime scene investigation (CSI) technician with the sheriff's department plugged it into a computer. During Detective Bailey's search for the granddaughter image, he scrolled through several non-incriminating images and allegedly saw images of other fully or partially nude minor females posing in sexual positions, images that Jones neither observed nor reported.

On 5 February 2014, Detective Bailey applied for a warrant to search, *inter alia*, the purple thumb drive for "contraband images of

child pornography and evidence of additional victims and crimes." In his application, Detective Bailey alleged that Jones reported that she saw the granddaughter image on defendant's purple thumb drive, that Jones reported her other daughter "several years ago" alleged that defendant "touched [her] down there," and that Jones also reported she found a floppy disk in the bed of defendant's truck about fifteen years ago that contained images of child pornography. According to Detective Bailey, an agent with the State Bureau of Investigation (SBI) refused to conduct a "forensic evaluation [of the thumb drive] based on [that] search warrant" and "asked [him] to put additional information in the search warrant."

On 5 May 2014, Detective Bailey applied for another search warrant, this time adding allegations that he personally reviewed the thumb drive and saw "several partially nude photographs of [the granddaughter]" as described by Jones, and that he also observed "several fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions."

The SBI agent executing the search warrant forensically examined several electronic devices using complex forensic software that creates a mirror image of their contents. The forensic examination of the thumb drive yielded twelve other incriminating images located in a different subfolder than the granddaughter image. Ten of those images had been previously deleted, and therefore would not have been observable during Jones's or Detective Bailey's searches, but were extractable using a computer forensic tool.

Defendant was indicted for possession of a photographic image from secretly peeping for the granddaughter image, four counts of second-degree sexual exploitation of a minor, and twelve counts of third-degree sexual exploitation of a minor based on the twelve images recovered from the forensic examination. Three of the second-degree sexual exploitation charges were dropped but the remaining charges proceeded to trial.

Before trial, defendant moved to suppress the contents of the thumb drive, arguing that the executed search warrant was based on evidence illegally acquired during Detective Bailey's unlawful warrantless search. At the suppression hearing, defendant argued that Detective Bailey's thumb drive search violated his federal and state constitutional rights to be free from unreasonable searches. He further argued that Detective Bailey's warrantless search was not exempted by the private-search exception to the warrant requirement because it unconstitutionally exceeded the scope of Jones's prior search. Defendant emphasized that

Jones's search revealed only the granddaughter image, while Detective Bailey's search revealed images of other fully or partially nude minors that Jones never viewed. To satisfy its burden to establish that the evidence obtained during Detective Bailey's warrantless search was lawful, the State called Jones and Detective Bailey to testify.

According to Jones, when she plugged in the thumb drive, she opened various "folders and sub-folders" that she "did not think . . . had a title." She explained that "the pictures were all in one folder and . . . the other folders [contained] movies." After opening the "one" image folder, she scrolled those images. Jones saw "images of adult women and . . . children, but they were not inappropriate, meaning they were clothed"; "pictures of a person that [defendant] alleged was his housekeeper over in the Philippines"; images of an adult she recognized as defendant's childhood friend, some clothed and some partially clothed; and then she saw the granddaughter image. Once she saw that image, Jones stopped scrolling through the images and unplugged the thumb drive. According to Jones, she never saw any images of defendant; images of her and defendant; nor images of nude minors, particularly no "images of a fully naked young . . . female standing around adult women." Jones testified she told Detective Bailey that she "had discovered the image of [her] granddaughter lying in bed and she's partially unclothed" on the thumb drive.

According to Detective Bailey, after the thumb drive was plugged into the CSI computer, he was "going through checking it to try to find the [granddaughter image]." He explained that, while he was "scrolling through . . . there was a lot of photos in there[,]" and he was "clicking trying to find exactly where [the] image [was] located . . . ." Detective Bailey viewed "multiple images of adult females and also [defendant] together clothed, nude, partially nude." He then "continued [his] way down" and "finally happened upon the photograph of the granddaughter." He then stated that during his search, he "observed other young females, prepubescent females, unclothed, also some that were clothed."

The State presented no evidence describing the precise scope of either search Jones or Detective Bailey conducted on the thumb drive. Neither testified to the exact folder pathway they followed to arrive at the granddaughter image, identified which folders or subfolders they opened or reviewed, nor identified which subfolder of images they scrolled through to arrive at the granddaughter image.

At the conclusion of the suppression hearing, the trial court rendered an oral ruling denying defendant's motion. It concluded that "there was a private party who went into this [thumb drive] and, by doing so,

. . . it frustrated the defendant's reasonable expectation of privacy as to the contents of that [thumb drive]." The trial court continued: "[W]hen [Detective Bailey] went into that same [thumb drive] . . . to confirm what had been stated to him, he found additional matters and he did so in a manner that was, perhaps, more thoroughly [sic] than the initial examination by Ms. [Jones]. He ran into more images than what Ms. [Jones] ran into." Thus, the trial court determined, Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights.

At trial, the twelve images were admitted into evidence and a computer forensic analyst published a mirror image copy of the thumb drive to the jury. The initial Windows Explorer display screen of the thumb drive revealed multiple closed digital file folders. According to the transcript, that initial screen revealed at least the following parent folders (but likely more, since the witness displaying its content to the jury was asked multiple times to "scroll down" to find certain folders): "bad stuff," "Terrell resume," and "DI info." Opening the "bad stuff" folder revealed at least the following subfolders: "me," "Swanee," "red bone," and "Cabaniia." The evidence showed that the granddaughter image was located in the "red bone" subfolder, while the twelve other images were located in the "Cabaniia" subfolder.

After the presentation of evidence, the jury convicted defendant of all charges based on the granddaughter image and the twelve images recovered from the search warrant executed on the thumb drive. The trial court sentenced defendant to twelve consecutive terms of five to fifteen months in prison, and a term of twenty to eighty-four months of imprisonment, to run concurrent with the last five-to-fifteen-month term. On 28 November 2016, the trial court entered its written order denying defendant's suppression motion. Defendant appeals.

II. Standard of Review

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). The trial court's legal conclusions "are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Arguments

Defendant contends the trial court erred by denying his motion to suppress the contents of the thumb drive seized from the executed

search warrant because it was based on illegal evidence obtained during Detective Bailey's unlawful search. He contends the trial court erred by concluding Jones's prior viewing of some images on the thumb drive effectively frustrated his expectation of privacy in the entire device, such that the private-search doctrine authorized Detective Bailey to search, without a warrant, through all of its digital data. Defendant cites to *United States v. Jacobsen*, 466 U.S. 109, 113–19, 104 S. Ct. 1652, 1656–59, 80 L. Ed. 2d 85 (1984) (establishing the private-search exception to the warrant requirement and instructing that the legality of a follow-up police search is limited by the degree it remains within the scope of the prior private search), to support his argument that because the trial court's findings establish that Detective Bailey's warrantless search exceeded the scope of Jones's earlier one, it was unlawful.

The State argues that the trial court properly determined that Detective Bailey's search was lawful under the private-search doctrine. The State contends that Detective Bailey's search was not unconstitutionally excessive in scope, since he merely examined the thumb drive "more thoroughly" than did Jones, citing to our decision in *State v. Robinson*, 187 N.C. App. 795, 798, 653 S.E.2d 889, 892 (2007) (holding that an officer viewing all of the footage of a videotape did not exceed the scope of a private search through only portions of the footage because the officer merely examined the "same materials . . . more thoroughly than did the private part[y]" (citations and internal quotation mark omitted)). The State further contends that even if Detective Bailey's search was conducted more thoroughly, it was not unconstitutionally excessive in scope because he had "virtual certainty" what contraband the thumb drive contained, citing to *Jacobsen*, 466 U.S. at 118–22, 104 S. Ct. at 1659–61 (establishing the virtual-certainty requirement), and *Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012) (holding that an officer did not exceed the scope of a private search by viewing more files on a memory card and zip drive when officers were "substantially certain" those devices stored only child pornography), *cert. denied*, 133 S. Ct. 672 (2012).

We conclude that our decision in *Robinson* concerning the extent to which a private actor viewing portions of a videotape frustrates an individual's expectation of privacy in the entire videotape footage is simply inapplicable to searches for digital data on electronic storage devices. We therefore decline to extend the container analogy we applied to the videotape search in *Robinson* and hold a thumb drive should not be viewed as a single container for Fourth Amendment purposes. In light of this determination, we hold that the trial court erred by concluding that

Jones's thumb drive search effectively frustrated defendant's expectation of privacy in its entire contents.

We further hold that Detective Bailey's warrantless search was not authorized under the private-search doctrine, since the court's findings establish that Detective Bailey did not conduct his warrantless search with the requisite "virtual certainty" required under *Jacobsen* that the thumb drive contained only contraband, or that his inspection of its data would not reveal anything more than Jones already told him. However, because the trial court's order is insufficient for us to determine whether it would conclude that excising from the warrant application the evidence illegally obtained during Detective Bailey's unlawful search would still supply probable cause to issue the search warrant, we remand the matter to the trial court to make a determination, in the first instance, as to whether the remaining allegations in Detective Bailey's warrant application would have been sufficient.

IV. Analysis

"Both the United States and North Carolina Constitutions protect against unreasonable searches . . . ." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). A warrantless police search is presumptively unreasonable unless the State proves that search was exempted from the warrant requirement. *See Jacobsen*, 466 U.S. at 114, 104 S. Ct. at 1657 ("[W]arrantless searches of [personal] effects are presumptively unreasonable." (footnote omitted)); *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) ("[W]hen the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant." (citations omitted)). The private-search doctrine provides one such exemption from the warrant requirement.

A. The Private-Search Doctrine

Under the private-search doctrine, an officer may duplicate a private search, without a warrant, in order to observe first-hand incriminating information a private searcher has revealed to him. The rationale behind the doctrine is that Fourth Amendment protection extends only to governmental action; "it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected [solely] by a private individual . . . .' " *Jacobsen*, 466 U.S. at 113, 104 S. Ct. at 1656 (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 2404, 65 L. Ed. 2d 410 (1980) (Blackmun, J., dissenting)). Once an individual's privacy interest in particular information has been frustrated by a private actor, who

then reveals that information to police, the police may use that information, even if obtained without a warrant. *See id.* at 117, 104 S. Ct. 1658 (explaining that the private-search doctrine "standard follows from the analysis applicable when private parties reveal other kinds of private information to authorities"); *see also id.* ("Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information."). Thus, a duplicative police search exposing information already revealed by a private searcher is not a "search" under the Fourth Amendment, since it would intrude no existing privacy interest in that information.

But where a warrantless police search uncovers previously unrevealed private information, any additional privacy intrusion effected by that police search constitutes a Fourth Amendment "search," and police are therefore prohibited from using that information under the private-search doctrine. *See id.* at 117–118, 104 S. Ct. at 1658–59 ("[I]f the authorities use information with respect to which the expectation of privacy has not already been frustrated[,]" "the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." (footnote omitted)). Thus, in determining whether information acquired during a warrantless police search can be used under the private-search doctrine, "the legality of the governmental search must be tested by the scope of the antecedent private search." *Id.* at 116, 104 S. Ct. at 1658 (citation omitted).

Additionally, "the Fourth Amendment's ultimate touchstone is 'reasonableness[.] . . .' " *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398, 126 S. Ct. 1943, 1944, 164 L. Ed. 2d 650 (2006). "The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657. Where information revealed by the private searcher is hidden from plain view, the reasonableness of a follow-up police search turns on whether the officer had "virtual certainty" that the item to be searched contained "nothing else of significance" and that his or her inspection of that item would not "tell him anything more than he already had been told" by a private searcher. *Id.* at 119, 104 S. Ct. at 1659.

B. Frustration of Privacy in Electronic Storage Devices

[1] Defendant contends the trial court erred by concluding that Jones's prior viewing of the thumb drive effectively frustrated his expectation of privacy in its entire contents and, therefore, Detective Bailey was

authorized to search, without a warrant, through all of its digital data without violating his Fourth Amendment rights. The State retorts that this conclusion was proper, relying heavily on our decision in *State v. Robinson*, 187 N.C. App. 795, 653 S.E.2d 889 (2007). *See id.* at 798–99, 653 S.E.2d at 892 (analogizing a videotape search to a container search, and holding that a private partial viewing of video footage from a videotape "opened the container" to its entire contents, effectively frustrating the defendant's expectation of privacy in all of the videotape footage). We find the State's authority unpersuasive as applied to searches of digital data on electronic storage devices, and hold that defendant retained an expectation of privacy in the information not revealed by Jones's search.

An individual has "reasonable and substantial" privacy interests in the digital information stored on a thumb drive. *See State v. Ladd*, ___ N.C. App. ___, ___, 782 S.E.2d 397, 403 (2016) ("Defendant's privacy interests in the digital data stored on these [external data] storage devices are both reasonable and substantial."). While this Court has applied the private-search doctrine to a police search of a privately searched videotape, *see Robinson*, 187 N.C. App. at 798–99, 653 S.E.2d at 892 (holding that a private search through some footage of a videotape frustrated an individual's privacy interests in the entire videotape footage), North Carolina courts have neither applied the private-search doctrine to a police search for digital data on a privately searched electronic storage device, nor defined the precise scope of a search for digital data on an electronic storage device, which bears directly on the extent to which a private search through a thumb drive may frustrate an individual's privacy interests in all of its digital data.

At issue is whether we should extend our holding in *Robinson*, as the State argues, treat the thumb drive as a single container for purposes of applying the private-search doctrine, and hold that Jones's prior search "opened the container" to all of the thumb drive's digital data, thereby authorizing Detective Bailey to conduct a "more thorough" examination of the entire device. We decline to do so.

C. A Thumb Drive is not a Single Container

In *Robinson*, the police viewed, without a warrant, the entire footage of a single videotape after a private searcher viewed portions of the footage and revealed to police that it showed the defendant engaging in sexual activities with two minors. 187 N.C. App. at 796, 653 S.E.2d at 891. The officer's videotape search confirmed what the private actor revealed to him—that the videotape contained footage of the defendant engaging in sexual activities with the two minors. *Id.* On appeal, we applied

the private-search doctrine and addressed whether the officer's search through the entire videotape footage exceeded the permissible scope of the private search through only portions of the footage. *Id.* at 797–99, 653 S.E.2d at 891–92.

The *Robinson* panel recognized that North Carolina courts had not defined the precise scope of a videotape search and turned to federal circuits courts of appeal for guidance. We adopted the Fifth and Eleventh Circuits' position that " 'the police do not exceed the scope of a prior private search when they examine the same materials . . . . more thoroughly than did the private parties.' " *Id.* at 798, 653 S.E.2d at 892 (quoting *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001); citing *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990)). We treated the videotape as a container, analogized the videotape search to a container search, and concluded that the private partial "viewing of the videotape effectively frustrated the defendant's expectation of privacy as to the contents of the [entire] videotape[.] . . ." *Id.* at 798, 653 S.E.2d at 892. Thus, because the prior private "viewing 'opened the container' of the videotape," we held that "the subsequent [police] viewing of the entire videotape was not outside the scope of [the private actor's] initial 'search.' " *Id.* at 799, 653 S.E.2d at 892 (citing *Runyan*, 275 F.3d at 465).

However, electronic storage devices are unlike videotapes, and a search of digital data on a thumb drive is unlike viewing one continuous stream of video footage on a videotape. The container analogy may appropriately apply to a videotape, since its entire "contents" can be revealed by merely playing that videotape and inactively observing its footage run until completion; a searcher need not further manipulate the videotape to observe the entire video footage. Thus, the more-thoroughly-searched principle may reasonably apply to a police viewing all of the video footage of a partially viewed videotape. But there are analytically significant reasons to view thumb drive searches differently.

One thumb drive may store thousands of videos, and it may store vastly more and different types of private information than one videotape. Data stored on a thumb drive may be concealed among an unpredictable number of closed digital file folders, which may be further concealed within unpredictable layers of nested subfolders. A thumb drive search that may require navigating through numerous closed file folders and subfolders is significantly more invasive and complex than a search of viewing one continuous stream of footage on a videotape. Based on a thumb drive's ever-expanding storage capacity, its potential to hold vastly more and distinct types of private information, and the complexity involved in searches of its digital data, we find *Robinson* and

the reasoning underlying our decision in that case simply inapplicable here. Accordingly, we decline to extend its container analogy to an electronic storage device and decline to apply the "opened the container" approach to authorize police to search through all of the digital data it may store.

In reaching this decision, we are guided by the substantial privacy concerns implicated in searches of digital data that the United States Supreme Court expressed in *Riley v. California*, 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014) (declining to extend the search-incident-to-arrest exception to police searches of digital data on cell phones). In *Riley*, the Court expressly rejected the analogy that a cell phone should be treated like a single container for Fourth Amendment purposes. *Id.* at 2488–89. In addressing the United States' argument that "a search of all data stored on a cell phone is 'materially indistinguishable' from searches of . . . physical items," the Supreme Court stated:

> That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Id.; *see also id.* at 2485 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in [a prior case]."). Since *Riley* was decided, this Court has relied on its guidance in rejecting the State's argument that a "GPS [device] should be viewed as a type of 'digital container' and treated the same as an address book, a wallet, or a purse" in the search-incident-to-arrest context. *See State v. Clyburn*, 240 N.C. App. 428, 435, 770 S.E.2d 689, 695 (2015) (holding that a search of the digital contents of a GPS was not a valid search incident to arrest).

While this is a private-search exception case, not a search-incident-to-arrest exception case, *Riley*'s guidance that the nature of an electronic device greatly increases privacy implications holds just as true, and it guides our decision in how best to apply a doctrine originating from the search of a container limited by physical realities to a search for

digital data on an electronic storage device that is not. *Cf. United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir. 2015) (relying on *Riley*'s guidance in applying the private-search doctrine to a laptop search), *aff'g*, 19 F. Supp. 3d. 753 (N.D. Ohio 2014); *see also United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015) (relying on *Riley*'s guidance in applying the private-search doctrine to a cell phone search), *cert. denied*, *Sparks v. United States*, 136 S. Ct. 2009, *and cert. denied*, *Johnson v. United States*, 137 S. Ct. 34 (2016).

Accordingly, we decline to extend the container analogy we applied in *Robinson* to searches of digital data on electronic storage devices. We hold that an electronic storage device should not be viewed as a single container for Fourth Amendment purposes. The trial court therefore erred by concluding that Jones's thumb drive search effectively frustrated defendant's expectation of privacy in the contents of the entire device. We turn now to whether the trial court's findings support its conclusion that Detective Bailey's search remained within the permissible scope of Jones's prior search and whether it was reasonable under the circumstances, and was, therefore, a valid warrantless search under the private-search doctrine.

D. Validity of the Thumb Drive Search Under the Private-Search Doctrine

[2] Defendant challenges the finding that "*[i]n addition* to the [granddaughter image] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions." (Emphasis added.) He contends this finding necessarily establishes that Detective Bailey's search unconstitutionally exceeded the scope of Jones's prior search because Jones never viewed those images and the granddaughter image was located in a different subfolder. The State contends that even if Detective Bailey's thumb drive search was "more thorough," it was not unconstitutionally excessive in scope under the private-search doctrine, because Detective Bailey had "virtual certainty" what contraband it contained. Because the private-search doctrine originated from an officer's physical search of the contents of a parcel box, which significantly differs from a digital search of data on an electronic storage device, we turn to the material facts of *Jacobsen* and its application of the private-search doctrine for guidance.

In *Jacobsen*, a Federal Express (FedEx) employee opened a damaged parcel package, a paper-wrapped cardboard box, which revealed that it contained crumpled newspaper covering a closed tube made of duct tape. 466 U.S. at 111, 104 S. Ct. at 1655. FedEx employees removed

the tube, cut it open, and discovered it contained zip-lock bags of white powder. *Id.* They summoned authorities to review the contents of the box, and replaced the plastic bags into the tube, and the tube and newspapers back into the box. *Id.* The responding Drug Enforcement Administration (DEA) agent saw that the repackaged box had a hole punched in its side and its top was open. *Id.* He removed the tube from the box, saw that one end of it had been slit open, removed the plastic bags from the tube, and then saw the white powder. *Id.* He then removed a trace of the white powder and conducted a field test confirming it was cocaine. *Id.* at 111–12, 104 S. Ct. at 1655.

The Court in *Jacobsen* addressed whether the DEA agent's warrantless search was valid under the Fourth Amendment. After articulating the private-search-doctrine standard, the Court began applying that doctrine by defining the scope of the FedEx employees' initial private search and then testing it against the DEA agent's subsequent one, in order to determine the extent to which the DEA agent's search invaded additional privacy interests and thus exceeded the scope of the FedEx employees' search. *Id.* at 118–20, 122, 104 S. Ct. at 1659–60, 1661. The Court explained that the FedEx employees' initial search, and the resulting invasions of privacy, "revealed that the package contained only one significant item, a suspicious looking tape tube[,]" and that "[c]utting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder." *Id.* at 115, 104 S. Ct. at 1657. Thus, the Court determined that the DEA agent's actions of removing the tube from the box, removing the plastic bags from the tube, and observing the white powder did not exceed the scope of the prior search, since "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120, 104 S. Ct. at 1660 (footnote omitted). Thus, "[i]t infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id.*

In analyzing the reasonableness of the DEA's warrantless search in light of what he knew from the FedEx employees' prior search, the Court explained that "[w]hen the first [DEA] agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder." *Id.* at 118, 104 S. Ct. at 1659. The Court further determined that "[e]ven if the powder was not itself in 'plain view' because it was still enclosed in so many containers and covered with papers," the DEA agent was authorized to search the contents of the box because "there was a *virtual certainty*

that nothing else of significance was in the package and that *a manual inspection* of the tube and its contents *would not tell [the DEA agent] anything more than he had already been told.*" *Id.* at 119–20, 104 S. Ct. at 1659 (emphasis added).

Accordingly, under *Jacobsen*'s beyond-the-scope test, judicial review centers on defining the precise scopes of both searches in order to determine whether a follow-up police search further invaded privacy interests and thus exceeded the scope of the prior private search. Further, under *Jacobsen*'s virtual-certainty requirement, where a private search does not leave incriminating evidence in plain view, judicial review of the reasonableness of a follow-up police search must be tested by the degree to which that officer had "virtual certainty" the privately searched item contained "nothing else of significance" other than the now non-private information, and that his inspection of that item "would not tell him anything more than" what the private searcher already told him.

Here, the trial court's only factual findings concerning the scope of both searches established the following:

> 3. . . . *[Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter,*. . . who appeared to be asleep and who was nude from the waist up with breasts displayed. . . .
>
> . . . .
>
> 6. Following his discussion with . . . [Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Jones]. . . . *The CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by [Jones] as containing the . . . granddaughter [image]*. This viewing in the CSI Unit confirmed what . . . [Jones] had told Detective Bailey that she had discovered on the flash drive. *In addition to the [granddaughter image] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.*

(Emphasis added.) Based on these findings, the trial court determined that "Detective Bailey's initial search and examination of the purple thumb drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough."

Jacobsen instructs that "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." 466 U.S. at 115, 104 S. Ct. 1657. Thus, the trial court should have made detailed findings on the exact scope of both Jones's and Detective Bailey's searches of the thumb drive's contents, in order to determine precisely the extent to which Detective Bailey's search may have exceeded Jones's earlier one. However, the State never presented any evidence, *see State v. Romano*, 369 N.C. 678, 800 S.E.2d 644, 654 (2017) (placing the burden on the State to prove there was no state action when a nurse drew the defendant's blood, or "that the seizure of the blood was not an act of the State and thus, was not subject to the Fourth Amendment's search and seizure analysis"), and the trial court never made any findings establishing exactly what folder(s) and/or subfolder(s) Jones or Detective Bailey searched. Nor did the trial court's findings describe what "other visual representations" Jones viewed, or whether Detective Bailey only viewed those particular images.

Although the trial court found that Detective Bailey viewed images in a folder Jones identified as containing the granddaughter image, it did not explore whether the images of partially or fully nude minors Detective Bailey allegedly viewed were located in another subfolder of images other than that which Jones searched. To the extent that they were, those images were not admissible under the private-search doctrine. *Cf. United States v. Kinney*, 953 F.2d 863, 866 (4th Cir. 1992) (holding drug evidence found during a follow-up police search of a closet inadmissible where the private search revealed only guns: "This phase of the search cannot be supported by Akers' prior private search because the fruits of [the officer's] search, the white powder and drug paraphernalia, were never discovered by Akers.").

Ordinarily, " 'when the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court.' " *State v. Ingram*, 242 N.C. App. 173, 180, 774 S.E.2d 433, 440 (2015), *disc. rev. denied*, *writ denied*, 369 N.C. 195, 791 S.E.2d 677 (2016) (quoting *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012)). "In such a situation, 'remand is necessary because it is the trial court that 'is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.' " *Ingram*, 242 N.C. App. at 180, 774 S.E.2d at 440 (quoting *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67). However, remand is not

required where "there are no material conflicts in the evidence" and "the superior court's order . . . contain[s] sufficient findings of fact to which this Court can apply the [applicable legal] standard." *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67; *see also Ladd*, ___ N.C. App. at ___, 782 S.E.2d at 403–04 (declining to remand for additional findings where there was no "conflicting evidence for the trial court to adjudicate" and the facts were "sufficient for our *de novo* review of the trial court's conclusions").

After carefully considering the suppression hearing evidence, we conclude that there were no material evidentiary conflicts and that the trial court's findings are sufficient for our *de novo* review of its ultimate conclusion that Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights. We conclude that findings on the precise scope of both searches are immaterial in this particular case, in light of the other findings establishing that *Jacobsen*'s virtual-certainty requirement was not satisfied and, therefore, Detective Bailey's search was unauthorized under the private-search doctrine. *Cf. Lichtenberger*, 786 F.3d at 490 (concluding that an officer's lack of "virtual certainty" he viewed the same child pornography images a private searcher viewed on the defendant's laptop dispositively established that his search was unconstitutional under the private-search doctrine).

Jacobsen further instructs that because Jones's prior search did not leave incriminating evidence in plain view, judicial review centers on whether Detective Bailey had "virtual certainty that nothing else of significance [except for the granddaughter image that Jones revealed to him] was in the [thumb drive] and that a[n] . . . inspection of the [thumb drive] and its [digital data] would not tell him anything more than he already had been told." 466 U.S. at 119, 104 S. Ct. 1659; *see also id.* at 120 n.17, 104 S. Ct. at 1660 n.17 (noting the "*significant . . . facts*" that "the container could no longer support any expectation of privacy" and "it was *virtually certain that it contained nothing but contraband*" (emphasis added)). This virtual-certainty requirement limits unfettered governmental searching through all of the digital data stored on an electronic storage device that is not known to contain only contraband.

Here, neither the State's evidence, nor the trial court's findings, established that Detective Bailey proceeded with any certainty, much less the virtual certainty required, that the thumb drive contained only the potential contraband that Jones had reported, nor that Detective Bailey's inspection of its contents would not reveal anything more than what Jones had told him. Rather, the findings establish that the only defining characteristic of the thumb drive was its purple color, which reveals nothing about the nature of its digital contents, and that

Detective Bailey knew the thumb drive contained "other visual representations" in addition to the one granddaughter image that was not obviously child pornography. According to Jones, those other representations were images of fully clothed adult women and children; defendant's housekeeper; and defendant's childhood friend as an adult, posing clothed and partially clothed. The trial court's findings establish that Detective Bailey did not search the thumb drive with the same level of "virtual certainty" contemplated by *Jacobsen* that the thumb drive only contained child pornography contraband, or that his inspection of its digital contents would not reveal private information that Jones had not already revealed to him.

In urging us to reach a different result, the State cites to our decision in *Robinson* and two other federal circuit courts of appeal cases to support its position that Detective Bailey's search did not materially exceed the scope of Jones's prior one because he merely examined the thumb drive more thoroughly. Those cases are distinguishable because the officers in those cases could be virtually certain the devices contained contraband.

In *Robinson*, based on the now non-private information revealed by the private searcher that portions of the videotape showed the defendant engaging in sexual activity with two minors, *see id.* at 796, 653 S.E.2d at 891, the officer could have virtual certainty the videotape contained only contraband and that his viewing of the entire footage would not reveal anything further. Here, contrarily, the only now non-private information Jones's search revealed was that the thumb drive contained, among several other images, only one potential contraband image, which was not obviously child pornography. The evidence showed that the thumb drive contained various folders and subfolders storing different types of private digital data and that the granddaughter image was stored in one subfolder among numerous other non-incriminating images. Unlike the officer in *Robinson*, Detective Bailey did not have the same sort of certainty that the thumb drive only contained contraband, or that his search would not reveal anything more than what Jones had reported. The State's other authority is similarly distinguishable. *See Runyan*, 275 F.3d at 464 (holding that police did not exceed the scope of a private search by examining more files on partially searched computer disks that a private searcher revealed contained child pornography); *Rann*, 689 F.3d at 836–37 (holding that police did not exceed the scope of a private search by examining more images on a memory card and zip drive that the police "could be substantially certain" contained child pornography based on the private searchers' reports).

Moreover, while the private-search doctrine "does not prohibit governmental use of . . . now nonprivate information[,]" it prohibits "use [of] information with respect to which the expectation of privacy has not already been frustrated." *Jacobsen*, 466 U.S. at 117, 104 S. Ct. at 1658–59. The trial court's findings establish that the only "now non-private information" Jones's search revealed was that the thumb drive contained only one potentially incriminating image of her granddaughter sleeping without a shirt. Because Jones's search never revealed that the thumb drive contained child pornography images, the private-search doctrine alone could not have authorized Detective Bailey to use that information for his warrant application.

Under the Fourth Amendment's reasonableness inquiry, " '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015) (quoting *Jacobsen*, 466 U.S. at 125, 104 S. Ct. at 1662 (alteration in original) (citation omitted)). The suppression evidence showed that Detective Bailey's search involved opening multiple closed folders and subfolders and scrolling through various non-incriminating files in search of one potential contraband image that was not obviously child pornography or overtly sexual in nature. The governmental interest alleged to justify the private-search exception to the warrant requirement was that of "merely avoiding the risk of a flaw in the [private searcher's] recollection," *Jacobsen*, 466 U.S. at 119, 104 S. Ct. at 1659, which carries little weight when balanced against the immense privacy interests at stake in the thumb drive search here, *see Riley*, 134 S. Ct. at 2488–91. Further, no risks supported an immediate search based on evidence preservation; the thumb drive was stored in an evidence locker. And thumb drives present no cognizable harm to police. *Id.* at 2485 ("Digital data stored on a cell phone cannot itself be used as a weapon. . . .").

"[T]he 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' " *United States v. Janis*, 428 U.S. 433, 446, 96 S. Ct. 3021, 3028, 49 L. Ed. 2d 1046 (1976) (citation omitted). "A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13, 88 S. Ct. 1868, 1875, 20 L. Ed. 2d 889 (1968). To hold that the evidence discovered during Detective Bailey's warrantless thumb drive search was admissible under the private-search doctrine may authorize unfettered police searching through all

of the digital data on an even more sophisticated electronic device that may contain greater quantities of distinct items of private information based merely on a private searcher viewing and revealing to police only one potentially incriminating file on that device. We therefore hold this evidence was inadmissible under the private-search doctrine and that Detective Bailey was prohibited from using it to support his warrant application.

In summary, although the trial court failed to make adequate factual findings concerning the exact scope of Jones's and Detective Bailey's searches through the thumb drive, its findings establish that Detective Bailey did not conduct his search with the requisite level of "virtual certainty" that the thumb drive contained only contraband or that his inspection of its contents would not reveal anything more than he already learned from Jones. Therefore, neither was Detective Bailey's warrantless thumb drive search authorized under the private-search doctrine, nor was he able to use the evidence he obtained during that search to support his warrant application. We thus hold that the trial court erred by concluding that Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights.

E. Probable Cause to Issue the Search Warrant

[3] Defendant next argues that without the illegally acquired information from Detective Bailey's search—that the thumb drive contained other images of minors posing in sexual positions—his warrant application failed to establish probable cause to issue the search warrant executed on the thumb drive that yielded the twelve incriminating images underlying his second- and third-degree sexual exploitation of a minor convictions. The State does not address the merits of this argument but contends that, because the evidence obtained during Detective Bailey's warrantless search was lawfully acquired pursuant to the private-search doctrine, the search warrant issued was valid.

> "The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause."

State v. McKinney, 361 N.C. 53, 59, 637 S.E.2d 868, 872 (2006) (emphasis omitted) (quoting *United States v. Giordano*, 416 U.S. 505, 554–55, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974) (Powell, J., concurring in part, dissenting in part) (citation omitted)). If excising illegally obtained information

from a warrant application would fail to supply probable cause to issue the search warrant, all evidence obtained from its execution must be suppressed as tainted fruit. *See, e.g.*, *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872 (citations omitted).

"The 'common-sense, practical question' of whether probable cause exists must be determined by applying a 'totality of the circumstances' test." *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597–98 (2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 543 (1983), and citing *State v. Arrington*, 311 N.C. 633, 637, 641, 319 S.E.2d 254, 257 (1984)). Thus,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, *there is a fair probability that contraband or evidence of a crime will be found in a particular place*. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed."

Id. at 664, 766 S.E.2d at 597–98 (emphasis added) (quoting *Gates*, 462 U.S. at 238–39, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548 (third and fourth alterations in original), as quoted in *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984)).

Striking the information Detective Bailey acquired during his warrantless search—that the thumb drive contained "several fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions"—all that remained to provide a "fair probability that contraband" would be found in the thumb drive, other than Jones's allegations concerning two incidents involving defendant in 2001, is Detective Bailey's allegation that Jones reported the thumb drive "contained pictures of [defendant] and other women engaged in sexual activities"; "pictures of them in her home[ ]"; and "pictures of her 9 year old granddaughter . . . in bed[,]" where she "appeared to be sleeping and she was exposed (Nude) from the waist up."

However, as defendant concedes, because the trial court determined that the evidence acquired by Detective Bailey's warrantless search was lawful under the private-search doctrine, the trial court never determined whether striking that information from his application would still supply probable cause to issue the search warrant. Further, the trial court's order contains no findings on the issue of whether it would have

found the evidence seized pursuant to the warrant admissible absent the tainted allegations acquired by Detective Bailey's unlawful thumb drive search. In such a situation, our Supreme Court has instructed that "remand to the trial court [is] more appropriate than unilateral appellate court determination of the warrant's validity[.]" *McKinney*, 361 N.C. at 64, 637 S.E.2d at 875 (citation omitted).

In *McKinney*, our Supreme Court was presented with an issue of whether omitting unlawfully obtained information from a search warrant application would have still supplied probable cause to issue the warrant. However, because the trial court's order "contained limited findings of fact," none of which "indicate[d] whether the trial court would have found the evidence seized pursuant to the warrant admissible even if the tainted evidence had been excised from the warrant application," *id.* at 63, 637 S.E.2d at 875, the Court determined that "the record . . . [did] not reveal the extent to which consideration of the illegally obtained information affected the trial court's determination that the evidence seized pursuant to the warrant should not be suppressed," *id.* Accordingly, the Court "decline[d] to speculate as to the probable outcome . . . had the trial court analyzed the validity of the search warrant based only on the legally obtained information on the warrant" and instead "afford[ed] the trial court an opportunity to evaluate the validity of the warrant" in the first instance. *Id.* at 65, 637 S.E.2d at 876.

Accordingly, under *McKinney*, we reverse the trial court's ruling on defendant's suppression motion and remand this matter to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search.

V. Conclusion

This case presents a novel issue for this Court of how to apply the private-search doctrine to an after-occurring police search for potential digital contraband on a privately searched electronic storage device. Guided by the *Riley* Court's emphasis on the tremendous privacy interests implicated in searches of digital data on a cell phone, and its express rejection of the analogy that a cell phone should be viewed as a single container in search-incident-to-arrest cases, as well as this Court's prior ruling in *Ladd*, we conclude that the "closed-container" approach we applied to the videotape search in *Robinson* should not be extended to searches for digital data on an electronic storage device. Accordingly, we hold that the trial court erred by concluding Jones's prior viewing of the thumb drive effectively frustrated defendant's expectation of privacy in its entire contents.

Additionally, while the trial court's findings did not adequately address the scope of both searches in order precisely to determine the extent to which Detective Bailey's search may have exceeded the scope of Jones's earlier one, we decline to remand the matter for more detailed findings. We conclude that such findings would be immaterial in light of the other findings establishing that Detective Bailey's search was not authorized under the private-search doctrine because he did not conduct his search with the requisite level of "virtual certainty" contemplated by *Jacobsen*. Since the additional information Detective Bailey acquired during his warrantless search was never revealed to him by Jones, the private-search doctrine did not permit him to use that information to support the warrant application. Accordingly, we hold the trial court erred by concluding the private-search doctrine authorized Detective Bailey's warrantless thumb drive search and, therefore, did not violate defendant's Fourth Amendment rights.

However, because the record "did not reveal the extent to which consideration of the illegally obtained information affected the trial court's determination that the evidence seized pursuant to the warrant should not be suppressed," *McKinney*, 361 N.C. at 63, 637 S.E.2d at 875, we reverse the ruling on defendant's suppression motion and remand this matter to the trial court with instructions to determine whether excising the evidence acquired during Detective Bailey's unlawful warrantless search would have supplied probable cause to issue the search warrant to forensically examine the thumb drive.

REVERSED IN PART AND REMANDED.

Judge TYSON concurs.

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

STROUD, Judge, concurring in part and dissenting in part.

The majority opinion considers thirteen images: (1) the "granddaughter image"[1] which was Ms. Jones's primary concern when she

1. I believe the majority's use of the term "granddaughter image" is misleading because the child in the image is not defendant's granddaughter; this is important in the consideration of probable cause because any implication of familial relationship or affection between the child in the image and defendant is false. Defendant was the boyfriend of the child's grandmother. Nonetheless, I will refer to the image as the "granddaughter image" to avoid confusion.

came to the Sheriff's Department because it was her granddaughter; (2) two images of nude prepubescent girls in sexual positions[2] ("two seen images") discovered in the process of confirming the information law enforcement officers were given about the granddaughter image; (3) and the remaining ten ("ten deleted images") discovered through a data recovery method because they had been deleted from the thumb drive. It is important to distinguish the three categories of photographs from the outset because Detective Bailey's knowledge at certain points in time is relevant to the legal analysis and to the question remanded to the trial court regarding probable cause.

It is also essential to understand the convictions regarding the different categories of images. As I will further discuss later in this dissent a major flaw in this appeal is that we have none of the images in the record before us, making it difficult to pair a particular image with a specific conviction. We can determine from the indictment and jury instructions that defendant was convicted of secretly peeping based upon the granddaughter image. It also appears that a second-degree exploitation conviction was likely based upon the granddaughter image. As noted by the majority there were thirteen photographs. Defendant was convicted of twelve counts of third-degree sexual exploitation, one count of second-degree sexual exploitation, and one count of secretly peeping, for fourteen total convictions. Logically this could mean the second-degree exploitation conviction was based upon the granddaughter image and the twelve third-degree exploitation convictions were based upon the twelve images other than the granddaughter image. So I will assume that as to the granddaughter image defendant was convicted of secretly peeping and second-degree sexual exploitation, and as to the two seen images and the ten deleted images, defendant was convicted of twelve counts of third-degree sexual exploitation.[3]

---

2. The majority opinion never states that Detective Bailey saw *two* other concerning images, but it does state there were twelve images at issue in addition to the granddaughter image, and ten of the twelve Detective Bailey could not have seen while looking for the granddaughter image because they had been deleted and were only discovered after the search warrant was issued and further analysis was performed on the thumb drive. This means there were two images at issue Detective Bailey would have seen while looking for the granddaughter image and because the trial court found as an unchallenged fact that while looking for the granddaughter image "Detective Bailey saw *photographs* of other nude or partially nude prepubescent females posing in sexual positions[,]" (emphasis added), those photographs must be the two not mentioned by the majority.

3. I also make this assumption because it is the defendant's duty to make sure the record is complete and includes all of the information necessary to understand the issues presented. *See N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010).

Now that I have clarified the images and convictions associated with the images, I will address the reasons for my dissent. I would affirm the trial court's denial of defendant's motion to suppress the granddaughter image based upon the private search doctrine, and I would find no error as to defendant's convictions for secretly peeping and second-degree exploitation of a minor. I dissent in part because there is no need to remand for any issue for the convictions based upon the granddaughter image. Because Detective Bailey found the two seen images while verifying Ms. Jones's report of the granddaughter image, I again would affirm the trial court in denying defendant's motion to suppress based upon the private search doctrine. I also would find no error on the third-degree sexual exploitation of a minor convictions entered based on the two seen images, and again remand is unnecessary on those images. As to the remaining ten deleted images and the ten related convictions for third-degree sexual exploitation of a minor, I agree with the majority these images do not fall under the private search doctrine and remand is necessary for the trial court to consider whether Detective Bailey had probable cause to obtain the search warrant. As to the ten deleted images and their related convictions, I concur in result only.

I. Evidence Not in the Record on Appeal

As I have mentioned, this appeal was filed on issues arising from thirteen photographic images and none were provided to this Court. If a party is seeking relief based upon a piece of evidence, that evidence must be in the record before this Court:

> Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal and any other items filed with the record in accordance with Rule 9(c) and 9(d).
>
> > The Court of Appeals can judicially know only what appears of record. Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court.

N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010) (citations, quotation marks, and ellipses omitted). The burden is on the appellant to ensure that all the evidence necessary to understand his argument is in our record. *See generally id.* Defendant would prefer that we lump all of the images together in the legal analysis – as the majority has – since that

would increase his chances of having more of his convictions reversed. But defendant should not benefit from any deficiency in the record.

II. Granddaughter Image

As this Court has noted before, "It is said that a picture is worth a thousand words. In this case, a picture would be worth several thousand words[.]" *State v. Sutton*, 232 N.C. App. 667, 673, 754 S.E.2d 464, 468 (2014). None of the thirteen images were provided to this Court, and on the granddaughter image specifically, this Court should make no assumptions of potential innocence about that image since we have not seen it. Perhaps someone could imagine an innocent reason for an unrelated adult male to have a photograph of his girlfriend's nine-year-old granddaughter's breasts stored in his photographs; someone could also easily imagine other reasons for the photograph and those reasons would provide not only probable cause for a future search warrant based upon the image but also grounds for a criminal conviction. The jury saw the image and they determined it violated North Carolina General Statute § 14-202(g) and convicted defendant of possessing a photographic image from peeping; this conviction means the jury found that defendant had taken the photograph "for the purpose of arousing or gratifying the sexual desire[.]" The "purpose of arousing or gratifying the sexual desire" is an element of the crime which the trial court instructed the jury on, and the jury unanimously found the granddaughter image to have been taken for such a purpose.

The majority's characterization of the granddaughter image as "not obviously child pornography" is perhaps correct but misleading as it ignores the fact that a partially nude photograph of a child may violate the law, as this one did for secret peeping and apparently second degree sexual exploitation, even if it is not "obviously pornographic." My primary concern is that the majority's focus on the term "pornography" could lead the trial court astray on remand. The trial court need not consider the granddaughter image to be child pornography to find probable cause for issuance of the warrant. It is true that the warrant affidavit alleged probable cause to search for "images of child pornography[,] but it also alleged probable cause to believe the search may reveal "evidence of additional victims and crimes committed in this case."

As the majority notes, the magistrate must be able

> to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place and the trial court

> must review to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

State v. Benters, 367 N.C. 660, 664, 766 S.E.2d 593, 597–98 (2014) (citation, quotation marks, ellipses and brackets omitted).

Even if all of the other images are excluded from consideration, the granddaughter image along with the other information in the warrant application and affidavit could support a finding of probable cause to issue the search warrant. Detective Bailey averred that in 2001 "there was an incident regarding child pornographic pictures[;]" in 2001 Ms. Jones's daughter, whom she had with defendant, had claimed defendant had "touched me down there[;]" and Ms. Jones also turned over a floppy disk drive from the 2001 "incidents" which she reported contained "children engaged in multiple sex acts." The passage of time since 2001 does not eliminate the potential import or relevance of the "incidents" of potential sexual molestation of a child and possession of child pornography in considering probable cause for a search warrant. And because the granddaughter image *is* evidence of criminal activity, it should also be an important part of the trial court's analysis on remand of whether there was probable cause for issuance of a search warrant to determine if the thumb drive may contain more similarly incriminating images.

III. The Two Seen Images

Turning now to the two images Detective Bailey saw prior to the granddaughter image, while I generally agree with the majority's analysis of the private search doctrine and determination that a thumb drive is not a single container, the majority's analysis overlooks the fact that Detective Bailey attempted to limit his initial search to find the image reported by Ms. Jones. Detective Bailey acted within the proper scope of the private search doctrine in his discovery of the granddaughter image and the two seen images as he was trying to confirm the existence of the granddaughter image. Ms. Jones brought the thumb drive to the Sheriff's Department. Ms. Jones did not specify which folder or sub-folder her granddaughter's photo was in, nor did she seem aware there were separate folders on the drive. Ms. Jones testified at the suppression hearing:

> Q. Okay. So, as you clicked on each folder or subfolder, you would open them up and see what the pictures were?
>
> A. Yeah, the *pictures were all in one folder* and then the other folders were like movies because he likes military movies and, you know, action movies and that -- that was it.

> Q. Do you remember the name of the folder or any of the sub-folders?
>
> A. *I don't think the folders had a title*. It was just a thumb – it's the title of the thumbdrive, purple rain.

(Emphasis added.)

Since Ms. Jones could not direct Detective Bailey to a particular folder, he could not go directly to the image but conducted his search reasonably considering the information Ms. Jones had given him. It is true, as the majority points out, that the thumb drive had many folders and sub-folders, but Ms. Jones did not understand how the data was organized on the drive.[4] We should not require individuals who take digital media to law enforcement and report potential sexual exploitation or abuse of children to be IT experts. Ms. Jones's understanding was that the thumb drive overall was entitled "purple rain" and she did not realize that "purple rain" was the entire drive which contained folders and sub-folders. The trial court also found in its order that Detective Bailey attempted to confirm the existence of the "granddaughter image" and discovered "photographs of other nude or partially nude prepubescent females posing in sexual positions." Detective Bailey specifically testified:

> Q. All right. So, at that point were you verifying what Ms. Jones had told you she had observed on the flashdrive?
>
> A. Yes.
>
> Q. And when you were able to verify what she told you she had seen on the flashdrive, what did you do?
>
> A. Then I completed my search.

Thus, the only evidence before the trial court was that Detective Bailey discovered the two seen images of prepubescent girls in sexual positions *before* he found the granddaughter image because upon discovering that image he *stopped* his search.

---

4. The trial court found that "[t]he CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by Ms. Jones as contained the picture of her granddaughter[.]" "Folder" was the word Ms. Jones used in her testimony, but in actuality she only identified the "drive" – the purple rain thumb drive – and not the folder. There were many folders and sub-folders to choose from within the purple rain thumb drive, and Ms. Jones had not clarified to Detective Bailey which one contained the granddaughter image.

"[T]here is a remarkable dearth of federal jurisprudence elaborating on what types of investigative actions constitute exceeding the scope" of a private search. *U.S. v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001) (quotation marks and footnote omitted). The same is true of state court jurisprudence. The unique factual situations of each private search and the particular "container" involved make cases difficult to compare. I have sought without success to find another case with a factual situation as presented here, where a law enforcement officer engages in a reasonably limited search of a drive only to confirm what the private searcher has reported but sees other evidence during that search because the private searcher's report on the organization of the drive was inaccurate or incomplete. But in *Runyan* the Fifth Circuit set out what I deem to be a reasonable "guideline" in considering the issue before us:

> The guideline that emerges from the above analysis is that the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that *container based on the statements of the private searchers*, *their replication of the private search*, *and their expertise*. This guideline is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule discourages police from going on fishing expeditions by opening closed containers. Any evidence that police obtain from a closed container that was unopened by prior private searchers will be suppressed unless they can demonstrate to a reviewing court that an exception to the exclusionary rule is warranted because they were substantially certain of the contents of the container before they opened it.

Id. at 463–64. (emphasis added).

Applying this "guideline" here, the purple thumb drive was "a closed container" which was opened by Ms. Jones, a private searcher. *Id.* at 463. Ms. Jones's statement to Detective Bailey was that the images were all in one folder, and she did not believe the drive had multiple folders

or sub-folders. Detective Bailey was "substantially certain" the drive would contain the "granddaughter image" as described by Ms. Jones. *Id.* Detective Bailey sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking. Detective Bailey saw other images before he found the one he was seeking, but upon finding the granddaughter image he stopped and sought a search warrant. Detective Bailey did not go on a "fishing expedition" *after* finding the granddaughter image. *Id.* at 464. This case differs from any other I have been able to find because Detective Bailey limited his search to a reasonable effort to find exactly what Ms. Bailey reported and then stopped and got a search warrant.

Due to Detective Bailey's attempts to limit his search only to seeking the evidence Ms. Jones had brought to his attention, the majority's analysis wrongly requires perfection from a private searcher who reports finding contraband and a law enforcement officer who seeks to confirm existence of contraband as reported by a private searcher. Ms. Jones did not understand the internal organization of the thumb drive but described it to Detective Bailey as best she could. And by the majority's analysis, unless Detective Bailey had gone directly to the specific granddaughter image identified by Ms. Jones upon opening the drive, he would unconstitutionally exceed the scope of her private search. But had Detective Bailey attempted to get a search warrant without looking at the thumb drive to confirm Ms. Jones's report, he would not have had enough information to find probable cause to support a search warrant. If we require perfection of private searchers and law enforcement officers, law enforcement officers would have to get a search warrant before trying to confirm the private searcher's report of information on any type of digital media or device. Otherwise, they risk inadvertently finding an incriminating image before finding the one reported and then all of the evidence may be suppressed. The majority places law enforcement officers in a Catch 22 of being unable to confirm the private searcher's report without a search warrant because of the risk of accidental discovery of an image other than the one reported but being unable to get a search warrant without confirming the report.

The granddaughter image and two seen photos Detective Bailey found while searching for the granddaughter image fall within the scope of the private search doctrine, and they too were properly not suppressed by the trial court. Furthermore, the granddaughter image and the two seen images would support probable cause for the other ten

deleted images, although I agree with the majority that is a determination the trial court must ultimately make for itself.

IV. The Ten Deleted Images

Last, as to the ten deleted images discovered after the search warrant was issued and upon forensic analysis of the drive, I agree that the private search doctrine did not extend to these images. The trial court should use the information in the search warrant affidavit and application, the granddaughter image, and the two seen images to determine whether there was probable cause to issue the search warrant which ultimately led to the discovery of the ten deleted images. I therefore concur with the majority to remand to the trial court to determine probable cause for issuance of the search warrant for the ten deleted images.

In summary, I dissent on remand regarding the images and related convictions for secretly peeping and second-degree exploitation as to the granddaughter image and the convictions of third-degree exploitation as to the two seen images. I concur in remanding for a determination of probable cause as to the ten deleted images.

STATE OF NORTH CAROLINA
v.
DAVID ALLEN VETTER

No. COA17-524

Filed 6 February 2018

1. Burglary and Unlawful Breaking or Entering—misdemeanor breaking or entering—motion to dismiss—lack of consent—access to garage but not interior residence

The trial court did not err by denying defendant's motion to dismiss a charge of misdemeanor breaking or entering where the State presented substantial evidence that defendant lacked consent to enter the residence. Defendant's ex-girlfriend testified that defendant had permission to access only the garage in order to collect his belongings; defendant never possessed a key to the home; defendant was not given the new code to the security system after their break-up; the ex-girlfriend activated the alarm system when she saw him in her driveway; and defendant had to kick in a door to gain entry into the residence.

2. Trespass—domestic criminal trespass—motion to dismiss—sufficiency of evidence

The Court of Appeals rejected defendant's arguments that the trial court erred by denying his motion to dismiss a charge of domestic criminal trespass. First, his ex-girlfriend's conduct was sufficient to allow the jury to conclude that defendant was forbidden from entering the interior of the residence; second, defendant's limited permission to enter the garage did not render him incapable of trespassing on a separate area of the premises; third, the ex-girlfriend did not have to be present in her home at the time of the trespass for the premises to be "occupied" pursuant to the statute.

3. Criminal Law—clerical error—judgment—incorrect crime

Where the trial court's judgment erroneously stated that defendant was convicted of misdemeanor larceny rather than misdemeanor breaking or entering, the Court of Appeals remanded the case for correction of the clerical error.

Appeal by defendant from judgments entered 30 November 2016 by Judge Nathaniel J. Poovey in Lincoln County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Edward Eldred for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether a defendant can lawfully be convicted of the offenses of domestic criminal trespass and breaking or entering where he possessed the prior consent of the victim to enter some — but not all — of the premises at issue. David Allen Vetter ("Defendant") appeals from his convictions for domestic criminal trespass, misdemeanor breaking or entering, and injury to real property. Because we find that Defendant exceeded the scope of the permission that had been granted to him, we affirm his convictions.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: Defendant dated Brittany Poole for approximately two years and lived with Poole in her Lincolnton, North Carolina home from 2013 until April 2015. Despite the fact that Defendant never possessed a key

to the house, Poole provided him with a garage door opener and generally left the door leading from the garage to the interior of the residence unlocked during the time period when Defendant was living with her. The home also had a security system that could be activated and deactivated by entering a code on a keypad. Defendant possessed the code to the security system while he lived at the residence.

In April 2015, Poole ended the relationship and ordered Defendant to leave her home. Although he moved out of the residence, Defendant did not take all of his belongings with him. Poole placed the majority of Defendant's possessions in the garage. In addition, his boat remained in the driveway. On a number of occasions thereafter, she would "tell [ ] him to come get his things." Poole testified that although Defendant had permission to enter the garage to retrieve his belongings he was not permitted to go inside the interior of the home.

On 11 June 2015, Defendant arrived unannounced at the residence. He spoke to Poole in the driveway as he was securing his boat to his truck. She asked if he was there to take his boat, and Defendant responded that he had also come "to get some other stuff." Following this interaction, Poole activated her home security system and left to visit a friend in the nearby town of Maiden. Using an application on her cell phone, she was able to observe Defendant's actions by watching a video stream from cameras that had been installed at her residence as part of her home security system. She stopped watching once Defendant drove away with the boat.

Unbeknownst to Poole, shortly after leaving the residence Defendant returned to her home. Poole subsequently received a call from the security company informing her that her security alarm had been triggered. A company representative asked her if she wanted the police to be notified, and she responded in the affirmative. Poole returned to the residence and discovered that the door leading from the garage to the interior of the house was "completely kicked in," although nothing was missing.

Shortly thereafter, Deputy William Payne of the Lincoln County Sheriff's Office arrived at the residence. Using her cell phone, Poole accessed a video recording from the security cameras and viewed the video with Deputy Payne. The video showed a person entering the home through the broken interior garage door and attempting to turn off the alarm system before leaving the residence. Poole identified Defendant as the person shown on the video.

Defendant was indicted by a Lincoln County grand jury on 14 March 2016 for felony breaking or entering, domestic criminal trespass, and

injury to real property. A jury trial was held beginning on 29 November 2016 before the Honorable Nathaniel J. Poovey in Lincoln County Superior Court.

At trial, Poole testified on direct examination, in pertinent part, as follows:

> [PROSECUTOR]: Okay. Who made the decision for David Vetter to leave your home in April?
>
> [POOLE]: I mean, I told him to leave and he left, except his things were still at the home.
>
> . . . .
>
> [PROSECUTOR]: Okay. And as of June of 2015, what property, if any, did David Vetter still have at your home?
>
> [POOLE]: A lot of stuff. The garage was half filled with his stuff. There was stuff underneath my house and his daughter's bed suit was in the home.
>
> [PROSECUTOR]: Okay. And did he have permission to go in your garage to get any of that --
>
> [POOLE]: Yes.
>
> [PROSECUTOR]: -- stuff? Did he have permission to go into your home --
>
> [POOLE]: No.
>
> [PROSECUTOR]: -- inside your house to get any of that stuff --
>
> [POOLE]: No.
>
> . . . .
>
> [PROSECUTOR]: Okay. And did David Vetter have any -- have permission to take any of your items from within your home?
>
> [POOLE]: No.
>
> [PROSECUTOR]: Okay. And just tell the jury, if you would, in a little more detail about what happened while David Vetter -- while you were there at your home on June 11 and David Vetter was there.

[POOLE]: I walked out to get into my vehicle. I noticed he was there hooking his boat up. I walked back inside, locked my door, set the alarm, and left.

[PROSECUTOR]: And when you say "lock your door," which door?

[POOLE]: The garage door which I normally leave unlocked, I locked it.

[PROSECUTOR]: Why did you do that that day?

[POOLE]: Because I knew he was there and he had no reason to be inside the house.

. . . .

[PROSECUTOR: . . . Was there any conversation about him going in the house?

[POOLE]: No.

[PROSECUTOR]: Okay. And again, did he have permission to go into your house?

[POOLE]: No.

. . . .

[PROSECUTOR]: Okay. Now, you said, I believe, that you set your alarm with an app on your phone.

[POOLE]: Uh-huh.

[PROSECUTOR]: Did you have an occasion while you were there to do anything else in regard to your alarm?

[POOLE]: I watched him. I watched him on the outside cameras get the boat and leave, but I pretty much quit watching after that. And it was probably not even 20 minutes later that the alarm company called me to say, "Your alarm is going off. Do you want us to send the police?" And I said, "Yes. My ex-boyfriend has been there."

[PROSECUTOR]: Okay. And if you would, describe for the jury your alarm system, where you got it and how it was set up.

[POOLE]: It's CPI. They came in and set it all up.

[PROSECUTOR]: And do you know how to work that alarm system?

[POOLE]: Uh-huh.

[PROSECUTOR]: And how do you work that alarm system?

[POOLE]: Well, there's a keypad at the garage door that you can set it with, or I generally use the app. It's the easiest thing. I can watch the cameras from the app. I can set it. I can turn it on, off, delay it, whatever.

. . . .

[PROSECUTOR]: Okay. And did you -- while you were at the other address in Maiden, again, tell the jury what use, if any, you made of that app and how you did that.

[POOLE]: All I did was set the alarm and I left. And I watched the outside cameras to see that the boat and the truck left. But pretty much after that I quit watching it. I assumed he got the boat and he was not coming back.

[PROSECUTOR]: Okay. So did you actually see [him] leave on the app?

[POOLE]: Uh-huh.

. . . .

[PROSECUTOR]: Now let me be clear: So there were items in the garage that he could get?

[POOLE]: Uh-huh.

[PROSECUTOR]: But did he have permission to come into your house to get any items?

[POOLE]: He didn't need to be in the home. He didn't live there. He had plenty of stuff to get outside in my garage and underneath my home that were his that he could have taken.

. . . .

[PROSECUTOR]: But were those things limited -- Were you fine with him getting anything other than the things that he was getting out of the garage?

> [POOLE]: No.
>
> . . . .
>
> [PROSECUTOR]: And did you ever on June 11 of 2015 give David Vetter permission to come within the main part of your home past the garage?
>
> [POOLE]: He was allowed to get his belongings from the garage.
>
> [PROSECUTOR]: Okay. But to come -- to come into --
>
> [POOLE]: To come in the house?
>
> [PROSECUTOR]: -- past the garage?
>
> [POOLE]: No. No.
>
> [PROSECUTOR]: And was he given permission without your presence to take any items at all from your house?
>
> [POOLE]: Not from in the home.

On cross-examination, the following exchange occurred between Poole and Defendant's counsel:

> [DEFENDANT'S COUNSEL]: Okay. You said this morning I think that at some point you gave Mr. Vetter notice to leave.
>
> [POOLE]: Uh-huh.
>
> [DEFENDANT'S COUNSEL]: Am I remembering that right?
>
> [POOLE]: Uh-huh.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: Okay. When did you give him that notice to leave?
>
> [POOLE]: April, May, something like that. End of April, beginning of May.

At the close of the State's evidence, Defendant moved to dismiss all three charges based on insufficiency of the evidence. The trial court denied Defendant's motion except as to the felonious breaking or entering charge and instead submitted the lesser included offense

of misdemeanor breaking or entering — along with the remaining two charges — to the jury.

On 30 November 2016, the jury convicted Defendant of misdemeanor breaking or entering, domestic criminal trespass, and injury to real property. The trial court consolidated the breaking or entering and domestic criminal trespass convictions and sentenced Defendant to 45 days imprisonment, suspended the sentence, and placed him on supervised probation for 24 months. The court also sentenced Defendant to 45 days imprisonment for the injury to real property conviction, suspended the sentence, and placed him on supervised probation for 24 months. Defendant filed a timely notice of appeal.

Analysis

Defendant argues that the trial court erred in denying his motion to dismiss the misdemeanor breaking or entering and domestic criminal trespass charges based on insufficiency of the evidence. "A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 508 (2016). On appeal, this Court must determine "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[.]" *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).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

I. Breaking or Entering

[1] Defendant contends that the trial court erred in denying his motion to dismiss the misdemeanor breaking or entering charge because the State failed to present substantial evidence that he lacked consent to enter the residence. Specifically, he argues that his entry into the building was complete once he entered the garage and that his presence there was lawful based on Poole's prior consent.

Misdemeanor breaking or entering "is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O' Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985) (citation omitted). N.C. Gen. Stat. § 14-54(c) provides that for purposes of the crime of breaking or entering the term " 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c) (2017). "Entry under this statutory crime has consistently been held to mean entry without the owner's consent." *State v. Boone*, 297 N.C. 652, 658, 256 S.E.2d 683, 687 (1979).

It is well established that for purposes of the crime of breaking or entering a person can possess consent to enter a portion — but not the entirety — of a building. *See*, *e.g.*, *State v. Rawlinson*, 198 N.C. App. 600, 679 S.E.2d 878 (2009); In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414 (2008). The defendant in *Rawlinson* was convicted of breaking or entering a business office attached to the retail area of a video store open to the public. *Rawlinson*, 198 N.C. App. at 604, 679 S.E.2d at 881. The State presented evidence that "members of the general public were only permitted entrance into the office when invited and accompanied by an employee of the video store." *Id.* at 610, 679 S.E.2d at 884. Because the defendant in *Rawlinson* was neither invited nor accompanied by an employee at the time he entered the office, we held that he lacked consent to enter for purposes of N.C. Gen. Stat. § 14-54. *Id.*

Likewise, in *S.D.R.* the defendant — who was convicted of felonious breaking or entering — was a participant in an after-school program at the Anson County Cooperative Extension Service. *S.D.R.*, 191 N.C. App. at 554, 664 S.E.2d at 417. Although asked to wait in the building's library by a staff member on the day in question, the defendant instead crossed the hall and entered the director's office where he proceeded to steal money from the director's purse. We noted that "[a]lthough the Extension is a public building that houses a public agency . . . the evidence does not show that [the director's] job functions necessarily require the general public to have access to her office or that members of the general public generally use [her] office." *Id.* at 558, 664 S.E.2d at 419. As a result, we concluded that the defendant lacked consent to enter the office. *Id.* at 559, 664 S.E.2d at 420.

Here, Poole testified that while Defendant was permitted to have access to the garage in order to collect his belongings he lacked

permission to enter the interior of the residence. Although Defendant retained a garage door opener after moving out of the home, he never possessed a key to the home and was not given the new code to the alarm system after Poole changed it following their break-up. Furthermore, Poole activated the alarm system upon seeing Defendant in her driveway on 11 June 2015 before she left. Finally, the fact that Defendant had to kick in the door in order to gain entry into the residence supports the proposition that he lacked permission to enter the home.

Therefore, we hold that the State presented sufficient evidence that Defendant lacked consent to enter the interior of the residence. *See State v. Thompson*, 59 N.C. App. 425, 427, 297 S.E.2d 177, 179 (1982) ("[T]estimony that the outside key had been removed to prevent the daughter from breaking in again, and that the daughter was not welcome when the key was removed . . . clearly indicated the victims' lack of consent to their daughter's entry in their absence without an express grant of permission."), *appeal dismissed and disc. review denied*, 307 N.C. 582, 299 S.E.2d 650 (1983). Accordingly, the trial court properly denied Defendant's motion to dismiss the misdemeanor breaking or entering charge.

II. Domestic Criminal Trespass

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the domestic criminal trespass charge. N.C. Gen. Stat. § 14-134.3 provides, in pertinent part, as follows:

> (a) Any person who enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse or by a person with whom the person charged has lived as if married, shall be guilty of a misdemeanor . . . .

N.C. Gen. Stat. § 14-134.3(a) (2017).

Defendant initially contends that the statute does not proscribe mere entry "without permission." Rather, he argues, "it criminalizes entry only after an express prohibition." According to Defendant, he was never "forbidden" from entering the interior of the residence because Poole never expressly prohibited him from doing so.

The term "forbid" is not defined in N.C. Gen. Stat. § 14-134.3. However, our Supreme Court has held that "[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary

meaning of words within a statute." *State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 449 (2009) (citation and quotation marks omitted).

Webster's Ninth New Collegiate Dictionary defines "forbid," in part, as "to hinder or prevent as if by an effectual command." *Webster's Ninth New Collegiate Dictionary* 482 (9th ed. 1991). Here, Poole ended her relationship with Defendant in April 2015 and ordered him to leave her residence. She then reaffirmed through her actions on 11 June 2015 the fact that Defendant was not allowed to go inside the house by locking the door and activating her alarm system upon discovering Defendant in her driveway. Her conduct served to prevent him from entering the interior of the residence and functioned as a prohibition against him doing so. Thus, we are satisfied that the State introduced sufficient evidence from which a rational juror could have found that Defendant was forbidden from entering Poole's home for purposes of N.C. Gen. Stat. § 14-134.3.

Defendant further asserts that he did not commit domestic criminal trespass because (1) his entry upon the *premises* occurred at the time he initially drove onto Poole's driveway; and (2) that entry took place in accordance with prior permission from Poole for him to return to the home to retrieve his belongings. Thus, he contends, because he had Poole's consent to enter the premises in the first place it necessarily follows that he could not have been guilty of domestic criminal trespass.

This argument fails for essentially the same reasons as his argument regarding his breaking or entering conviction. Although the "premises" occupied by Poole included both her home and the surrounding curtilage, the specific portion of the premises that Defendant was forbidden from entering was the interior of Poole's home. She had granted him limited permission to enter the garage in order to collect his belongings, but this consent never extended to the inside of the residence. Therefore, the fact that Defendant initially entered a *portion* of the premises with Poole's consent did not render him incapable of later trespassing upon a separate part of the premises where his presence was forbidden.

Finally, Defendant argues that because Poole was not physically present at the time he entered the interior of her home the statute's requirement that the premises be "occupied" at the time of the trespass was not satisfied. In support of this contention, Defendant cites N.C. Gen. Stat. § 14-34.1 (criminalizing the act of discharging a firearm "into an *occupied* dwelling") (emphasis added) and N.C. Gen. Stat. § 14-202 (proscribing peeping "secretly into any room *occupied* by another person") (emphasis added) as examples of statutory crimes that use the word "occupied" to require the victim's actual physical presence.

Defendant's reliance on these two statutes is misplaced, however, because the harms they seek to prevent could not logically occur absent the victim's physical presence at the time of the offense. With regard to the crime of domestic criminal trespass, conversely, the infliction of mental distress upon a victim resulting from a defendant's unauthorized entry into her home is a harm that can occur regardless of whether the victim is physically present at the time of the trespass. Accordingly, Defendant's argument lacks merit.

We recognize that the circumstances of this case differ from the typical fact pattern of a domestic criminal trespass prosecution in that the victim actually requested Defendant's presence upon a portion of her property. Nevertheless, viewing the evidence in the light most favorable to the State — as we must — a reasonable juror could have concluded that the State's evidence satisfied all of the elements of this offense. Therefore, we conclude that the trial court properly denied Defendant's motion to dismiss the domestic criminal trespass charge.

III. Clerical Error

[3] In his final argument, Defendant contends, and the State concedes, that a clerical error exists in the trial court's judgment. The judgment erroneously states that Defendant was convicted of misdemeanor larceny rather than misdemeanor breaking or entering. Accordingly, we remand for correction of this clerical error. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (citation and quotation marks omitted)).

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant's motion to dismiss. However, we remand for the correction of a clerical error in the judgment.

NO ERROR AT TRIAL; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
ROBERT E. WILKERSON

No. COA17-800

Filed 6 February 2018

Constitutional Law—right to speedy trial—Barker factors—full evidentiary hearing required

The trial court's prior speedy trial ruling in a robbery and murder case based on a previous remand was vacated, and defendant's motion for a speedy trial in a case that was delayed for nearly four years was again remanded for a full evidentiary hearing on the factors in *Barker v. Wingo*, 407 U.S. 514 (1972).

Appeal by defendant from order entered 1 February 2017 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 8 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.

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

TYSON, Judge.

Robert Earl Wilkerson ("Defendant") appeals from the denial of his motion to dismiss for violation of his right to a speedy trial. The superior court failed to adequately weigh and apply the factors in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 103 (1972), after our previous remand, and failed to fully consider the *prima facie* evidence of prosecutorial neglect. We vacate the superior court's order and again remand this matter to the superior court for a full evidentiary hearing and to make proper findings and analysis of the relevant factors.

I. Background

On 2 July 2010, Defendant was arrested for offenses allegedly occurring on 7 April 2010. Defendant was subsequently indicted for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree murder.

On 7 May 2012, Defendant filed a *pro se* motion for a speedy trial, which was adopted by his attorney and argued at a hearing on 23 August 2012. This motion was denied. Defendant filed a *pro se* motion to dismiss for violation of his right to speedy trial on 21 April 2014. This motion was also adopted and argued by his counsel, and also denied.

Defendant was tried 21 April 2014 through 2 May 2014. The jury returned a verdict of guilty for robbery and conspiracy to commit robbery, but found Defendant not guilty of murder. Defendant was sentenced to 97-126 months for robbery and a consecutive 38-55 months for conspiracy. Defendant appealed.

Defendant's first appeal was heard on 7 July 2015. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 N.C. App. LEXIS 560 (unpublished). This Court concluded Defendant had failed "to show that the trial court committed prejudicial error at his trial" and affirmed the Defendant's convictions. *Wilkerson*, 2015 N.C. App. LEXIS 560 at *40. However, this Court also concluded "[t]he trial court erred by summarily denying Defendant's motion without considering all of the *Barker* factors and making appropriate findings." *Id.* at *39. This Court concluded that the trial court had "simply stat[ed] that Defendant had 'made an insufficient showing to justify a dismissal under speedy trial grounds[,]' " instead of weighing the factors identified by the Supreme Court of the United States and the Supreme Court of North Carolina *Id.* This Court remanded the proceedings to the trial court to make appropriate findings. *Id.* at *40.

Upon remand, the superior court denied Defendant's motion to dismiss. During what was calendared as a status hearing on the issues remanded, the superior court proceeded to "take action in response to the Court of Appeals remand." Finding "[b]oth parties at the hearing had the full opportunity to present any evidence [they] desired[,]" the superior court did not allow for any further argument or any additional evidence to be presented. Defendant objected to the lack of a full evidentiary hearing. The superior court stated it had considered the *Barker* factors when it made its first ruling, and recorded these past considerations in a written order denying Defendant's motion to dismiss on 1 February 2017. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). We review the superior court's order to determine "whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citation omitted).

IV. Right to a Speedy Trial

Defendant argues the superior court relied upon unsupported factual findings and improperly analyzed the *Barker* factors to conclude his right to a speedy trial was not violated. Defendant asserts a proper application of the *Barker* factors could support the conclusion that his right to a speedy trial was violated. After review of the arguments and evidence in the record, following the new evidentiary hearing on remand, the superior court should consider all the evidence, and decide how each factor, separately and together, weighs for and against the State and Defendant to reach a final ruling.

The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17. "These factors are: (1) the '[l]ength of delay;' (2) 'the reason for the delay[;]' (3) 'the defendant's assertion of his right[;]' and, (4) 'prejudice to the defendant.' " *State v. Carvalho*, 243 N.C. App. 394, 400, 777 S.E.2d 78, 83 (2015) (quoting *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117), *aff'd per curiam* 369 N.C. 309, 794 S.E.2d 497, 497 (2016), *cert. denied* __ U.S. __, 199 L. Ed. 2d 19 (2017). None of these factors are determinative; they must all be weighed and considered together:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 33 L. Ed. 2d at 118-19.

A. Length of Delay

"[T]he length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003); *see Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84. No bright line exists to signify how much of a delay or wait is prejudicial, but as wait times approach a year, a presumption of prejudice arises. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). This " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.*

Here, over three years and nine months elapsed from Defendant's arrest until his trial began. This Court had previously remanded this matter to the trial court for a full review and application of the *Barker* factors, indicating the length of delay was sufficient to trigger such a review. *Wilkerson*, 2015 N.C. App. LEXIS 560 at *38-*39.

Upon remand, the trial court acknowledged this "amount of time [was] noteworthy" but was "not *per se* prejudicial" because of "all the matters necessarily involved in the preparation by the prosecution and the defense of this case involving a first degree murder charge with co-defendants, including pretrial discovery, investigation and analysis of crime scene and crime laboratory analysis[.]" No specified length of time is "*per se* prejudicial," but as one of four factors to be reviewed, this factor weighs in favor of Defendant and triggers the need for analysis of the remaining three *Barker* factors. *See Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84.

B. Reason for Delay

Defendant bears the burden of showing the delay was the result of "*neglect* or *willfulness* of the prosecution." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (emphasis original). "If a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002) (citing *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 655-56 (1996)), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2013).

Once the defendant has made a *prima facie* showing of neglect or willfulness, the burden shifts to the State to rebut and offer explanations for the delay. *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. The State is allowed "good-faith delays which are reasonably necessary for the State

to prepare and present its case[,]" but is proscribed from "purposeful or oppressive delays and **those which the prosecution could have avoided by reasonable effort**." *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 804 (2008) (citation omitted) (emphasis original). Different reasons for delay are assigned different weights, but only "valid reason[s]" are weighed in favor of the State. *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117.

This Court in *Chaplin* found a pre-trial delay of 1,055 days, with the case being calendared thirty-one times before being called, constituted a *prima facie* showing of prosecutorial negligence or willfulness. *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656. The State was unable to offer any reasonable explanation for the excessive delay and continuances, and that factor weighed in favor of the defendant. *Id.*

This Court in *Strickland* concluded a delay of 940 days was enough to constitute a *prima facie* showing of prosecutorial negligence. *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 903. However, the State rebutted this showing by providing evidence of prosecutorial backlog. *Id.* at 587, 570 S.E.2d at 903. Because the defendant was unable to produce any evidence of neglect or willfulness by the prosecutor, this factor weighed in favor of the State. *Id.*

Here, Defendant's trial was delayed 1,390 days, nearly four years and at least a year longer than either *Chaplin* or *Strickland*. In addition, in the previous appeal this Court recognized:

> Defendant's trial counsel argued that (1) the State had made a material misrepresentation in responding to Defendant's earlier motion that it was still waiting on the SBI laboratory's analysis of evidence; (2) the State had improperly used the delay for the strategic purpose of working out a plea agreement with [co-defendant] between the 23 August 2012 hearing and the date of trial[.]

Wilkerson, 2015 N.C. App. LEXIS 560 at *39.

At the speedy trial motion hearing on 23 August 2012, the prosecutor represented to the superior court that the State was still waiting on the State Bureau of Investigation ("SBI") to provide some DNA analysis on hair samples. This SBI report had been completed on 24 February 2012, almost six full months before the date of the hearing. At the hearing, the prosecutor repeatedly stated the hair evidence was collected in April 2012, when in fact it had been collected in October 2011. The prosecutor explained he had been assigned to Defendant's trial in April 2011,

and began requesting additional analysis from the SBI and FBI at that time. No explanation was provided of why, if the prosecutor's hair collection date was accurate, the prosecutor had waited a year to request the hair samples from Defendant. Further, at the April to May 2014 trial, an FBI agent testified that an analysis of records dated 7 April 2010 was requested of him "a year or so" before trial.

While agreeing "in spirit" with Defendant's motion for a speedy trial, the prosecutor argued he could not move forward without the completion of the hair analysis. Despite the State's assertion at the speedy trial hearing that it was otherwise prepared to go to trial, the State moved for at least two continuances after the trial was initially set for September 2013. The first continuance was granted after the State alleged that necessary witnesses were unavailable. The second was granted after the State alleged additional discovery had been provided and witnesses listed in this additional discovery had not been subpoenaed.

The misrepresentation concerning the hair samples was brought up at Defendant's pretrial motion to dismiss for violation of his right to speedy trial. His *pro se* motion, which was adopted and argued by his counsel, included an affidavit on this matter, as well as supporting documentation of the addition of the co-defendant's plea deal. The trial court heard these arguments, and summarily denied Defendant's motion. On remand from Defendant's previous appeal, the superior court found:

> 6. The defendant, in his motion to dismiss, contended that the State delayed his trial by intentionally misrepresenting to the Court that SBI Crime Lab analysis results had not been received, that the intentional delay by the State was for an improper purpose in allowing the State to obtain a statement from a co-defendant implicating the defendant in the alleged crimes[.]
>
> . . .
>
> 8. Reason for delay. Not withstanding [sic] the defendant's assertion that the former prosecutor handling this case willfully and intentionally misrepresented to the Court that laboratory results had not been received, the defendant has failed to show that the trial delay was due to willfulness or neglect on the part of the prosecution.

These findings are not supported by the evidence. The prosecutor purports to place the entire blame for the delays upon the SBI, indicating

there was "no part of our negligence in no part." The prosecutor may not have been willfully misrepresenting the status of the SBI report to the trial court at the hearing, but at a minimum he most certainly was negligent in not knowing the status of this completed report he expressly used as a reason to delay the trial, regardless of what he asserted at the hearing.

The State argues crowded dockets and anticipated laboratory results are "neutral factors" and are "valid justifications for the delay." Nowhere in the record are crowded dockets alleged by the State or found by the trial court to be a reason for the delays in Defendant's trial. The State's misrepresentation, whether negligent or willful, at the speedy trial motion could have been avoided by reasonable efforts. *See Washington*, 192 N.C. App. at 283, 665 S.E.2d at 804.

The State acknowledges it misrepresented the status of the SBI report, but now asserts it was a "mistake." The superior court's finding that Defendant did not provide evidence of negligence by the State regarding the delay is unsupported by the record evidence. Defendant's evidence, if true, would tend to show this second *Barker* factor weighs in his favor. Upon remand, the superior court must consider the evidence which would support a *prima facie* showing of neglect or willfulness of the prosecutor, and then, if a *prima facie* showing is established, allow the State the opportunity to rebut it.

C. Defendant Asserted Right to Speedy Trial

"A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *Strickland*, 153 N.C. App. at 587, 570 S.E.2d at 903.

Defendant filed a *pro se* motion for speedy trial on 7 May 2012, which was adopted and argued by his counsel. Prior to his motion for speedy trial, Defendant contacted prison officials as early as 30 January 2012 and sought action on the detainer on the pending charges filed from Durham County. On 21 February 2012, Defendant filed a motion for final disposition of the detainer, requesting resolution of the charges. Defendant objected to the case being continued at least one of the two times.

The superior court acknowledged Defendant's motion for speedy trial in its findings of fact, though it fails to credit or resolve the other instances of Defendant "vigorously assert[ing] his right to speedy trial." *See id.* Considering the record evidence, this *Barker* factor tends to weigh in favor of Defendant.

D. Prejudice

Following *Barker*, this Court has repeatedly held:

> [t]he right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

State v. Webster, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994) (quoting *Barker*, 407 U.S. at 532, 33 L.Ed.2d at 118) (quotation marks omitted) (emphasis in *Webster*).

In its findings of fact, the superior court noted Defendant was "currently serving an active sentence for the unrelated drug trafficking conviction that began on August 2, 2011." Defendant was arrested for this current charge on 2 July 2010. The superior court found that as a result of this incarceration "any anxiety or concern by the defendant . . . is thereby somewhat reduced or minimized."

The fact a defendant is already incarcerated while awaiting trial "does not mitigate against his right to a speedy and impartial trial." *State v. Frank*, 284 N.C. 137, 141, 200 S.E.2d 169, 172 (1973) (citations omitted).

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from undue and oppressive incarceration prior to trial. But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

Smith v. Hooey, 393 U.S. 374, 378, 21 L. Ed. 2d 607, 611 (1969) (citation and quotation marks omitted).

During his hearing on his motion for speedy trial, Defendant asserted the Durham County detainer for first-degree murder was impacting his current incarceration on the drug trafficking charge. Due to the nature of the first-degree murder charge, Defendant was held in higher security custody, which limited where he could be housed. While not determinative of prejudice, the superior court's conclusion that because Defendant was incarcerated on other charges it was not prejudicial to delay his pending trial, is unsupported by the evidence presented.

The fact that Defendant was incarcerated on other charges does not indicate he would have reduced anxiety or concern over the pending charge. Beyond the additional anxiety Defendant faced while being housed in allegedly "extremely violent" quarters, "there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large." *Id.* at 379, 21 L. Ed. 2d at 612.

Defendant argued the delay allowed for the State to secure a plea deal with Leryan Scarlett, a co-defendant. Scarlett initially denied any involvement in the robbery. After being charged with additional offenses while out on bond, Scarlett negotiated with the State to testify against Defendant in exchange for the additional charges being dropped.

Defendant presented evidence this agreement with Scarlett was reached after his motion for speedy trial had been denied. The superior court's conclusion that this argument was "unsubstantiated and not supported by any evidence" is not supported by the evidence presented. The superior court should allow and consider additional evidence in order to properly consider this issue.

During the delay, Defendant's brother, who was listed to be an alibi witness for Defendant, died. Defendant's brother proposed to testify that Defendant was at work during the time of the robbery. The superior court found there were copies of time cards from work and possibly other employees who could serve as alibi witnesses for Defendant, but excluded or ignored statements of defense counsel concerning the other alibi witnesses:

> There were other employees, Your Honor, yes. I can tell the Court, unfortunately, several of the family members are not available at this time. In particular, one individual who you've already heard referenced, that's Mr. Rico Wilkerson, I believe he is in federal custody at this time. I know there are other individuals who I have not been able

> to establish contact with since 2012, individuals who I had contact with prior to that date, however.

The superior court's findings are not supported by the record, and its conclusion "there [was] no actual, substantial prejudice to the defendant as a result of the delay" is not supported by the facts.

"*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' " *Doggett*, 505 U.S. at 655, 120 L. Ed. 2d at 530-31 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118). "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.

The State argues Defendant was unable to show he was substantially prejudiced, and cites *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984), for the proposition a defendant must prove actual and substantial prejudice. Our Supreme Court in *Goldman* rejected the defendant's claims of faded memories and lost witnesses as prejudice. *Id.* Unlike the defendant in *Goldman*, Defendant presents more than "general averments" regarding the prejudice he suffered. *See id.* at 345, 317 S.E.2d at 366. Defendant indicated two specific instances where evidence essential to his defense was prejudiced because of the delays in bringing his charges to trial. This factor, above all others, requires a careful and thoughtful analysis before deciding whether or not Defendant was prejudiced by delays to his right to a speedy trial.

V. Conclusion

Trial courts "must" engage in a "difficult and sensitive balancing process" to ascertain whether a violation of a defendant's right to a speedy trial has occurred. *See Barker*, 407 U.S. at 533, 33 L.Ed.2d at 118-19; *see also Spivey*, 357 N.C. at 118-19, 579 S.E.2d at 255. This balancing process is difficult because

> it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker*, 407 U.S. 514, 33 L. Ed. 2d 101).

Upon review of the four *Barker* factors, with the limited record before us, Defendant tends to show his Sixth Amendment right to a speedy trial may have been violated. The length of the delay and the lack of appropriate reason for the delay tends to weigh in his favor. Defendant's evidence regarding the prejudice he suffered in his pretrial incarceration and the prejudice to his ability to defend against his charges, if true, would tend to weigh in his favor, but requires a more nuanced consideration.

The superior court concluded it had "weighed" and "balanced" the factors, but provided no findings to support this assertion. The written order produced upon this Court's earlier remand was changed little from the order on the previously summarily denied motion. The superior court's findings of fact were not supported by the evidence.

A full evidentiary hearing is required in order for the superior court to hear and make an appropriate assessment of Defendant's arguments. If the superior court ultimately concludes Defendant's right to a speedy trial was violated, the only remedy is dismissing the indictment and vacating those convictions. *See Barker*, 407 U.S. at 522, 33 L.Ed.2d at 112.

The trial court's prior speedy trial ruling upon the previous remand is vacated. Defendant's motion for a speedy trial is again remanded for a full evidentiary hearing on all *Barker* factors. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

RALPH WHITEHURST, PETITIONER-APPELLEE
v.
EAST CAROLINA UNIVERSITY, RESPONDENT-APPELLANT

No. COA17-629

Filed 6 February 2018

1. Public Officers and Employees—state employee—-university police officer—dismissal—just cause

A university police officer's failure to file a non-criminal information report constituted unacceptable personal conduct in that he acted in violation of a known or written work rule, but, considering the discipline imposed in other cases involving similar violations, this did not provide just cause for the officer's dismissal.

2. Public Officers and Employees—State employee—university police officer—improper conduct at scene

The conduct of a university police officer at the scene of an arrest did not provide just cause for his dismissal where he received a report of an assault, and when he arrived at a the scene several people were sitting on the person arrested, they reported to the officer that that the defendant had hit a girl in a bar, no one informed the officer that defendant himself had been assaulted, and the officer allowed witnesses to leave the scene without properly investigating. The severity of his conduct was substantially mitigated by his misunderstanding of the situation.

3. Public Officers and Employees—discipline—demotion instead of dismissal

An Administrative Law Judge had the authority to determine that demotion rather than dismissal was an appropriate action under 25 NCAC 1J.0604(a) where just cause for dismissal did not exist (the officer allowed potential witnesses to leave a crime scene).

Appeal by respondent from the Final Decision entered 22 February 2017 by Administrative Law Judge Donald J. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 15 November 2017.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph A. Newsome and Special Deputy Attorney General Stephanie A. Brennan, for the State.

The McGuinness Law Firm, by J. Michael McGuinness, for amicus curiae North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

ZACHARY, Judge.

Respondent East Carolina University appeals from a Final Decision of the North Carolina Office of Administrative Hearings, which concluded that respondent did not have just cause to dismiss petitioner Ralph Whitehurst from his position as a police sergeant at East Carolina University. After careful review, we affirm the decision of the administrative law judge.

Factual and Procedural Background

Petitioner-appellee Ralph Whitehurst was initially employed by the East Carolina University ("ECU") Police Department in April 2004 as a Master Police Officer. ECU promoted Whitehurst to Public Safety Supervisor in June 2006. Whitehurst was a permanent State employee subject to the North Carolina Human Resources Act, Chapter 126 of the North Carolina General Statutes.

On the evening of 17 March 2016, Whitehurst responded to a dispatch call reporting an assault on the ECU campus. Whitehurst's actions on the scene resulted in negative media coverage, and ECU administration began taking steps to dismiss Whitehurst from employment.

On 21 July 2016, ECU Chancellor Cecil Staton issued ECU's Final University Decision dismissing Whitehurst from employment. Whitehurst filed a petition for a contested case hearing with the Office of Administrative Hearings on 28 July 2016. On 22 February 2017, Administrative Law Judge Donald J. Overby ("ALJ") issued a Final Decision reversing Whitehurst's dismissal, ordering instead that he be demoted.

At issue on appeal is ECU's decision to dismiss Whitehurst based on his response to the 17 March 2016 assault. The unchallenged details of the incident are as follows.

On the night of 17 March 2016, non-ECU student Patrick Myrick "hit a girl in the face" at a bar in downtown Greenville. This prompted a group of individuals to pursue Myrick. The group of individuals chased Myrick onto ECU's campus and began attacking him. Meanwhile, an ECU telecommunicator saw the attack on Myrick on the University's surveillance cameras and alerted the ECU police. Whitehurst responded to the scene and was the first officer to arrive.

The surveillance footage shows that the attack on Myrick had ended by the time Whitehurst appeared. When Whitehurst arrived, the scene was relatively calm and the group of individuals was detaining Myrick by sitting on top of him. Whitehurst had not been informed of the details of the attack, but knew only that he was responding to "an assault" on campus.

When Whitehurst approached the group, most of the individuals began to leave, and it does not appear from the surveillance video that Whitehurst made an attempt to detain them. The individuals who remained on the scene told Whitehurst that Myrick "had assaulted a girl downtown, punched her in the face." Whitehurst asked Myrick what happened and Myrick told him that he "had been in a fight downtown." Whitehurst secured Myrick by placing handcuffs on him; however, he did not attempt to prevent the remaining individuals from leaving the scene, nor did he ask them to stay so that he could obtain a statement. Whitehurst noticed blood on Myrick's face and contacted emergency rescue.

Other officers began to arrive several minutes later. By that point, almost all of the perpetrators and witnesses of the assault on Myrick had left the scene. Whitehurst directed Officer Chuck Wills "to make sure to get the individuals on scene information." In the surveillance footage, Officer Tarkington is seen talking on her cell phone to a dispatcher, who informed her that Myrick had been the victim of an assault. However, Officer Tarkington did not convey this fact to Whitehurst. Whitehurst contends that he did not hear any of the radio calls about Myrick being assaulted. Myrick was brought to the hospital and no further action was taken.

That same morning, around 3:30 a.m., Whitehurst notified Chief Gerald Lewis and other command officers that he had responded to an assault on campus. Chief Lewis viewed the surveillance footage of the incident. Sgt. Jermaine Cherry informed Chief Lewis that Whitehurst had not filed a report with respect to the assault. Chief Lewis was concerned that no official reports were filed and that Whitehurst had not detained anyone at the scene in order to gather information from them. On 18 March 2016, Chief Lewis initiated an Internal Affairs investigation. Whitehurst viewed the surveillance footage for the first time when he met with Chief Lewis on 21 March 2016. Chief Lewis informed Whitehurst that he was being placed on an Investigatory Placement with Pay status effective that day.

The Internal Affairs Investigation Report concluded that Whitehurst's response to the assault violated three written work rules. The Report found that Whitehurst violated General Order 1400-01 when he failed to obtain information from the witnesses and suspects. The Report also

found that Whitehurst violated General Order 500-02 (Field Reporting and Management) because he failed to ensure that the appropriate report was filed in order to document the incident. Lastly, the Report concluded that by failing to document the incident, Whitehurst violated General Order 1100-01 (Criminal Arrest Policy and Procedure), which requires documentation by a responding officer when a private citizen detains someone. Whitehurst was notified that a pre-disciplinary conference would be held on 18 April 2016, and that his dismissal was being recommended.

Whitehurst's pre-disciplinary conference was conducted by Chief Lewis and Sara Lilley of the ECU Human Resources Department on 18 April 2016. Despite Whitehurst's responses to the allegations against him, Chief Lewis and Lilley concluded that Whitehurst engaged in unacceptable personal conduct for which no reasonable person should expect to receive a prior warning. This conclusion was based on Whitehurst's failure to properly investigate and document the incident, both of which constitute willful violations of the General Orders, the department's written work rules. Whitehurst was notified by letter of his dismissal for unacceptable personal conduct on 19 April 2016.

Whitehurst properly followed the ECU grievance procedure. On 29 June 2016, a grievance hearing was held before a three-member panel at ECU to consider Whitehurst's dismissal. The Grievance Hearing Panel recommended to the Chancellor that Whitehurst be demoted, rather than dismissed. On 21 July 2016, ECU Chancellor Staton issued a Final University Decision upholding Chief Lewis's dismissal of Whitehurst from employment for unacceptable personal conduct.

Whitehurst filed a petition for a contested case hearing with the Office of Administrative Hearings on 27 July 2016. On 22 February 2017, Administrative Law Judge Donald J. Overby issued a Final Decision. The ALJ determined that ECU "met its burden of proof, by the preponderance of the evidence, that [Whitehurst's] actions on the night of March 17, 2016, constitute unacceptable personal conduct, [and] that [just] cause exists for disciplining [Whitehurst.]" However, the ALJ reversed ECU's decision to dismiss Whitehurst, and concluded that:

> taking into account all of the facts and circumstances in this case, . . . dismissal was not the appropriate discipline[.] Having considered all the evidence presented, [Whitehurst's] work and discipline history, the fact that he has not previously been discipline[d] and all relevant factors, the appropriate punishment for [Whitehurst] is demotion.

The ALJ ordered that Whitehurst be reinstated to his employment by ECU, "but demoted to a position one pay grade below the rank he held at the time of his separation." ECU timely filed Notice of Appeal to this Court from the ALJ's Final Decision pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a).

Discussion

On appeal, ECU argues that the ALJ erred in concluding as a matter of law that ECU did not have just cause to dismiss Whitehurst from employment. ECU also argues that the ALJ did not have the authority to order the alternative relief that Whitehurst be demoted. We conclude that ECU's arguments lack merit, and affirm the decision of the ALJ.

I. Standard of Review

The standard of review to be applied on appeal of an administrative tribunal's final decision depends upon the nature of the error asserted. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [the] decision are reviewed under the whole-record test." *N.C. Dep't. of Env't. & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation, quotation marks, and alterations omitted). Section 150B-51 of our State's Administrative Procedure Act sets out in more detail the applicable scope and standards of review. That Section provides that

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2016).

Where the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2016). Under the whole record standard of review, the reviewing "court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 798 S.E.2d 127, 133, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (2017). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* However,

> "[t]he whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." Therefore, the whole record test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views."

Blackburn v. N.C. Dep't. of Pub. Safety, ___ N.C. App. ___, ___, 784 S.E.2d 509, 518 (2016) (quoting *Carroll*, 358 N.C. at 674, 599 S.E.2d at 903-04 (internal quotation marks omitted) and *Lackey v. Dep't of Human Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)) (alteration omitted).

We conduct a *de novo* review of an asserted error of law falling under subsections 150B-51(b)(1)-(4), *supra*. N.C. Gen. Stat. § 150B-51(c) (2016); *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 518. "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Souther v. New River Area Mental Health Dev. Disabilities & Substance Abuse Program*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (2001) (internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the ALJ." *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 518.

The determination of "whether a public employer had just cause to discipline its employee requires two separate inquiries[.]" *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. The initial inquiry is "whether the employee engaged in the conduct the employer alleges[.]" *Id.* (quotation marks omitted). This is a question of fact, "reviewed under the whole record test." *Id.* After determining that the employee did engage in the conduct alleged, the second inquiry is "whether that conduct constitutes

just cause for the disciplinary action taken." *Id.* (quotation marks omitted). "Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*." *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 378, 726 S.E.2d 920, 923 (2012) (citing *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898).

II. ALJ'S Findings of Fact

The majority of the ALJ's findings of fact have not been challenged, and are thus binding on appeal. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 519 (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). ECU only argues that Findings of Fact Nos. 44, 55, and 57 are unsupported by substantial evidence. However, "after careful review of the record and the ALJ's order," we do not find it necessary to assess the evidentiary support for each of these findings in order to determine whether the ALJ correctly found that ECU did not have just cause to terminate Whitehurst's employment. *Id.* We will review the evidence supporting these findings to the extent that they become material to the ALJ's decision below.

III. Just Cause

[1] The State Human Resources Act, Chapter 126 of the North Carolina General Statutes, creates "a constitutionally protected 'property' interest in the continued employment of career State employees." *Peace v. Employment Sec. Comm'n.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). Pursuant to N.C. Gen. Stat. § 126-35(a) (2016), "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." If a career State employee believes that he was discharged, suspended, or demoted without just cause, he "may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 126-34.02(a) (2016). The Office of Administrative Hearings must then determine whether just cause existed for the employee's dismissal, demotion, or suspension. N.C. Gen. Stat. § 126-34.02(b)(3) (2016). "[T]he burden of showing that a career State employee was discharged . . . for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d) (2016).

Only two grounds may constitute just cause for disciplinary action, including dismissal, pursuant to 25 N.C.A.C. 1I.2301(c): (1) unsatisfactory job performance, including grossly inefficient job performance, and (2) unacceptable personal conduct. 25 N.C.A.C. 1I.2301(c) (2016). "Unacceptable personal conduct" includes, among other things, "conduct for which no reasonable person should expect to receive prior

warning" and "the willful violation of known or written work rules[.]" 25 N.C.A.C. 1J.0614(8)(a) and (d) (2016). One instance of unacceptable personal conduct may constitute just cause for dismissal, and an employee may be dismissed without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a) (2016); *Hilliard v. North Carolina Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

However, while "just cause" is defined to include "unacceptable personal conduct," "the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was 'just.' " *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900.

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. . . . If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. Accordingly, not every instance of unacceptable personal conduct will "give[] rise to 'just cause' for employee discipline." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 901. Rather, "just cause" "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

In determining whether unacceptable personal conduct constitutes just cause for dismissal under *Warren's* third inquiry, we look to several factors that were set forth in *Wetherington v. N.C. Dep't of Public Safety*, 368 N.C. 583, 780 S.E.2d 543 (2015). Those factors include "the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548.

In the instant case, the ALJ concluded that, under the first step of the *Warren* analysis, Whitehurst failed (1) to submit a non-criminal information report, and (2) to properly investigate the on-campus assault. Under the second prong—whether Whitehurst's actions constituted unacceptable personal conduct—the ALJ concluded that Whitehurst's conduct at the scene constituted unacceptable personal conduct, but that his failure to submit a non-criminal report did not.

We agree that Whitehurst's failure to file a non-criminal report, in violation of General Order 500-02, did not constitute just cause for his dismissal. As the ALJ explained in Conclusion of Law No. 24, which ECU has not challenged,

> [Whitehurst's] failure to submit a non-criminal information report is not unacceptable personal conduct. While indeed policy stated that such a report was to have been submitted, the undisputed evidence was that *the pattern and practice of the department was that this was left to the discretion of the supervisor*. There is no evidence that anyone had ever been disciplined for failure to submit this report, let alone dismissed. The evidence was that [Whitehurst] himself thought the matter was subject to his discretion, and there was no evidence that [Whitehurst's] thinking was either unreasonable or contrary to the pattern and practice of the department.

(emphasis added).

Whitehurst's failure to file a non-criminal report constitutes unacceptable personal conduct in that he acted in violation of a known or written work rule pursuant to 25 N.C.A.C. 1J.0614(8). However, upon consideration of the "discipline imposed in other cases involving similar violations," we agree that this violation did not provide just cause for Whitehurst's dismissal.

[2] Concerning Whitehurst's conduct at the scene, in Conclusion of Law No. 26 the ALJ reasoned that:

> [Whitehurst's] conduct at the scene constitutes unacceptable personal conduct. Not only did he fail to gain control prior to the arrival of the other officers, but it seems as though at some point he lost sight of the fact that there had been an assault on campus, despite the fact he was responding to an assault on campus and had someone with obvious signs of injury.

However, the ALJ concluded that Whitehurst's unacceptable personal conduct did not provide just cause for his dismissal. Taking into consideration all of the facts and circumstances of the case, including the factors that our Supreme Court set forth in *Wetherington*, we agree.

We do not discount the harm that resulted from Whitehurst's conduct on the evening of 17 March 2016. However, "just cause" is a concept

"embodying notions of equity and fairness" to the *employee*. *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks omitted). Whitehurst's conduct must be judged with reference to the facts of which he was aware at the time of his actions. After reviewing the whole record, including the ECU surveillance video footage, we conclude that the severity of Whitehurst's conduct was substantially mitigated by his misunderstanding of the situation with which he was presented.

At the time Whitehurst reached the scene, no one was being assaulted. As acknowledged by Chief Lewis and confirmed by ECU's surveillance video footage, upon arrival Whitehurst encountered a group of individuals restraining Myrick. When Whitehurst approached the group, "it was reported to him that [Myrick] . . . had assaulted a girl downtown [and] punched her in the face[.]" In that Whitehurst was responding to "an assault," this reasonably led him to believe that the assault had ended, and that the gathered individuals had detained the perpetrator. No one on the scene, including Myrick, informed Whitehurst that there had been a separate assault on Myrick. In fact, when Whitehurst asked Myrick what happened, Myrick "told . . . Whitehurst that he . . . had been in a fight downtown . . . [a]nd . . . said nothing about being the victim of an assault [on campus.]" Fairness and equity do not allow just cause for dismissal to be predicated upon Whitehurst's failure to respond appropriately to facts of which he had no knowledge.

In consideration of the "discipline imposed in other cases involving similar violations[,]" *Wetherington*, 368 N.C. at 592, 780 S.E.2d at 548, the minimal discipline received by Officer Tarkington is also relevant to our just cause analysis. The only ECU officer on the scene privy to information regarding the assault on Myrick was Officer Tarkington. Officer Tarkington, however, failed to convey that information to Whitehurst, for which she was issued a written warning. The relatively light discipline imposed on Officer Tarkington for a similar violation weighs heavily against a determination that just cause existed for Whitehurst to be cashiered.

Whitehurst's discipline-free work history is also relevant to this just cause analysis. We agree with ECU that Chief Lewis was aware of Whitehurst's work performance history when he made the decision to dismiss Whitehurst, despite the ALJ's finding to the contrary. However, Chief Lewis's discounting of that factor has no bearing on this Court's consideration of it in our *de novo* review.

Whitehurst was subject to regular performance reviews by ECU and generally received above average ratings. Jimmy Cannon, an ECU police

sergeant who worked with Whitehurst for roughly twelve years, testified that "He's been an outstanding peer to work with especially when it comes to his knowledge of police procedures and police work in general. He's one of the best . . . that I've worked with[.]" Whitehurst had worked for ECU for twelve years, with no disciplinary action. This factor also mitigates against a finding that just cause existed to dismiss Whitehurst from employment based on his conduct the night of 17 March 2016.

Lastly, we note that Whitehurst's position as a supervising law enforcement officer does not lower the standard that must be met in order to justify his dismissal. ECU is correct in citing *Blackburn v. N.C. Dep't of Public Safety* for the proposition that there is a "degree of responsibility associated with [Whitehurst's] position" as a supervising law enforcement officer. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 528. *Blackburn* does not, however, hold that anything less than just cause is required to dismiss a State employee where that employee is a law enforcement officer. In *Blackburn*, we simply held that, given Petitioner Blackburn's duty to ensure the health and safety of inmates, his "actions of (1) allowing [an inmate] to remain lying on his bed in handcuffs for five days, (2) without receiving anything to drink during this time, and (3) without any attention to [the inmate's] condition," directly contributed to that inmate's death, and constituted "just cause to terminate [Blackburn] for grossly inefficient job performance." *Id.* Whitehurst's violations in the present case clearly do not rise to the level of severity present in *Blackburn*.

We agree that Whitehurst's position as a law enforcement officer imposed duties upon him which are not commonly shared by other State employees. Nonetheless, Whitehurst is entitled to the exacting protections given to all career State employees pursuant to N.C. Gen. Stat. § 126-35. Considering all of the facts and circumstances of the present case, we conclude that ECU did not have just cause to dismiss Whitehurst from employment.

IV. ALJ's Authority to Demote Whitehurst

[3] ECU next argues that the ALJ did not have the authority to order that Whitehurst be demoted instead of dismissed after having found that just cause existed to impose "some" discipline on Whitehurst. This argument is unavailing.

" 'Unacceptable personal conduct does not necessarily establish just cause for all types of discipline.' " *Harris*, ___ N.C. App. at ___, 798

S.E.2d at 137, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (quoting *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925). Rather, "[j]ust cause must be determined based upon an examination of the facts and circumstances of each individual case." *Id.* This inquiry extends not only to whether just cause existed to discipline generally, but also to whether just cause existed to impose the particular disciplinary action taken.

Upon its review of a contested case, the ALJ "may grant the following relief: (1) [r]einstate [the] employee to the position from which the employee has been removed[,] (2) [o]rder the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied[, or] (3) *[d]irect other suitable action to correct the abuse*[.]" N.C. Gen. Stat. § 126-34.02(a) (2016) (emphasis added). As our Supreme Court explicitly affirmed in *Harris*, the ALJ has the "authority to direct other suitable action upon a finding that just cause does not exist for the particular action taken by the agency[,]" which "includes the authority to impose a less severe sanction as 'relief.' " *Harris*, ___ N.C. App. at ___, 798 S.E.2d at 138, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (quotation marks and alteration omitted). After reviewing the particular facts and circumstances of the case, "the ALJ may impose an alternative sanction within the range of allowed dispositions[]" set forth in 25 NCAC 1J.0604(a): "(1) written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." *Id.*

In the present case, based on the information he had received, Whitehurst had no reason to believe that any of the individuals present at the scene were perpetrators of an assault on Myrick. Nevertheless, these individuals were potential witnesses, and Whitehurst made no attempt to prevent them from leaving the scene and did not request that they not leave the scene. The ECU surveillance video footage shows that after about 45 seconds, eight of the ten people present at Whitehurst's arrival had been allowed to walk away. As the Internal Affairs investigation found, this was in violation of General Orders 1400-01 and 1100-01. This also constituted unacceptable personal conduct for which no reasonable person should expect to receive a prior warning. Accordingly, while just cause did not exist to dismiss Whitehurst, "considering the totality of the unique facts and circumstances of the present case," *id.* at ___, 798 S.E.2d at 137-38, we affirm the ALJ's determination that demotion was an appropriate form of "other suitable action to correct the abuse[.]" N.C. Gen. Stat. § 126-34.02(a)(3) (2016).

Conclusion

For the reasons explained herein, the Final Decision of Administrative Law Judge Donald J. Overby is

AFFIRMED.

Judges STROUD and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 FEBRUARY 2018)

BRANCH BANKING & TR. CO. v. SURANE No. 17-842	Mecklenburg (16CVS3222)	Affirmed
COOK v. COOK No. 17-359	Wake (10CVD8072)	Vacated and Remanded
FAIRCLOTH v. FAIRCLOTH No. 17-332	Rockingham (12CVD1455)	Affirmed
HENDERSON v. HENDERSON No. 16-72-2	Mecklenburg (10CVD8288)	Affirmed
HOPKINS v. THOMAS No. 17-474	Pamlico (16CVS101)	Reversed
IN RE B.M. No. 17-663	Rutherford (09JA133)	Affirmed in part; Vacated in part.
IN RE C.C. No. 17-654	Wake (16SPC8132)	Affirmed
IN RE G.D.O. No. 17-902	Mecklenburg (14JT807) (14JT808) (16JT90)	Affirmed
IN RE K.W. No. 17-735	Guilford (16JA527)	Reversed and Remanded
IN RE S.K.D.M. No. 17-573	Caldwell (14JA112)	Affirmed
IN RE SMITH No. 17-483	Gaston (14SP50)	Affirmed
JACOBSON v. PADGETT No. 17-192	Wake (16CVD2437)	Dismissed
JENKINS v. EASTER SEALS UCP OF N.C. & VA., INC. No. 17-540	N.C. Industrial Commission (14-002099)	Affirmed
KEENA v. CEDAR ST. INVS., LLC No. 17-852	Mecklenburg (16CVS9789)	Affirmed

KELLY v. POLK CTY. N.C. No. 17-832	Polk (17CVS29)	Affirmed
LEE v. CTY. OF CUMBERLAND No. 17-446	Cumberland (14CVS9502)	Affirmed
LINKER v. LINKER No. 17-894	Guilford (14CVD359)	Affirmed
MESSER v. POLLACK No. 17-582	Haywood (09CVD589)	Vacated and Remanded
PARSONS v. PARSONS No. 17-278	Ashe (16CVS211)	Affirmed
SMS CONSTR., INC. v. WITTELS No. 16-1081	Dare (11CVS861)	Affirmed
STATE v. ANDREWS No. 16-925	Edgecombe (13CRS52078-79) (13CRS52080-81)	No Error
STATE v. ARTIS No. 17-478	Lenoir (15CRS51413) (16CRS411)	No Error
STATE v. BROWN No. 17-818	Mecklenburg (14CRS19602) (17CRS15)	No error in part, remanded in part.
STATE v. DAVIS No. 17-721	Guilford (13CRS98087) (13CRS98093-94) (14CRS24059)	No Error
STATE v. DORSEY No. 17-684	Guilford (14CRS83281-83)	No Error
STATE v. FERRELL No. 17-300	Durham (15CRS3817) (15CRS59165)	NO PREJUDICIAL ERROR
STATE v. FORNEY No. 17-631	Watauga (15CRS50683) (15CRS541)	No Error
STATE v. GATES No. 17-772	Swain (15CRS459) (15CRS50650-51)	No prejudicial error

STATE v. GOINS No. 17-458	Guilford (15CRS72384)	No Error
STATE v. HERRERA No. 17-695	Forsyth (12CRS40079)	Reversed and Vacated
STATE v. JACOBS No. 17-539	Brunswick (15CRS56227) (15CRS56234)	Vacated and Remanded; Remanded for correction of clerical error.
STATE v. JOHNSON No. 17-412	Cabarrus (14CRS51159) (14CRS51844) (15CRS1125) (15CRS1766)	Affirmed
STATE v. LILLY No. 17-835	Craven (15CRS50778)	Affirmed
STATE v. LLOYD No. 17-838	Forsyth (13CRS10665) (13CRS52707)	Affirmed
STATE v. MARTINEZ No. 17-505	Wake (02CRS53666) (08CRS81625-26)	No Prejudicial Error
STATE v. MAZARIEGOS No. 17-685	Wayne (15CRS50840)	Affirmed
STATE v. McALLISTER No. 17-614	Wilson (15CRS52815-16) (16CRS1081)	No error in part; no plain error in part; dismissed in part
STATE v. MITCHELL No. 17-706	McDowell (14CRS50464)	No Error
STATE v. RIGGINS No. 17-571	Alamance (05CRS59299-311) (05CRS59366-373)	Affirmed
STATE v. UPRIGHT No. 17-678	Rowan (15CRS2358) (15CRS50759-60)	No Error
STATE v. WHITE No. 17-214	Mecklenburg (15CRS207188) (15CRS24438)	Affirmed

STATE v. WHITE No. 17-142	Franklin (14CRS49)	NO PREJUDICIAL ERROR
STATE v. WHITEHEAD No. 16-294-2	Nash (13CRS54109)	No Error
STATE v. WILSON No. 17-750	Buncombe (15CRS83040)	No Error
STATE v. WOMACK No. 17-635	No Error (15CRS245429)	Mecklenburg
THOMSON v. HOLLING No. 17-734	Union (12CVD2587)	Vacated and remanded.
VINES v. McKOY No. 17-555	Durham (15CVD3128)	Dismissed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS