258 N.C. App.—No. 2 Pages 207-371

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 11, 2019

MAILING ADDRESS: The Judicial Department
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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
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COURT OF APPEALS

CASES REPORTED

FILED 6 MARCH 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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.

BRIGGS v. DEBBIE'S STAFFING, INC.

[258 N.C. App. 207 (2018)]

WILLARD BRIGGS, EMPLOYEE, PLAINTIFF
v.
DEBBIE'S STAFFING, INC., EMPLOYER, N.C. INS. GUAR. ASS'N, CARRIER; EMPLOYMENT PLUS, EMPLOYER, N.C. INS. GUAR. ASS'N; AND PERMATECH, INC., EMPLOYER, CINCINNATI INS. CO., CARRIER, DEFENDANTS

No. COA17-778

Filed 6 March 2018

Workers' Compensation—occupational disease—risk for contracting disease—expert medical evidence

The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee's claims for benefits where plaintiff failed to offer expert medical evidence showing that his job actually placed him at a greater risk of contracting asthma as required by *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85 (1983).

Appeal by plaintiff from opinion and award entered 31 March 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2017.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by John A. Tomei and Matthew D. Flammia, for defendants-appellees Employment Plus and NCIGA.

Muller Law Firm, PLLC, by Tara Davidson Muller, and Anders Newton, PLLC, by Gregg Newton, for defendants-appellees Permatech and Cincinnati Insurance.

Cranfill Sumner & Hartzog LLP, by Buxton S. Copeland and Tracy C. Myatt, for defendants-appellees Debbie's Staffing and NCIGA.

DAVIS, Judge.

In this workers' compensation appeal, we revisit the issue of whether an employee is required to present expert medical evidence in order to establish that the conditions of his employment placed him at a greater risk than members of the general public for contracting a disease. Willard Briggs appeals from the opinion and award of the North Carolina Industrial Commission denying his claim for workers'

compensation benefits in which he alleged that his asthma resulted from his working conditions. Because we conclude the Industrial Commission properly found that Briggs failed to offer expert medical evidence showing that his job actually placed him at a greater risk of contracting asthma, we affirm.

Factual and Procedural Background

The facts of this case involve events that occurred during Briggs' employment with Permatech, Inc. ("Permatech") and two staffing agencies — Debbie's Staffing, Inc. ("Debbie's Staffing") and Employment Plus. Briggs worked for Permatech from 14 June 2010 to 25 April 2012. Permatech and Debbie's Staffing served as his joint employers from 14 June 2010 to 22 April 2012. Permatech and Employment Plus served as his joint employers from 23 April 2012 to 25 April 2012.

Permatech is a refractory manufacturer that makes "precast troughs and molds that are used in the molten metal industry." Briggs worked as a ceramic technician at the Permatech facility in Graham, North Carolina. A portion of his time was spent working on a "Voeller" machine — a large, circular mixing machine containing a blade that mixes dry ingredients with water. Briggs also worked on "smaller molds in other areas of the plant or helping to cast small parts." The dry ingredients that were mixed in the Permatech machines included "alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, and silicon carbide . . . ."

Due to the dusty environment created by the Voeller machine, Permatech employees were required to wear respiratory protection masks while working around the machine. Briggs was provided with a P95 mask, "which filters out 95 percent of the airborne particulate that is respirable." In addition, near the end of his employment at Permatech, he was given a P100 cartridge respirator, which "had a 99.9% filtration rate for airborne particulate."

Briggs was terminated from his employment at Permatech for attendance-related issues. He subsequently filed a Form 18 (Notice of Accident) on 5 November 2013, alleging that he had "developed COPD and asthma as a result of working as a Voeller technician . . . ." Employment Plus and Debbie's Staffing each filed a Form 61 in which they asserted that Briggs "did not suffer a compensable occupational disease arising out of and in the course of his employment . . . ."

On 8 October 2015, a hearing was held before Deputy Commissioner J. Brad Donovan. Briggs testified in support of his claim at the hearing.

Depositions were later taken of Dr. Dennis Darcey and Dr. Douglas McQuaid as well as of two vocational experts.

Dr. McQuaid, a pulmonary and critical care physician employed by LeBauer HealthCare, testified that Briggs had come to his office complaining of shortness of breath and wheezing. He opined that Briggs' condition had been caused by the substances he was exposed to at the Permatech facility. He conceded, however, that he was unaware of the fact that Briggs had (1) smoked cigarettes during breaks at work; (2) been given a respirator mask for use during work hours; (3) a history of marijuana usage; and (4) previously been treated for allergies with albuterol.

Dr. Darcey, the Division Chief of Occupational and Environmental Medicine and the Medical Director of the Occupational Medicine Clinic at Duke University, testified that Briggs' asthma likely predated his employment with Defendants because his medical records established that he "already had a reactive airway before he began working at the Permatech facility." He did state, however, his belief that Briggs' asthma had been aggravated during his employment at Permatech.

On 18 May 2016, the deputy commissioner issued an opinion and award concluding that "[b]ased upon the preponderance of evidence in view of the entire record . . . [Briggs] has met his burden and is temporarily totally disabled from employment as a result of his occupational disease and is entitled to temporary total disability compensation at the rate of $213.27 per week for the period beginning on 25 April 2012 and continuing." Defendants appealed to the Full Commission.

On 31 March 2017, the Full Commission issued an Opinion and Award reversing the deputy commissioner's decision and denying Briggs' claim for benefits. Commissioner Bernadine S. Ballance dissented. On 4 April 2017, Briggs filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App.

377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

"For an injury or death to be compensable under our Workmen's Compensation Act it must be either the result of an 'accident arising out of and in the course of the employment' or an 'occupational disease.'" *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 465, 256 S.E.2d 189, 194 (1979) (citation omitted). N.C. Gen. Stat. § 97-53(13) provides that a disease is considered occupational if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2017).

Our Supreme Court has held that in order

> [f]or a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the claimant's employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citation, quotation marks, and brackets omitted). The Supreme Court has made clear that "[a]ll ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* (citation omitted).

The first two prongs of the *Rutledge* test "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365 (citation omitted). "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 94, 301 S.E.2d at 365 (citation and quotation marks omitted).

This Court has explained that

> [r]egardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), the employee must nevertheless satisfy the

> remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for *contracting* the condition than the general public.

Futrell v. Resinall Corp., 151 N.C. App. 456, 460, 566 S.E.2d 181, 184 (2002) (citation omitted and emphasis added), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003).

In the present case, the Commission's Opinion and Award contained the following pertinent findings of fact:

> 1. Plaintiff is a thirty-two-year-old high school graduate who worked primarily as a restaurant cook and lawn care worker before obtaining vocational training in a forestry fire fighter program through Job Corps. Prior to Plaintiff's involuntary termination from the Job Corps program in 2008, he was noted to complain of wheezing during medical visits on May 30, 2007, July 27, 2007, and January 14, 2008. Plaintiff was also prescribed Albuterol for his symptoms.
>
> 2. Permatech is a refractory manufacturer which makes precast troughs and molds that are used in the molten metal industry. Plaintiff worked at Permatech as a ceramic technician. As a ceramic technician, less than half of Plaintiff's time was spent working on the "Voeller" machine. The remainder of Plaintiff's time was spent working on smaller molds in other areas of the plant or helping to cast small parts.
>
> 3. The Voeller machine is a big circular mixing machine which measures approximately 12 to 13 feet in diameter and contains a blade which mixes dry ingredients with water. The dry ingredients which are mixed in the Voeller machine and the smaller molding machines Plaintiff would work with were composed of, *inter alia*, alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, and silicon carbide, all materials which may cause upper respiratory irritation and can aggravate preexisting chronic lung conditions.
>
> 4. The dry ingredients were taken to the Voeller machine by a forklift operator, who maneuvers the bag or bin over a chute which measure[s] approximately 20 inches by 20 inches and was located at the top of the

machine. Once the bag or bin was in place, about one or two feet above the chute, Plaintiff would cut a hole in the bottom to discharge the mix. A plume of dust would surround Plaintiff as each bag was emptied into the chute and would stay in the air approximately two to three minutes before it would settle. After the material and any needed chemicals were poured into the machine, its blades would spin, and then water was added in an amount that the chemist of the plant directed. Operation of the Voeller machine and cleaning it out created a dusty environment, but not to the extent or magnitude depicted by Plaintiff in his testimony. While Plaintiff testified that he dumped 10 to 20 bins or bags per day, Permatech records show that the above-described process occurred on average 1.9 times per day.

5. Plaintiff was required to wear respiratory protection when working around the Voeller machine. Permatech provided Plaintiff with a P95 mask, which OSHA has deemed a respirator and which filters out 95 percent of the airborne particulate that is respirable. Plaintiff wore the P95 mask as required. Towards the end of Plaintiff's employment at Permatech, he was provided with a P100 cartridge respirator, which had a 99.9% filtration rate for airborne particulate.

6. Dust sampling results for testing done at Permatech, including personal air monitoring, were all well below OSHA's permissible exposure limits, except in the Moldable Department, where Plaintiff never worked. The results were also well below the "occupational exposure limits" which Permatech's predecessor in interest, Alcoa, established internally and which were more stringent than those set forth by OSHA. The air sampling results also do not take into account the ten-fold protection afforded by the P95 mask Plaintiff was required to wear. While the testing relied upon by Defendants was done prior to Plaintiff's employment at Permatech, there have not been any significant changes in weight or equipment usage up to and through the time Plaintiff worked there, so the same testing results would be expected. Permatech has never been cited by OSHA for exceeding the regulatory exposure limits for dusts and chemicals,

and no employee other than Plaintiff has alleged an occupational lung disease from employment at Permatech.

7. Plaintiff alleges that his breathing problems began in 2011 while working at the Permatech facility and developed gradually thereafter. However, he never complained of breathing problems to anyone at Permatech or to any medical provider when he was working at Permatech. Moreover, contrary to what he subsequently reported to medical providers, Plaintiff continued to smoke cigarettes during the time he worked at Permatech.

8. On July 18, 2012, almost three months after he was terminated from his employment at Permatech for attendance issues, Plaintiff presented to the Emergency Department at University of North Carolina Hospitals complaining of wheezing and shortness of breath. Plaintiff reported that he was experiencing shortness of breath since November 2011, that at onset he may have had some cold symptoms, that he initially believed he had developed bronchitis, but then his symptoms became persistent. He also reported using asthma medications and that his symptoms appeared to improve with Albuterol. It is unclear from the record who had prescribed the asthma medications he was taking or how long he had been taking them. Plaintiff underwent a chest x-ray and EKG and the attending physician ruled out the possibility of interstitial lung disease.

. . . .

11. Plaintiff began treatment with Dr. Douglas McQuaid, who is board-certified in internal medicine, pulmonary medicine, and critical care medicine, beginning April 22, 2014 and continuing through September 2014. Plaintiff was evaluated for the purpose of establishing care for asthma, a condition he had previously had medical treatment for, including Albuterol. Plaintiff reported a history of smoking approximately one-quarter pack per week for 3 years, quitting in 2005. Plaintiff also reported that he was directly exposed to silica fibers and chemicals containing iron particles on a daily basis at his job and that he developed a cough, shortness of breath, and wheezing for the first time in his life while working at

the Permatech facility. Plaintiff further reported that he began to produce black nasal and chest mucus and was not given a respirator for several months.

12. Plaintiff underwent pulmonary function testing, which revealed moderate airflow obstruction. This condition was capable of reversal with a bronchodilator. Based upon his examination and the testing, Dr. McQuaid was of the opinion that Plaintiff had asthma. Plaintiff reported experiencing seasonal allergies and Dr. McQuaid recommended allergy testing, but Plaintiff declined. According to Dr. McQuaid, it is important to understand any allergies an asthmatic person may have because "if you're allergic to something and you have asthma, it can make the asthma symptoms worse."

13. In response to a letter from Plaintiff's counsel dated April 20, 2015, Dr. McQuaid opined that Plaintiff's condition was caused by the substances he was exposed to at the Permatech facility. However, there is no description of all of the substances and the letter indicates plaintiff did not use a breathing device. Dr. McQuaid could not remember seeing any additional documentation setting out the specific substances used at the Permatech facility. Dr. McQuaid did not review material data safety sheets of the chemicals Plaintiff worked with and did not review Permatech's dust sampling results in conjunction with his evaluation and diagnosis of Plaintiff. Dr. McQuaid was not familiar with the types of respiratory masks used at the Permatech facility and used by Plaintiff. Dr. McQuaid testified that his understanding was that plaintiff "was exposed to some black stuff."

14. When Dr. McQuaid testified by deposition, he initially opined, to a reasonable degree of medical certainty, that Plaintiff's asthma was very likely caused by his environmental exposure at the Permatech facility. However, Dr. McQuaid did not know that Plaintiff had smoked cigarettes after 2005, did not know that Plaintiff had complained of wheezing in 2007 and 2008, and did not know that Plaintiff wore a respirator mask during the entirety of his employment at the Permatech facility. Dr. McQuaid ultimately testified that a different history might affect his opinions on causation, and that Plaintiff's smoking at

work after 2005 would be a different history than the one Plaintiff gave him.

15. On September 29, 2015, Dr. Dennis Darcey conducted an independent medical examination of Plaintiff at the request of Defendants Debbie's Staffing, Inc., and NCIGA. Dr. Darcey is an expert in occupational and environmental medicine, industrial hygiene, and epidemiology and is currently the Division Chief of Occupational and Environmental Medicine at Duke University and the Medical Director of Duke's Occupational Medicine Clinic. In addition to reviewing Plaintiff's medical records, Dr. Darcey reviewed the material safety data sheets and Permatech's dust sampling results in conjunction with his evaluation of Plaintiff. Dr. Darcey noted Plaintiff's past history of allergic reaction to cats, smoking cigarettes and marijuana, and inhalant abuse.

16. After ordering a high resolution CT examination and pulmonary function studies, Dr. Darcey concluded that Plaintiff suffers from a mild to moderate case of asthma. Dr. Darcey explained that asthma occurs when the airways become irritated and inflamed, and that reactions can be triggered by any number of things. However, irritant dust does not generally cause new onset asthma; it is more typically associated with an aggravation of a preexisting airway hyperreactivity. With regard to Plaintiff specifically, Dr. Darcey testified that, based on the history of smoking and allergic responses, Plaintiff had a reactive airway before he began working at the Permatech facility, and that Plaintiff's exposure to dust at Permatech could have aggravated his preexisting reactive airway/asthma condition.

17. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's employment was a significant contributing factor in his development of asthma, to the extent that his exposure to irritant dust aggravated but did not cause his asthma.

18. Neither Dr. McQuaid nor Dr. Darcey testified that Plaintiff's employment placed him at an increased risk of *contracting*, as opposed to aggravating, asthma as compared to members of the general public not so employed.

> During Dr. Darcey's deposition, Plaintiff's counsel introduced two articles which summarized studies of silicon carbide protection workers in Norway and Romania. The articles are based upon exposure to dust in facilities where silicon carbine is made and there is no evidence that this was similar to the dust exposure at the Permatech facility. The level of silicon carbide-containing dust in the studies was significantly higher than the levels documented at Permatech, and significantly higher than what Plaintiff could have possibly been exposed to with his P95 respirator/mask. According to one article, the study was conducted in a Romanian silicon carbide production facility where "the overall level of pollution was exceptionally high" and the measurement of total dust in the air was "more than 50 times the maximum level permitted in Romania." Furthermore, the articles do not indicate whether the workers wore respiratory protection at work. These articles do not support a finding that Plaintiff's employment placed him at an increased risk of contracting asthma.

After setting out its findings of fact, the Commission then made conclusions of law stating, in relevant part, as follows:

> 4. In order to satisfy the remaining two prongs of the *Rutledge* test, Plaintiff was required to present competent medical evidence that his exposure to alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, silicon carbine alumina, and other dusts placed him at a greater risk than the general public of contracting asthma. . . .
>
> 5. Plaintiff has failed to prove through competent expert opinion evidence that his employment at the Permatech facility placed him at an increased risk of contracting asthma than the general public. . . .

The only one of the Commission's findings of fact challenged by Briggs in this appeal is Finding No. 6. Thus, because the remainder of the Commission's findings of fact are unchallenged, they are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation omitted)).

The interplay between the three prongs of the *Rutledge* test was explained by this Court in *Futrell*. In *Futrell*, the employee filed a workers' compensation claim contending that he had contracted carpal tunnel syndrome as a result of his employment as a resin kettle operator. He testified that his job responsibilities required him to "tear[ ] open fifty-pound bags of chemicals with his hands, us[e] an axe to bang on drums to loosen their contents, and monitor[ ] kettles." *Futrell*, 151 N.C. App. at 457, 566 S.E.2d at 182.

The defendants presented testimony from an orthopedic surgeon who testified that the "plaintiff's employment did not place him at a greater risk for developing carpal tunnel syndrome than the general public." *Id.* at 459, 566 S.E.2d at 183. The Commission determined that "neither of plaintiff's treating physicians, Drs. Vernon Kirk and Anthony DiStasio, offered evidence that plaintiff's job placed him at an increased risk for development of the disease as compared to the employment population at large." *Id.* Based on its findings, the Commission concluded that the plaintiff had failed to establish that his carpal tunnel syndrome was compensable because he had not satisfied the first two prongs of the *Rutledge* test. *Id.* at 458, 566 S.E.2d at 183.

We affirmed the Commission's decision, ruling that its findings were supported by competent evidence and supported its conclusions of law. In our opinion, we stated the following:

> . . . [T]here is no authority from this State which allows us to ignore the well-established requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for *contracting* the condition, even where the condition may have been aggravated but not originally caused by the plaintiff's employment. We cannot agree with the dissent's position that this reading of *Rutledge* effectively precludes recovery in all cases where a claimant does not argue that his employment caused him to contract the disease. It simply precludes recovery where a claimant cannot meet all three well-established requirements for proving an occupational disease. This is not a novel approach or reading of *Rutledge*.
>
> Indeed, if the first two elements of the *Rutledge* test were meant to be altered or ignored where a claimant simply argued aggravation or contribution as opposed to contraction, then our courts would not have consistently

> defined the third element of the *Rutledge* test as being met where the claimant can establish that the employment caused him to contract the disease, or where he can establish that it significantly contributed to or aggravated the disease. . . . *Rutledge* and subsequent case law applying its three-prong test make clear that evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third element of the *Rutledge* test. Regardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), the employee must nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public.

Id. at 460, 566 S.E.2d at 184 (internal citations omitted).

Here, the Commission concluded that Briggs had satisfied the third prong of the *Rutledge* test by showing that the conditions at the Permatech facility aggravated his asthma, and this determination is not in dispute. Rather, the key question in this appeal is whether Briggs has likewise satisfied the first two prongs of the *Rutledge* test.

Briggs asserts that he provided sufficient evidence to demonstrate that his conditions of employment increased his risk of contracting asthma as compared with the general public. Specifically, he contends that the evidence he presented in the form of lay testimony and articles — coupled with basic notions of "common sense" — was sufficient to meet his burden of proof. Defendants, conversely, argue that Briggs was required to produce expert medical evidence in order to establish that his employment conditions placed him at a greater risk for contracting asthma. In order to analyze this issue, we find it instructive to review the relevant case law from our appellate courts applying *Rutledge*.

Norris v. Drexel Heritage Furnishings, Inc., 139 N.C. App. 620, 534 S.E.2d 259 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001), involved a worker who brought a claim for workers' compensation benefits based on her allegations that her employment as a splicing machine operator had caused her fibromyalgia. *Id.* at 622, 534 S.E.2d at 261. The plaintiff offered the testimony of a specialist in chronic pain management who had diagnosed her with myofascial pain syndrome. He "indicated a causal relation existed between plaintiff's condition and

her employment." *Id.* at 621-22, 534 S.E.2d at 261. Several other medical specialists with whom the plaintiff had consulted stated that they had diagnosed her disease as fibromyalgia. *Id.* at 622, 534 S.E.2d at 261. Additionally, three of the plaintiff's co-workers testified that "they experienced similar burning sensation and knots in their upper backs and shoulders as a result of performing the job." *Id.* at 622, 534 S.E.2d at 261.

The Commission found that "the plaintiff had fibromyalgia and that her fibromyalgia was caused or aggravated by her employment with the defendant." *Id.* However, because the Commission concluded that "there was no medical evidence that plaintiff's employment with defendant placed her at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed," it concluded that her fibromyalgia was not an occupational disease. *Id.*

We affirmed the Commission's decision, stating as follows:

> Plaintiff . . . contends that the Commission acted under a misapprehension of law by requiring medical evidence to prove plaintiff's employment subjected her to a greater risk of developing fibromyalgia than the general public not so employed. We disagree.
>
> . . . . [W]ith regard to the necessity of proof by expert medical testimony, our Supreme Court has stated that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. . . . It has also stated that when a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony. . . . Therefore, findings regarding the nature of a disease—its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony.

Id. at 622-23, 534 S.E.2d at 262 (internal citation and quotation marks omitted).

In *Chambers v. Transit Mgmt.*, 360 N.C. 609, 636 S.E.2d 553 (2006), the employee sought workers' compensation benefits for a left ulnar

nerve entrapment affecting his elbow and a cervical spine condition affecting his neck. He alleged that these conditions were caused by his occupation as a bus driver. *Id.* at 610, 636 S.E.2d at 554.

The plaintiff offered testimony from Dr. Tim Adamson, a neurosurgeon who diagnosed him with a "double crush syndrome" and helped describe the relationship between the two injuries. *Id.* at 611, 636 S.E.2d at 554. Dr. Adamson also wrote a letter to the plaintiff's attorney in which he stated that "plaintiff's occupation as a bus driver did place him slightly at higher risk than the general public." *Id.* at 614, 636 S.E.2d at 556. At his deposition, he clarified the statements in his letter by testifying that he was "not able to say that the bus driving activities caused the ulnar neuropathy, but that it could have aggravated the ulnar neuropathy[.]" *Id.* at 615, 636 S.E.2d at 557. Based on Dr. Adamson's opinions, the Commission found that both of the plaintiff's injuries were compensable occupational diseases. *Id.* at 611, 636 S.E.2d at 554.

The Supreme Court reversed the Commission's award and held that the "plaintiff ha[d] failed to establish that his employment placed him at a greater risk of contracting either his ulnar nerve entrapment or his cervical spine condition than the general public." *Id.* at 614, 636 S.E.2d at 556. The Court focused its analysis on the medical evidence presented by the plaintiff, holding that even though Dr. Adamson's letter stated that the plaintiff was "at higher risk than the general public[,]" the letter did not "satisfactorily distinguish between the risk faced by plaintiff of *contracting* his conditions and the risk of *aggravating* a preexisting condition relative to the general public[.]" *Id.* at 614-15, 636 S.E.2d at 556. Thus, the Court concluded that the plaintiff had not met his burden of establishing through expert medical evidence that his employment placed him at a greater risk than members of the general public of contracting the diseases. *Id.* at 615, 636 S.E.2d at 556.

Briggs does not dispute the proposition that he was required to satisfy the first two prongs of the *Rutledge* test by showing that his employment at Permatech exposed him to a greater risk of contracting asthma than the general public. Instead, he contends that North Carolina courts have never expressly required expert medical evidence to establish the first two prongs of the *Rutledge* test. However, based on our careful reading of *Norris* and *Chambers*, we conclude that our case law has, in fact, consistently required that such evidence be produced in order for these two prongs to be met. *See Thomas v. McLaurin Parking Co.*, 181 N.C. App. 545, 551, 640 S.E.2d 779, 783 (2007) (affirming denial of benefits where "[n]o evidence was presented by either doctor presenting

testimony to the Commission that plaintiff's employment placed him at a greater risk for contracting degenerative arthritis").[1]

The Commission's unchallenged findings of fact fully support its conclusion that Briggs failed to offer sufficient medical evidence that the conditions at the Permatech facility placed him at a greater risk for contracting asthma than the general public. In Finding No. 17, the Commission found that "Plaintiff's employment was a significant contributing factor in his development of asthma, to the extent that his exposure to irritant dust aggravated but did not cause his asthma." In Finding No. 18, the Commission found that "[n]either Dr. Darcey nor Dr. McQuaid testified that Plaintiff's employment placed him at an increased risk of *contracting*, as opposed to aggravating, asthma as compared to members of the general public not so employed." Moreover, as the Commission also noted, Dr. Darcey testified that "asthma occurs when the airways become irritated and inflamed, and that reactions can be triggered by any number of things" but that "irritant dust does not generally cause new onset asthma . . . ."

Briggs also argues that the Commission erred by failing to determine that the two articles he submitted during Dr. Darcey's deposition supported a finding that his job at Permatech placed him at an increased risk of contracting asthma. As an initial matter, these articles are not an adequate substitute for expert medical evidence on this issue. Furthermore, we note that the Commission made an unchallenged finding that these articles — which detailed studies of silicon carbide effects on workers in factories in Norway and Romania — involved working environments in which the amounts of silicon carbide were significantly higher than those at the Permatech facility. The Commission also found that the articles did not specify whether the workers in the study wore respiratory masks for protection as did the workers in the Permatech facility.

In his final argument, Briggs contends that expert medical evidence was not required under the circumstances of this case to establish the first two prongs of the *Rutledge* test because the facts here did not involve complex questions of science so much as "common sense." He

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1. While Briggs attempts to rely on *Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985), that case is inapposite. The issue in *Caulder* was not whether the plaintiff's employment placed him at a greater risk than the general public of contracting his disease for purposes of the *Rutledge* test. Rather, the question in *Caulder* involved the entirely separate issue of whether the defendants' employment was the plaintiff's "last injurious exposure" to the hazards of the disease from which the plaintiff suffered. *Id.* at 72, 331 S.E.2d at 647 (emphasis added).

argues that "[t]he average person is not exposed to 108 tons of asthma-causing dust" and asserts that any layperson would know that working in a dusty environment exposes a worker to an increased risk of contracting asthma.

We are unable to agree with Briggs that the question of whether an individual can actually *contract* asthma simply by working in a dusty environment is one that a layperson could answer. Rather, we believe such a determination is beyond a layperson's understanding given that questions as to the root causes of asthma can only be answered by medical experts.[2] *See Norris*, 139 N.C. App. at 622-23, 534 S.E.2d at 262 (holding that "when a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony").

Thus, Briggs failed to establish that "[his] employment exposed [him] to a greater risk of contracting [asthma] than the public generally . . . ." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365 (citation omitted). Accordingly, the Commission properly denied his claim.

Conclusion

For the reasons stated above, we affirm the Commission's 31 March 2017 Opinion and Award.

AFFIRMED.

Judges TYSON and BERGER concur.

2. We observe that Briggs' "common sense" argument stands in stark contrast to Dr. Darcey's testimony that asthma is generally *not* caused by irritant dust.

DAVIS v. NEW ZION BAPTIST CHURCH

[258 N.C. App. 223 (2018)]

SARAH B. DAVIS, ET AL., PLAINTIFFS
v.
NEW ZION BAPTIST CHURCH, DEFENDANT

No. COA17-523

Filed 6 March 2018

1. Jurisdiction—standing—church dispute

Plaintiffs had standing to pursue claims against a church where the injuries they alleged occurred during a time when they were active members of the church, even though the church asserted that plaintiffs were told they were no longer members of the church after the lawsuit was filed.

2. Churches and Religion—dispute between members—amendments to bylaws—procedural rules

The trial court could declare void an amendment to church bylaws where the question was whether the church and its members had followed the procedural rules established in those bylaws.

3. Churches and Religion—deacons and trustees—court-ordered election

The trial court exceeded its authority by ordering a mandatory election of deacons and trustees in a dispute between church members.

4. Churches and Religion—removal of deacons and trustees—bylaws

The trial court properly determined that it could play no part in determining whether deacons and trustees were properly removed from their posts in a dispute within the church. The church's bylaws were silent on the matter; without neutral principles to apply, the courts have no authority.

Appeals by defendant and plaintiffs from judgment entered 23 November 2016 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2018.

James, McElroy & Diehl, P.A., by J. Alexander Heroy, Edward T. Hinson, Jr., and Preston O. Odom, III, for plaintiffs-appellees.

The McIntosh Law Firm, P.C., by Jesse C. Jones, for defendant-appellant.

DIETZ, Judge.

This dispute between a church and some of its former members returns to us for a second time. Our review is constrained by the mandate in the previous decision of this Court, and the limits on judicial intervention in the governance of religious bodies established in the First Amendment to the United States Constitution.

As explained below, we affirm the trial court's judgment that, applying neutral principles of law, the church did not follow the procedure established in its bylaws when it attempted to amend them. Because the bylaws govern some non-ecclesiastical issues involving church property and contract rights, courts have the power to adjudicate this issue. With respect to the remaining issues on appeal, concerning removal and election of church deacons and trustees, the bylaws are silent. The courts can play no role in the resolution of those issues. We therefore affirm the trial court's order in part and vacate the order in part.

Facts and Procedural History

In 2013, Plaintiffs, all of whom were active, voting members of New Zion Baptist Church, sued the Church and its pastor, Henry Williams, Jr.

All of Plaintiffs' claims stemmed from the Pastor's management of Church finances and a decision by the Church in 2013 to amend the Church bylaws, changing various tenets of Church doctrine as well as other aspects of the Church's day-to-day operations. The trial court denied the Church's motion to dismiss for lack of subject matter jurisdiction, rejecting the argument that the First Amendment barred the courts from adjudicating these claims.

This Court affirmed the trial court in part. *Davis v. Williams*, 242 N.C. App. 262, 774 S.E.2d 889 (2015). We held that courts had the power to adjudicate Plaintiffs' claim with respect to the Church's breach of its own bylaws, but only to the extent that this claim involved application of neutral principles of law to Church rules that did not involve doctrine or religious practice. *Id.*

On remand, the trial court entered summary judgment holding that the Church "violated its Bylaws in its 2013 attempts to vote on proposed amendments" and therefore those amendments were void. The trial court also found that, because the existing bylaws were "silent as to the process for removing deacons and trustees," the trial court could not play any role in reviewing the removal of those officers from their posts. But the trial court nevertheless ordered the Church to hold an election

"to fill vacancies in the office of deacon and trustee . . . at the next regular business meeting of the church, but in any event, no later than ninety (90) days from the filing of this Order." Both parties timely appealed portions of the trial court's ruling.

Analysis

I. Standing

[1] We begin with the Church's argument that Plaintiffs lack standing to pursue their claims.

Standing is a jurisdictional principle that stems from the notion of "justiciability." It is designed to ensure that a party seeking relief from the courts has a sufficient stake in the controversy to justify adjudication of the dispute. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). There is a well-established body of case law governing standing in the federal courts. But because "North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution," our State's standing jurisprudence is broader than federal law. *Id.* at 114, 574 S.E.2d at 52. Although our Supreme Court has declined to set out specific criteria necessary to show standing in every case, the Supreme Court has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury. *See, e.g., Goldston v. State*, 361 N.C. 26, 34–35, 637 S.E.2d 876, 881–82 (2006).

Here, Plaintiffs were voting members of the Church in good standing at the time of the alleged violations of the Church bylaws, and at the time they filed this lawsuit. They alleged that they were harmed, as voting members of the Church, by the Church's failure to follow the proper voting procedure when amending the bylaws.

But the Church asserts in its brief that, "[a]fter this lawsuit was filed, plaintiffs were advised . . . they are no longer members of the church." Thus, the Church argues, Plaintiffs no longer have standing because, as non-members of the Church, they have no right to challenge the Church bylaws or voting practices.

We disagree. Because the injury Plaintiffs allegedly suffered occurred during a time that the parties concede they were active members of the Church, and because that injury has not been resolved or redressed among these parties, we hold that Plaintiffs have a sufficient stake in the controversy to confer standing despite their removal as

members after the lawsuit began. *See Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009).

II. Trial court's entry of summary judgment

[2] We next turn to the merits of the parties' arguments. This case returns to us with the parties asserting many of the same arguments they asserted in *Davis I*. Since then, the law has not changed. As we explained in *Davis I*, "[t]he First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. However, not every dispute involving church property implicates ecclesiastical matters." 242 N.C. App. at 264, 774 S.E.2d at 892 (quoting *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510–11, 714 S.E.2d 806, 810 (2011)). Courts may resolve disputes involving a religious institution through "neutral principles of law." *Id.* "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Id.*

We first address the portion of the trial court's order that declared the 2013 amendments to the Church's bylaws void. As our analysis in *Davis I* indicates, this portion of the order did not violate the First Amendment. Although with respect to the "establishment and exercise of church polity the civil courts have no jurisdiction or right of supervision," the courts can determine "whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules" with respect to "civil, contract or property rights." *Western Conference of Original Free Will Baptists of North Carolina v. Creech*, 256 N.C. 128, 140–41, 123 S.E.2d 619, 627 (1962).

Put another way, when the Church creates written bylaws that govern the use of church property, and other matters unrelated to church doctrine and religious practice, courts can review whether the Church and its members followed the procedural rules created in those bylaws. *Davis I*, 242 N.C. App. at 265, 774 S.E.2d at 892. The trial court did so, consistent with our mandate from *Davis I*, when it declared that the means by which the Church and its members voted to amend the bylaws violated the procedure established in the bylaws. We therefore affirm that portion of the trial court's judgment.

[3] The Church next challenges the portion of the trial court's ruling that is, in effect, a mandatory injunction stating that "[a]n election to fill vacancies in the office of deacon and trustee shall be held at the next regular business meeting of the church, but in any event, no later than ninety (90) days from the filing of this Order." The Church, citing *Creech*, argues that this portion of the trial court's order impermissibly assumes

a supervisory role over Church governance. Plaintiffs concede that the trial court "exceed[ed] its authority by . . . ordering a new vote." We agree and therefore vacate this portion of the trial court's order.

[4] Finally, we agree with the Church that the trial court properly determined it could play no part in determining whether deacons and trustees properly were removed from their posts. As the trial court held, the Church bylaws "are silent as to the process for removing deacons and trustees." Neither party directs this Court to any neutral principles of law that would permit this Court to fill in the gaps. With no neutral principles to apply, the courts have no authority to wade into when and how these church leaders are removed from office. *Id.*

Conclusion

Consistent with our previous mandate in this case, we affirm the trial court's judgment that the 2013 proposed amendments to the Church bylaws are void because, applying neutral principles of law, the Church did not properly use the procedure contained in the bylaws when attempting to amend them.

We vacate the portion of the trial court's order requiring the Church to hold elections to fill vacancies in the offices of Church deacons and trustees at a specified time.

VACATED IN PART AND AFFIRMED IN PART.

Judges ELMORE and HUNTER, JR. concur.

GRIER FLEISCHHAUER, REX H. FRAZIER AND JENNIE FRAZIER, ROBERT TAYLOR AND BARRY TAYLOR, JACK V. MACKMULL; HERBERT NETHERTON AND DOROTHY L. NETHERTON, ED HARTMAN AND KATHY HARTMAN, STEPHEN J. LEARY AND PATTI LEARY, BARBARA SACCHI, JACK MATTHEWS AND SERENA MATTHEWS, JERRY TOOMES; DONALD LESAGE AND JUDY LESAGE; EDWARD MENNONA; STANLEY M. FARRIOR AND JULIE E. FARRIOR; BILL BURNS AND JULIE BURNS; LISA BERESNYAK; WALTER STARKEY; CATHERINE MURPHY; RANDY PRICE; DON TISDALE AND VICKY TISDALE; JAMES YORK AND DIANA YORK; KIM FRANCE; GWEN FRAZIER AND JENNIE FRAZIER; KEVIN KEIM; BEN AND MARY THOMPSON, PLAINTIFFS

v.

TOWN OF TOPSAIL BEACH, NORTH CAROLINA, DEFENDANT

No. COA17-915

Filed 6 March 2018

Jurisdiction—subject matter jurisdiction—ripeness—no final determination—use of land—declaratory judgment

The trial court did not err in a declaratory judgment action, concerning the issuance of building permits on beach property that would allow for the alteration of dunes, by granting defendant town's motion to dismiss based on lack of subject matter jurisdiction where the issues raised by the complaint were not ripe for review. There was no final determination about what uses of the land would be permitted by defendant, and plaintiff landowners' speculation that defendant would make a certain determination was insufficient to create a justiciable case or controversy.

Appeal by plaintiffs from an order entered 13 April 2017 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 7 February 2018.

Kilpatrick Townsend & Stockton, LLP, by Phillip A. Harris, Jr., Todd S. Roessler, and Joseph S. Dowdy, for plaintiffs-appellants.

Rountree Losee, LLP, by Stephen D. Coggins, Anna Richardson-Smith, and Laura K. Greene, and Jack Cozort, for defendant-appellant.

ARROWOOD, Judge.

Grier Fleischhauer; Rex H. Frazier and Jennie Frazier; Robert Taylor and Barry Taylor; Jack V. Mackmull; Herbert Netherton and Dorothy L. Netherton; Ed Hartman and Kathy Hartman; Stephen J. Leary and Patti

Leary; Barbara Sacchi; Jack Matthews and Serena Matthews; Jerry Toomes; Donald Lesage and Judy Lesage; Edward Mennona; Stanley M. Farrior and Julie E. Farrior; Bill Burns and Julie Burns; Lisa Beresnyak; Walter Starkey; Catherine Murphy; Randy Price; Don Tisdale and Vicky Tisdale; James York and Diana York; Kim France; Gwen Frazier and Jennie Frazier; Kevin Keim; and Ben and Mary Thompson ("plaintiffs") appeal from an order granting Town of Topsail Beach's ("defendant" or "Topsail Beach") motion to dismiss for lack of subject matter jurisdiction and dissolving a previously issued temporary restraining order. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Topsail Beach, a municipality organized and existing pursuant to the laws of North Carolina, is located on a barrier island along the southeastern coast of North Carolina. Plaintiffs own soundside properties on the south end of Topsail Beach. Twenty-eight undeveloped lots ("the oceanfront lots") lie between plaintiffs' properties and the Atlantic Ocean. Some of the plaintiffs own lots adjacent to the land, while others own lots a city block or more from the oceanfront lots.

On 19 December 2016, plaintiffs filed suit against Topsail Beach, seeking a declaratory judgment that (1) any excavation or manmade alterations of the landward dune on the oceanfront lots would violate local ordinances, the town's land use plan, and federal law, and (2) any permits issued by defendant that would allow the excavation or manmade alterations of the landward dune on the lots would violate local ordinances, the town's land use plan, and federal law. Plaintiffs also requested injunctive relief, enjoining defendant "from issuing any [permits] that would allow the owners of [the oceanfront lots] to proceed with excavation or any manmade alterations of the landward dune and development of the lots." That same day, plaintiffs obtained an *ex parte* temporary restraining order, prohibiting defendant from issuing building permits on "property that would allow the alteration of dunes."

On 28 December 2016, the temporary restraining order was modified and extended. On 16 February 2017, defendant answered and filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, motion to strike pursuant to Rule 12(f), motion to join necessary parties pursuant to Rule 12(b)(7), and motion to dissolve the temporary restraining order pursuant to Rule 65.

On 30 March 2017, defendant's motions came on for hearing in Pender County Superior Court, the Honorable R. Kent Harrell presiding. The materials considered at the hearing, including pleadings,

motions, affidavits, and memoranda submitted to the court, tended to show as follows.

State and local government have concurrent responsibilities with regard to coastal area management in North Carolina. N.C. Gen. Stat. § 113A-101 (2017). Under State law, the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. § 113A-100 *et seq.*, requires the property owners of the oceanfront lots to obtain a CAMA minor development permit ("CAMA permit") before constructing a residence on their lot. *See* N.C. Gen. Stat. § 113A-118(a) (2017). The North Carolina Division of Coastal Management, the agency tasked with administering CAMA, has issued minor development permits to six of the property owners of the oceanfront lots in accordance with State law.

Once an owner of an oceanfront lot obtains a CAMA permit, the owner must then obtain a zoning permit and a building permit from the municipality before he can construct a residence. The building permit process aims to ensure compliance with the State Building Code and local ordinances, including the town's Flood Damage Prevention Ordinance ("FDPO"). The FDPO states, "[t]here shall be no alteration of sand dunes which would increase potential flood damage[,]" Topsail Beach, N.C., Code ("Town Code") § 14-75(7) (2017), and requires property owners in a VE Zone,[1] where the oceanfront lots are located, to provide an engineering analysis that a proposed project will not increase potential flood damage before they may obtain a building permit. Whether a proposed project will increase potential flood damage is a site specific inquiry. Once the town, through a permit official, decides whether to allow or deny a building permit, any "person aggrieved" may seek review of the decision to the Board of Adjustment, and, if discontent with the Board decision, may seek redress in the courts. *See* Town Code §§ 16-301, 16-351 (2017). A "person aggrieved" includes one who either has "an ownership interest in property that is the subject of the situations or conditions[,]" or:

> [p]ersons who will suffer special damages that:
>
> a. Arise by virtue of the person aggrieved's ownership interest in property that is adjacent to property that is the subject of situations and conditions that are the subject of a final decision . . . ; and

1. A VE Zone is a "coastal high hazard area[,]" defined as "special flood hazard areas . . . associated with high velocity waters from storm surges or seismic activity . . . ." Town Code § 14-75.

b. Are distinct from any damage all the remainder of the town may suffer in consequence of the situations and conditions; and

c. Are directly and proximately caused by situations and conditions that are the subject of a final decision.

Town Code § 16-295(a) (2017). "A town officer or official, department, board, or commission[,]" or certain associations organized to protect and foster the interest of a particular neighborhood or local area, as set out in § 16-295, may also qualify as a "person aggrieved" pursuant to the Town Code. *Id.* Presently, Topsail Beach has received no applications for a zoning permit or a building permit for the oceanfront lots.

Although State and local law manage the development of North Carolina's coast, Topsail Beach also opts in to the National Flood Insurance Program ("NFIP"), created by the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 *et seq.*, and administered by the Federal Emergency Management Agency ("FEMA"). To participate in the NFIP, a municipality must adopt ordinances setting forth certain minimum requirements to reduce the risk of flood damage. 44 C.F.R. § 59.22(a)(3) (2017). The minimum requirements include prohibiting the man-made alterations of naturally occurring sand dunes in VE zones that would increase potential flood damage. *See* 44 C.F.R. §§ 59.1, 60.3(e) (2017). Property owners receive lower insurance premiums through the NFIP if local law adopts heightened standards of flood protection in addition to the minimum requirements. When a participant in the NFIP fails to implement or enforce certain requirements, it may be subject to probation or suspension from the program. 44 C.F.R. § 59.24(d) (2017). The NFIP must provide the participant with notice and an opportunity to cure any deficiencies before placing the participant on probation or suspending the participant from the program. *Id.* The policyholders in Topsail Beach receive the highest possible discount on their flood insurance premiums, and Topsail Beach has not received notice that it may be subject to probation or suspension from the program, or that the premiums available to policyholders may increase.

On 14 December 2016, defendant repealed one of its local ordinances, the Dune Protection Ordinance, which provided protections for dunes that were additional to the FDPO that plaintiffs allege generally prevented development of the oceanfront lots. Although the FDPO remains in effect, plaintiffs allege the issuance of building permits and development of the oceanfront lots is now imminent. Plaintiffs claim that developing the oceanfront lots will increase the potential flood

damage to plaintiffs' properties, and jeopardize both their participation in the NFIP and also their discounted NFIP premiums.

After hearing arguments of counsel, and reviewing the pleadings, motions, affidavits, and memoranda in the record, the trial court dismissed plaintiffs' complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because (1) the issues raised by the complaint were not ripe for review because there was no final determination about what uses of the land will be permitted by defendant, and (2) plaintiffs did not have standing to pursue their action.

Plaintiffs appeal.

II. Discussion

Plaintiffs present two issues on appeal. First, plaintiffs argue the trial court erred in concluding the issues raised in the complaint are not ripe for adjudication. Second, plaintiffs argue the trial court erred in concluding that plaintiffs did not have the standing to institute this action. We agree with the trial court that this matter is not ripe for adjudication. Therefore, we affirm the trial court's order dismissing plaintiffs' action for lack of subject matter jurisdiction, however, we do not reach the issue of whether plaintiffs had standing to institute the action.

Rule 12(b)(1) of the North Carolina Rules of Civil Procedure "permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citing N.C.R. Civ. P. 12(b)(1) (2017)). We review a trial court's dismissal for lack of subject matter jurisdiction *de novo* and may consider evidence outside the pleadings. *Id.* at 482, 720 S.E.2d at 735 (citation omitted).

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Prop. Rights Advocacy Grp. ex rel. Its Members v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (citation and internal quotation marks omitted). To satisfy this requirement, the complaint must show "that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough[,]" *id.* at 182, 617 S.E.2d at 717 (citation and internal quotation marks omitted), because "[t]he resources of the judicial system should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions." *Andrews v. Alamance Cty.*, 132 N.C. App. 811, 814, 513 S.E.2d 349, 350 (1999) (citation and internal quotation marks omitted).

A speculative possibility that land development might proceed in the future does not constitute a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718. Indeed, "[a]ny challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted." *Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted).

Here, plaintiffs sought a declaratory judgment that the development of the oceanfront lots, and the issuance of permits to develop the same, violates local and federal law because any development would alter the landward dune on the properties. However, plaintiffs have not shown that defendant made a final determination as to what development of the land, if any, will be permitted by the town. Plaintiffs have not even shown that the oceanfront lot owners have submitted applications for zoning or building permits to defendant to request such a determination. Additionally, there is no evidence that FEMA has notified defendant, or any flood insurance policyholder within Topsail Beach, that, with regard to NFIP, probationary status is impending or that policyholders' insurance premiums may increase.

In essence, plaintiffs ask us to rule that they may challenge the permissible uses of neighboring oceanfront lots based on a speculative possibility that development will proceed in the future. We decline to do so, as, until defendant makes a final decision about what uses of the oceanfront lots will be permitted, any challenge related to the use thereof will not be ripe for adjudication. *See Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted). Therefore, the trial court correctly dismissed plaintiffs' action for lack of subject matter jurisdiction.

We note that plaintiffs argue that because defendant permitted the construction of a beach house in 2014, prior to the decision to repeal the Dune Protection Ordinance, it is clear that defendant will approve similar development, which plaintiffs allege violates federal and local laws. We disagree. It would be precipitous to presume Topsail Beach has made a final decision as to the permissible development of the oceanfront lots because defendant previously authorized a building permit for an oceanfront property. Plaintiffs' speculation that defendant will make a certain determination is insufficient to create a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718.

Plaintiffs failed to show the existence of a justiciable case or controversy. *See Andrews*, 132 N.C. App at 815, 513 S.E.2d at 351. Thus,

we affirm the trial court's dismissal of plaintiffs' action for lack of subject matter jurisdiction and do not reach or decide the issue of whether plaintiffs have standing.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

DONNIE L. GOINS AND JACKIE KNAPP, PLAINTIFFS
v.
TIME WARNER CABLE SOUTHEAST, LLC, AND WAKE ELECTRIC MEMBERSHIP CORPORATION D/B/A WAKE ELECTRIC, DEFENDANTS

No. COA17-531

Filed 6 March 2018

1. Negligence—contributory—following too closely

In an accident that began with cyclists running over a downed utility line, the issue of contributory negligence in whether plaintiff Knapp was following the cyclist in front of her too closely was for the jury. Furthermore, even if she was following too closely, there was a question of whether she would have hit the wire even if no one was in front of her.

2. Negligence—sudden emergency—instruction—prejudicial error

An instruction on sudden emergency was prejudicial error in a case arising from an accident that began with cyclists running over a downed power line. There was evidence that defendant did not act reasonably in attending to the downed power line, on which the trial court correctly instructed the jury; evidence of contributory negligence in that plaintiffs were traveling too fast, failed to keep a proper lookout, and that defendant followed the cyclist in front of her too closely, on which the trial court also instructed the jury; but no evidence from which the jury should have been asked to determine whether plaintiff's failure to see the wire was caused by some sudden emergency.

Appeal by Defendant from judgment entered 8 August 2016 and order entered 30 September 2016 by Judge Elaine M. O'Neal in Wake County Superior Court. Heard in the Court of Appeals 16 October 2017.

Martin & Jones, P.L.L.C., by H. Forest Horne and Huntington M. Willis, for the Plaintiffs-Appellees.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Thomas M. Buckley and Joshua D. Neighbors, for the Defendant-Appellant.

DILLON, Judge.

Donnie L. Goins and Jackie Knapp (together, "Plaintiffs") brought this action seeking damages sustained when they each (at different times) collided with a utility line owned by Time Warner Cable Southeast, LLC, ("Defendant") that was lying at ground level in a public roadway. The jury found that Defendant was negligent and that neither Plaintiff was contributorily negligent. Defendant appeals from the trial court's judgment entered based on the jury's verdict and from the trial court's subsequent denial of its Motion for Judgment Notwithstanding the Verdict ("JNOV"). We agree with Defendant that, based on our jurisprudence, the trial court committed reversible error by instructing the jury on the sudden emergency doctrine, an instruction which provided a theory by which the jury could determine that neither Plaintiff was contributorily negligent. Specifically, there was no evidence to support the instruction. Accordingly, we vacate the judgment entered by the trial court and remand the matter for a new trial.

I. Background

The evidence presented at trial tended to show the following:

On 11 January 2014, severe weather caused a utility line belonging to Defendant to fall from its poles. That same day, Defendant was notified of the fallen line.

The following morning, Donnie Goins ("Plaintiff Goins") was cycling and was severely injured when his front tire made impact with the line, which was still lying in the roadway. A short time later, Jackie Knapp ("Plaintiff Knapp") was cycling when a cyclist directly in front of her struck the wire and wrecked. Plaintiff Knapp was unable to stop before colliding with him, resulting in a pile-up and causing Plaintiff Knapp to sustain severe injuries.

A jury ultimately found Defendant responsible for both Plaintiffs' injuries, and the trial court entered judgment on the verdict and denied Defendant's subsequent motion for JNOV. Defendant now appeals.

II. Analysis

Defendant contends that the trial court erred in two respects. First, Defendant argues that the trial court should never have allowed the issue of Plaintiff Knapp's contributory negligence to reach the jury, contending that Plaintiff Knapp was contributorily negligent as a matter of law. Second, Defendant argues that a jury instruction regarding the doctrine of sudden emergency was not warranted in this case. We address each argument in turn.

A. Plaintiff Knapp's Contributory Negligence

[1] In its first argument, Defendant challenges the trial court's denial of its JNOV as to Plaintiff Knapp, contending that Plaintiff Knapp was contributorily negligent as a matter of law for cycling too closely to the cyclist in front of her before she was injured. Therefore, Defendant argues, the issue of Plaintiff Knapp's contributory negligence should never have gone to the jury.[1] We disagree.

"[A] directed verdict [or a JNOV] for [the moving party] on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to [the non-moving party] establishes the [non-moving party's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976). Decisions regarding motions for directed verdict and JNOV are questions of law, to be reviewed *de novo*. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013).

Defendant contends that the only reasonable conclusion to be drawn from the evidence in this case is that Plaintiff Knapp was negligent *per se*, and that the trial court should have granted its summary motions on the issue. Specifically, Defendant claims Plaintiff Knapp's actions fall within the purview of Section 20-152(a) of our General Statutes, in that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." N.C. Gen. Stat. § 20-152 (2015). It is true that a violation of the statute amounts to negligence *per se*. *See Ratliff v. Duke Power Co.*, 268 N.C. 605, 612, 151 S.E.2d 641, 646 (1966).

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1. We note here that Defendant's contentions on appeal regarding the contributory negligence of Plaintiffs focuses solely on Plaintiff Knapp. Whether it was proper for the jury to review any negligence on the part of Plaintiff Goins is not before us on appeal.

However, our Supreme Court has repeatedly held that a rear-end collision by a following vehicle is mere evidence that the driver may have been following too closely, and such is a question of fact for the jury. *See Beanblossom v. Thomas*, 266 N.C. 181, 188-89, 146 S.E.2d 36, 42 (1966); *Fox v. Hollar*, 257 N.C. 65, 71, 125 S.E.2d 334, 338 (1962).

We hold that the issue of Plaintiff Knapp's contributory negligence was one for the jury. There is a question as to whether Plaintiff Knapp was following the cyclist in front of her too closely. Furthermore, assuming she was following too closely, there is a question as to whether this negligence proximately caused her injuries. That is, the jury could have determined from the evidence that Plaintiff Knapp would have hit the wire and been injured anyway even if no one was in front of her.

The evidence presented to the jury was not such that the only reasonable conclusion to be drawn was in favor of Defendant on the question of Plaintiff Knapp's contributory negligence, and we therefore find no error.

B. Sudden Emergency

[2] Defendant's second argument concerns the trial court's jury instruction regarding the doctrine of sudden emergency, to which it objected at trial. Specifically, Defendant contends that there was no evidence to support this instruction.

We review challenges regarding the appropriateness of jury instructions to determine, first, whether the trial court abused its discretion, *see Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 393, 396 (1988), and, second, whether such error was likely to have misled the jury. *Union Cty. Bd. of Educ. v. Union Cty. Bd. of Comm'rs* 240 N.C. App. 274, 290-91, 771 S.E.2d 590, 601 (2015). "[W]e consider whether the instruction [challenged] is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013). For the reasons stated below, we agree with Defendant that the evidence did not warrant the instruction and that the error was prejudicial.

Our Supreme Court has explained that the doctrine of sudden emergency excuses the actions of a party which may normally constitute negligence where the party so acted *in response* to a sudden emergency which the party did not cause:

> The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in

> such an emergency. *If he does so, he is not liable for failure to follow a course which calm, detached reflection at a later date would recognize to have been a wiser choice.*

Rodgers v. Carter, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1966) (emphasis added).

The doctrine of sudden emergency applies only to conduct, alleged to be negligent, that occurs *after* the emergency arises. *See Carrington v. Emory*, 179 N.C. App. 827, 830, 528 S.E.2d 532, 534 (2006) ("[A] sudden emergency arises in most, if not all, motor vehicle collisions, but the doctrine of sudden emergency is applicable only when there arises from the evidence . . . an issue of negligence by an operator *after being confronted by the emergency*." (alteration in original) (emphasis added)). In applying the doctrine,

> the jury is permitted to consider, in its determination of whether specific conduct was reasonable under the circumstances, that the actor faced an emergency. It logically follows that in order for perception of an emergency to have affected the reasonableness of the actor's conduct, the [actor] *must have perceived the emergency circumstance and reacted to it.*

Pinckney v. Baker, 130 N.C. App. 670, 673, 504 S.E.2d 99, 102 (1998) (emphasis added).

In the present case, the trial court properly instructed the jury on Defendant's negligence, as there was evidence, taken in the light most favorable to Plaintiffs, that Defendant did not act reasonably in attending to its fallen utility line. Further, the trial court properly instructed the jury on Plaintiffs' contributory negligence, as there was evidence, taken in the light most favorable to Defendant, that Plaintiffs were traveling too fast and that they failed to keep a proper lookout, and that Plaintiff Knapp followed too closely to the cyclist in front of her.

However, over Defendant's objection, the trial court also instructed the jury on the doctrine of sudden emergency as a theory by which the jury could excuse Plaintiffs' behavior of traveling too fast or failing to keep a proper lookout, which normally might constitute contributory negligence. Defendant argues the trial court improperly instructed the jury on sudden emergency because the instruction was not supported by the evidence. We agree. As our Supreme Court has held, a motorist is not entitled to a sudden emergency instruction to excuse otherwise negligent behavior (e.g., failing to keep a proper lookout) where it is this otherwise negligent behavior that contributed to the emergency:

> A motorist is required in the exercise of due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen. Where a motorist discovers, or in the exercise of due care should discover, obstruction within the extreme range of his vision and can stop if he acts immediately, but his estimates of his speed, distance, and ability to stop are inaccurate and he finds stopping impossible, he cannot then claim the benefit of the sudden emergency doctrine.
>
> The crucial question in determining the applicability of the sudden emergency doctrine is thus whether [the motorist], when approaching the [obstruction in the roadway], saw or by the exercise of due care should have seen that he was approaching a zone of danger. Did his failure to decrease his speed and bring his [vehicle] under control without first ascertaining the nature of the highway conditions ahead of him constitute negligence on his part which contributed to the creation of the emergency thereafter confronting him? The sudden emergency must have been brought about by some agency over which he had no control and not by his own negligence or wrongful conduct.

Hairston v. Alexander Tank, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984) (citations omitted).

Plaintiffs contend the instruction was proper because "the emergency situation *was created by* the very negligence of [] [D]efendant giving rise to the cause of action, namely a dangerous hazard left in the roadway." (emphasis in original). Plaintiffs' argument misconstrues the sudden emergency doctrine. That is, assuming the jury determined that Plaintiffs failed to keep a proper lookout, Defendant's failure to remove the wire did not *cause* Plaintiffs' failure to keep a proper lookout or failure to travel at a safe speed. The doctrine of sudden emergency would apply if, for instance, the Plaintiffs were keeping a proper lookout and then, suddenly, an outside agency, such as a car turning into their lane of traffic, caused them to swerve into the wire. In such a case, their action of swerving in a direction without first determining if there was an obstacle in that direction might be excused since their action of swerving was in response to a sudden emergency, i.e., the car turning into their lane of traffic.

In the present case there is no evidence that an outside agency caused them to fail to keep a proper lookout. For example, Plaintiff

Knapp admitted she was unaware that a hazardous road condition existed and had no opportunity to "react" or attempt to avoid injury before colliding with the cyclist in front of her. Her testimony necessarily precludes application of the sudden emergency doctrine. Likewise, Plaintiff Goins testified he was simply traveling down a hill and then suddenly saw the wire in the road and did not have time to react. There was no evidence that any outside agency distracted them.

Accordingly, based on the evidence, the questions were (1) whether Defendant was negligent in failing to attend to its wire and (2) whether Plaintiffs were contributorily negligent in failing to perceive the wire. There was no evidence from which the jury should have been asked to determine whether Plaintiffs' failure to perceive the wire was caused by some sudden emergency.

Further, we are persuaded, if not compelled, by our Supreme Court's holding in *Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 806 (1966) to conclude that the instruction constituted *prejudicial* error likely to mislead a jury. In *Rodgers*, our Supreme Court held that it was prejudicial error for the trial court to instruct on sudden emergency where the evidence showed that a motorist seeking the instruction hit a child who ran into the road in his path, where there was otherwise no evidence of any prior emergency which caused the motorist to be distracted:

> The learned judge who presided at the trial of this action so instructed the jury [on the motorists' duty to keep a proper lookout], but he added to these instructions [his] remarks concerning the doctrine of sudden emergency, which were not applicable in view of the evidence presented and could have confused the jury as to the principle by which they were to be guided in reaching their verdict.

Rogers, 266 N.C. at 571, 146 S.E.2d at 812.

In the present case, it may be that the jury determined Plaintiffs were not contributorily negligent because they kept a proper lookout. Alternatively, it may be that the jury determined that either or both of the Plaintiffs were not keeping a proper lookout and/or were following too closely, but improperly determined that Plaintiffs were otherwise not contributorily negligent because they were confronted with the "sudden emergency" of a wire in their path which they could not avoid. Because there is a reasonable possibility that the latter occurred, we must conclude that the instruction on sudden emergency was prejudicial error.

III. Conclusion

We conclude that the trial court did not err in denying Defendant's JNOV motion. We conclude, however, that the trial court did commit prejudicial error by instructing the jury on the doctrine of sudden emergency. We vacate the judgment and remand the matter for a new trial consistent with these conclusions.

NEW TRIAL.

Chief Judge McGEE and Judge CALABRIA concur.

IN THE MATTER OF C.P.

No. COA17-639-2

Filed 6 March 2018

1. Child Abuse, Dependency, and Neglect—dependency—appropriate alternative child care arrangement

The trial court erred in a child neglect and dependency case by adjudicating a child as dependent where the child had an appropriate alternative child care arrangement. The child was living with his brother, who was a responsible adult.

2. Child Abuse, Dependency, and Neglect—neglect and dependency—reunification—concurrent plan

The trial court erred in a child neglect and dependency case by failing to order reunification as a concurrent plan during the initial permanency planning hearing pursuant to N.C.G.S. § 7B-906.2(b).

3. Child Abuse, Dependency, and Neglect—reunification efforts—ceased at first permanency planning hearing

Because it was bound by a prior decision in *In re H.L.*, 256 N.C. App. 450 (2017), the Court of Appeals held that the trial court did not err by ceasing reunification efforts with respondent mother at the first permanency planning hearing based on its findings that reunification would be unsuccessful or not in the juvenile's interests. Because the prior holding was contrary to the plain statutory language, the Court of Appeals panel noted that the issue would need to be resolved through an en banc hearing or a decision of the N.C. Supreme Court.

4. Child Abuse, Dependency, and Neglect—neglect and dependency—permanent plan of guardianship—statutorily required findings

The trial court erred in a child neglect and dependency case by ordering a permanent plan of guardianship with a relative without making a finding, as mandated by N.C.G.S. § 7B-906.1(e)(1), on whether it was possible for the child to be returned to respondent-mother within six months and, if not, why placement of the child with respondent-mother was not in the child's best interest.

5. Appeal and Error—preservation of issues—guardianship—notice—failure to raise issue at trial

Respondent-mother waived appellate review of her argument that the trial court erred by awarding guardianship of her child to a non-parent without finding that respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected parental status. Respondent-mother had ample notice that guardianship was being recommended, but she failed to raise the issue below.

Judge ARROWOOD concurring in result only.

Appeal by respondent-mother from order entered 21 March 2017 by Judge Joseph Moody Buckner in Orange County District Court. Originally heard in the Court of Appeals 14 December 2017. Petition for Rehearing allowed 14 February 2018.

Holcomb and Stephenson, LLP, by Angenette Stephenson, for Orange County Department of Social Services, petitioner-appellee.

K&L Gates LLP, by Leah D'Aurora Richardson, for guardian ad litem.

W. Michael Spivey, for respondent-appellant mother.

BERGER, Judge.

Respondent-mother appeals from an order that adjudicated the juvenile, C.P. ("Carl"),[1] as a neglected and dependent juvenile, and awarded permanent guardianship to the juvenile's half-brother ("Chris"). On

1. Carl is a stipulated pseudonym for ease of reading and to protect the juvenile's identity pursuant to N.C.R. App. P. 3.1(b).

January 2, 2018, this Court filed an opinion that reversed the adjudication that Carl is a dependent juvenile, and vacated the order for failing to order reunification as a concurrent plan and failing to make required findings regarding guardianship with Chris. On January 29, 2018, petitioner-appellee Orange County Department of Social Services ("OCDSS") filed a Petition for Rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We subsequently allowed the Petition for Rehearing, and this opinion replaces the original opinion. After careful review, we affirm the portion of the trial court's order that ceases reunification efforts; reverse the adjudication that Carl is a dependent juvenile; and vacate the order for failing to order reunification as a concurrent permanent plan and failing to make required findings regarding guardianship with Chris.

Factual and Procedural Background

On July 14, 2015, OCDSS filed a juvenile petition alleging that thirteen-year-old Carl was a neglected and dependent juvenile. A hearing was held on August 6, 2015 and an order was entered on August 27, 2015 in which the trial court (1) adjudicated Carl and his older sister[2] as neglected and dependent, and (2) awarded custody of Carl and his sister to their adult half-brother. Respondent-mother appealed.

On October 4, 2016, this Court reversed and remanded the case for a new hearing because the order did not result from a proper adjudicatory hearing or valid consent by Respondent-mother. *In re K.P., C.P.*, ___ N.C. App. ___, ___, 790 S.E.2d 744, 749 (2016). On remand, the trial court held an "adjudication/disposition and permanency planning hearing" on March 2, 2017. The trial court (1) adjudicated Carl as dependent and neglected, and (2) awarded guardianship of Carl to his adult half-brother in an order dated March 21, 2017. Respondent-mother filed notice of appeal.

Respondent-mother concedes that she failed to serve a copy of her written notice of appeal on the guardian for the juvenile. *See* N.C.R. App. P. 3.1(a). Although Respondent-mother failed to comply with Rule 3.1(a) of the North Carolina Rules of Appellate Procedure, this Court has the discretionary authority "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." N.C.R. App. P. 21(a)(1). Therefore, we grant Respondent-mother's petition for writ of certiorari and address the merits of this case.

2. Carl's sister has reached the age of majority and is not a party to this appeal.

Analysis

[1] Respondent-mother first contends that the court erred by adjudicating Carl as a dependent juvenile. The Juvenile Code defines a dependent juvenile as one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Respondent-mother argues that all of the evidence and findings show that Carl was always in the care of a suitable relative, and thus he could not be adjudicated as dependent. OCDSS concedes that this adjudication was error because at the time of the adjudication, Carl was living with his brother, who was a responsible adult. Because he had an appropriate alternative child care arrangement, Carl was not a dependent juvenile, and the adjudication must be reversed.

[2] Respondent-mother next contends that the court lacked authority to cease reunification efforts at the initial dispositional hearing. Specifically, she argues the court improperly heard the adjudication, initial disposition, and permanency planning hearings on the same day. Associated therewith, Respondent-mother also asserts that the trial court was required to order reunification as a concurrent plan pursuant to N.C. Gen. Stat. § 7B-906.2.

The "dispositional hearing shall take place immediately following the adjudicatory hearing." N.C. Gen. Stat. § 7B-901(a) (2015). The trial court is required to "conduct a review hearing within 90 days from the date of the [initial] dispositional hearing." N.C. Gen. Stat. § 7B-906.1(a) (2015). Within one year from "the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." *Id.* The General Assembly has not proscribed conducting adjudications, dispositional, and permanency planning hearings on the same day, and the trial court did not err in hearing these matters.

However, Respondent-mother correctly asserts, and the guardian *ad litem* concedes, that the trial court erred in failing to order reunification as a concurrent plan during the initial permanency planning hearing. "At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. *Reunification shall remain* a primary or secondary plan unless" certain findings are made. N.C. Gen. Stat. § 7B-906.2(b) (2015) (emphasis

added). The statutory requirement that "reunification shall remain" a plan presupposes the existence of a prior concurrent plan which included reunification. Thus, reunification must be part of an initial permanent plan. Here, even though the trial court found that Respondent-mother "presents a risk to the health and safety of the juvenile" and that "[r]eunification efforts . . . would be futile," the trial court erred in failing to include reunification as part of the initial concurrent plan.

[3] The same cannot be said of reunification efforts, however. Pursuant to Section 7B-906.1(g), a trial court "*shall* inform the parent, guardian, or custodian that failure or refusal to cooperate with the plan may result in an order of the court in a *subsequent* permanency planning hearing that reunification efforts may cease." N.C. Gen. Stat. § 7B-906.1(g) (2015) (emphasis added). However, despite the plain language of Section 7B-906.1(g), a prior panel of this Court has held that a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful or not in the juvenile's interests. *In re: H.L.*, ___ N.C. App. ___, ___, 807 S.E.2d 685, 693 (2017).[3] The trial court made findings that: Respondent is a danger to C.P.'s health and safety; Respondent failed to take her medications properly; Respondent was unable to feed or care for C.P.; C.P. did not feel safe with Respondent; C.P. was afraid to go to sleep because of Respondent's behavior; and Respondent abused medications and used marijuana which impacted her ability to function and parent C.P. The trial court also found that reunification efforts would be futile and Respondent was unable to provide a safe and stable home for C.P. These findings support the trial court's conclusion that reunification efforts may be ceased, and we must affirm this portion of the order despite the fact that such action is contrary to the plain language of Section 7B-906.1(g).

[4] Respondent-mother next contends that the court erred by ordering a permanent plan of guardianship with a relative without making a finding mandated by N.C. Gen. Stat. § 7B-906.1(e)(1) (2015); namely,

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3. Respectfully, it appears that our Court in *H.L.* did not focus on Section 7B-906.1(g) in its entirety. The second sentence of that section requires prior notice be provided to a parent before reunification efforts may be ceased. Thus, the statutory language precludes eliminating reunification efforts at the permanency planning hearing in this case, as appellant never received the mandated notice. However, case law requires us to follow *H.L. In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") This issue will need to be resolved through an *en banc* hearing with this Court, or a decision from the North Carolina Supreme Court.

"[w]hether it is possible for the juvenile to be placed with a parent within the next six months, and if not, why such placement [with the parent] is not in the juvenile's best interests." *Id.* The guardian *ad litem* and OCDSS concede that the order does not contain the mandated finding. Although the trial court addressed Respondent-mother's faults as a mother and the fractured relationship she had with Carl, the court erred in not finding the key issues of whether it is possible for the child to be returned to her within six months, and if not possible, why placement of the child with Respondent-mother is not in the child's best interest.

[5] Respondent-mother next contends that the court erred by awarding guardianship of Carl to a non-parent without finding that Respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected parental status. Respondent-mother concedes that she did not raise this issue in the trial court but argues she did not have the opportunity.

"[T]o apply the best interest of the child test in a custody dispute between a parent and a non-parent, a trial court must find that the natural parent is unfit or that . . . her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). This finding should be made when the court is considering whether to award guardianship to a non-parent. *In re P.A.*, 241 N.C. App. 53, 66-67, 772 S.E.2d 240, 249 (2015). To preserve the issue for appellate review, the parent must raise it in the court below. *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (citation omitted). However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing. *In re R.P.*, ___ N.C. App. ___, ___, 798 S.E.2d 428, 431 (2017). Here, although counsel had ample notice that guardianship with Chris was being recommended, Respondent-mother never argued to the court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis. We conclude Respondent-mother waived appellate review of this issue.

Conclusion

Accordingly, we affirm the portion of the trial court's order that ceases reunification efforts. We reverse the adjudication that Carl is a dependent juvenile, and vacate the order for failing to order reunification as a concurrent permanent plan and failing to make required findings regarding guardianship with Chris. Because we reverse and remand, we need not address the issue of visitation, but we note that

the trial court made appropriate findings pursuant to N.C. Gen. Stat. § 7B-905.1. We remand for findings consistent with this opinion.

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

Judge ELMORE concurs.

Judge ARROWOOD concurs in result only.

IN THE MATTER OF D.A.

No. COA17-819

Filed 6 March 2018

1. Child Abuse, Dependency, and Neglect—child abuse and neglect—constitutionally protected status as parent—sufficiency of findings of fact

The trial court erred in a child abuse and neglect case by finding and concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent where the findings of fact were insufficient.

2. Child Abuse, Dependency, and Neglect—child abuse and neglect—reunification efforts—sufficiency of findings

The trial court erred in a child abuse and neglect case by failing to make the necessary findings of fact to cease reunification efforts with respondent-mother when it awarded permanent custody of a child to his foster parents.

Appeal by respondents from order entered 12 May 2017 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 15 February 2018.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

Miller & Audino, LLP, by Jay Anthony Audino, for respondent-appellant mother.

Julie C. Boyer for respondent-appellant father.

Parker Poe Adams & Bernstein LLP, by E. Bahati Mutisya, for guardian ad litem.

TYSON, Judge.

Respondent-parents appeal from an order granting full physical and legal custody of their child, D.A., to court-approved caretakers. We vacate and remand.

I. Background

Respondents are married and both serve as active-duty marines in the United States Marine Corps. D.A. was born in June 2014. On 9 July 2014, Respondents sought medical treatment for D.A. after Respondent-father observed dried blood in D.A.'s mouth and nose. D.A. was hospitalized for over two weeks while being treated for a pulmonary hemorrhage.

Respondents sought further medical care for D.A. on 16 September 2014. D.A. was evaluated for possible maltreatment and a blood disorder. A skeletal survey revealed a healing rib fracture, which was not present in an earlier skeletal survey in July 2014. After a medical evaluation, D.A. was diagnosed as suffering from child physical abuse.

Following an investigation by law enforcement, Respondent-mother was charged with felony assault inflicting serious bodily injury, felony child abuse, and misdemeanor contributing to the delinquency of a juvenile. Respondent-father was charged with misdemeanor contributing to the delinquency of a juvenile. Respondent-mother subsequently pled guilty to misdemeanor child abuse. Respondent-father's charge was dismissed.

On 22 September 2014, the Onslow County Department of Social Services ("DSS") filed a juvenile petition, alleging that D.A. was abused and neglected. DSS obtained nonsecure custody of D.A. the same day. Following a hearing, the trial court entered an order on 15 June 2015 adjudicating D.A. as an abused and neglected juvenile. Respondents were ordered to submit to mental health and psychological evaluations, follow all resulting recommendations, and complete parenting classes. The trial court held a permanency planning hearing on 13 January 2016, after which the court entered an order establishing a primary permanent plan of reunification "with a parent, with a secondary plan of custody with a relative or court-approved caretaker." After a 31 August 2016 permanency planning hearing, the trial court entered an order on 12 May 2017, which granted custody of D.A. to his foster parents and waived further review. Respondents timely filed notice of appeal.

II. Issues

Respondent-father contends the trial court erred by: (1) finding and concluding that he had acted inconsistently with his constitutionally protected status as a parent; (2) finding that returning the juvenile to the home of his parents would be contrary to the juvenile's best interests; (3) placing the juvenile in the custody of the foster parents as the most reasonable permanent plan; and, (4) ruling that it would be in the best interests of the juvenile for him to be placed in the full legal and physical custody of the foster parents.

Respondent-mother contends: (1) the trial court's findings were not supported by clear, cogent, and convincing evidence and it failed to make the necessary findings of fact to cease reunification efforts with Respondent-mother and to grant custody to D.A.'s foster parents; and, (2) the evidence presented at the permanency planning hearing did not support the trial court's finding that Respondent-mother has unresolved mental health issues, and the trial court abused its discretion to make such a finding.

III. Standard of Review

"A trial court must determine by 'clear and convincing evidence' that a parent's conduct is inconsistent with his or her [constitutionally] protected status." *Weideman v. Shelton*, ___ N.C. App. ___, ___, 787 S.E.2d 412, 417 (2016) (citation omitted), *disc. review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

Our review of "[w]hether . . . conduct constitutes conduct inconsistent with the parents' [constitutionally] protected status" is *de novo*. *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 242 (2011) (citation omitted). Under this review, we "consider[ ] the matter anew and freely substitute[ ] [our] judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted).

IV. Analysis

A. Respondent-Father's Appeal

[1] Respondent-father argues that the trial court erred in finding and concluding that he acted inconsistently with his constitutionally protected status as a parent. We agree.

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (alteration in original) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). As is present here, "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009).

DSS and the guardian *ad litem* ("GAL") argue that, because custody was granted from a non-parent (DSS) to a non-parent (the foster parents), the trial court did not need to find that the parents had acted inconsistently with their constitutionally protected status prior to awarding permanent custody to the foster parents. In support of this position, they cite *In re J.K.*, 237 N.C. App. 99, 766 S.E.2d 698, 2014 WL 5335274 (2014) (unpublished). In *In re J.K.*, this Court held that the trial court was not required to find that the parents were unfit or had acted inconsistently with their constitutionally protected status before transferring custody because "the court in the order under review did not transfer legal custody from a parent to a nonparent, but instead transferred legal and physical custody from DSS to a relative." *Id.* at 2014 WL 5335274 *5-6.

As an initial issue, DSS and the GAL fail to inform this Court of the *In re J.K* opinion's unpublished status, in violation of N.C. R. App. P. 30(e)(3). Moreover, DSS and the GAL fail to acknowledge the next statement in the opinion that "[w]e note, nonetheless, that at the time when the court awards *permanent* custody of [the juvenile], it must make these determinations prior to awarding custody to a nonparent." *Id.* at 2014 WL 5335274 *6 (emphasis supplied).

Because the trial court awarded *de facto* permanent custody of D.A. to the foster parents and waived further review, the trial court was first required to find that the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. *See In re P.A.*, 241 N.C. App. 53, 56, 66-67, 772 S.E.2d 240, 243, 249 (2015)

(instructing the trial court on remand to make findings regarding whether the respondent had lost her constitutionally protected right of control over her child after the trial court had initially failed to do so when transferring custody from DSS to a nonparent).

In awarding permanent custody of D.A. to his foster parents, the trial court found and concluded that "[R]espondents have acted inconsistently with their constitutionally protected status as parents." In support of this finding and conclusion, the trial court found that

> this juvenile has been in the custody of [DSS] for nearly two years, and in that time, neither respondent parent has taken responsibility or provided a plausible explanation for the injuries that occurred to the juvenile while he was in their care. That while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries, and this remains a barrier to reunification as the home remains an injurious environment.

Respondent-father contends that the trial court held him responsible for D.A.'s injuries, despite a lack of any evidence tending to show Respondent-father caused or knew the cause of D.A.'s injuries. The trial court's findings are insufficient to support a conclusion that Respondent-father was unfit or had acted inconsistently with his constitutionally protected status as a parent.

In the case of *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517, *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010), the trial court held both the respondent-parents responsible for the juvenile's injury where the court made findings that the injury was non-accidental, the parents were the sole caregivers for the juvenile when she sustained her injury, neither parent explained nor took responsibility for the juvenile's injury, and the trial court could not "separate the parents as to culpability." *Id.* at 124-25, 695 S.E.2d at 520.

In affirming the trial court's order, this Court stated that, "[a]s the child's sole care providers, it necessarily follows that Respondents were jointly and individually responsible for the child's injury. Whether each Respondent directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each Respondent is responsible." *Id.* at 129, 695 S.E.2d at 522-23.

By contrast, in the present case, the trial court failed to make any finding that the juvenile's injuries were non-accidental or that

Respondents were the sole caregivers for D.A. when he sustained his injuries. Moreover, even if the trial court intended to find that Respondents were the sole caregivers when D.A. suffered non-accidental injuries, the court's findings are unclear of which parent or parents the court assigned responsibility.

The trial court's finding that the "injuries . . . occurred to the juvenile while he was in [Respondents'] care" could suggest that the court intended to hold both parents responsible for D.A.'s injuries. However, the findings next state that "while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries." This finding suggests the trial court looked to Respondent-mother as the cause for D.A.'s injuries.

The trial court's findings do not explain how Respondent-father was culpable for D.A.'s injuries, unfit, or otherwise acted inconsistently with his constitutionally protected status as a parent to support its conclusion. Absent clear findings, based upon clear, cogent, and convincing evidence, demonstrating how Respondent-father acted inconsistently with his constitutionally protected status, the trial court erred in awarding permanent custody of D.A. to the foster parents. We vacate and remand for a new hearing.

Respondent-father additionally challenges one of the trial court's findings of fact as unsupported by the evidence. We need not review Respondent-father's remaining arguments because of our holding that the trial court's findings do not support its ultimate finding and conclusion that Respondent-father acted inconsistently with his constitutionally protected status as parent.

B. Respondent-Mother's Appeal

[2] Respondent-mother first contends that the trial court lacked clear, cogent, and convincing evidence and necessary findings of fact to cease reunification efforts with Respondent-mother and grant permanent custody to D.A.'s foster parents. In response, DSS and the GAL contend that the trial court did not cease reunification efforts in the order.

We agree with Respondent-mother that the permanent order, without further scheduled hearings, effectively ceases reunification efforts. In the case of *In re N.B.*, 240 N.C. App. 353, 771 S.E.2d 562 (2015), this Court held that the trial court ceased reunification efforts in the permanency planning order despite not explicitly doing so by "(1) eliminating reunification as a goal of [the juveniles'] permanent plan,

(2) establishing a permanent plan of guardianship with [the prospective guardians], and (3) transferring custody of the children from [Youth and Family Services] to their legal guardians." *Id.* at 362, 771 S.E.2d at 568.

In this case, the order eliminated reunification as a goal of D.A.'s permanent plan, established a permanent plan of full legal and physical custody with the foster parents, and transferred custody of the child to the foster parents. In addition, the order waived regular periodic reviews and released all the attorneys for the parties and the GAL. While the trial court's order may not have explicitly ceased reunification efforts, these actions show its effect, in fact and in law, was to waive further review and cease reunification efforts.

1. Ceasing Reunification

We must now consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). Here, the trial court failed to make findings under N.C. Gen. Stat. § 7B-901(c) (2017). The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

2. Statutory Requirements

In order to cease reunification efforts in this way, the statute requires:

> the court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d).

Here, the trial court made findings related to the factors listed in N.C. Gen. Stat. § 7B-906.2(d)(1)-(3), all of which were largely favorable to Respondents. The trial court failed to make findings related to whether Respondents were acting in a manner inconsistent with D.A.'s health or safety. The order also contains no findings that embrace the requisite ultimate finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety."

While the order does state that "the home remains an injurious environment" and that "a return home would be contrary to the best interests of the juvenile," these findings are not tantamount to a finding that reunification efforts would be unsuccessful or inconsistent with D.A.'s health or safety. These findings appear to be more directed at Respondent-mother's failure to admit she had caused D.A.'s injuries after pleading guilty to misdemeanor child abuse. The trial court failed to make the requisite findings required to cease reunification efforts. N.C. Gen. Stat. § 7B-906.2(d) clearly requires the trial court to do so before it ceases reunification efforts. We vacate the trial court's order and remand for further proceedings.

Respondent-mother also challenges one of the findings as lacking in evidentiary support. In light of our holding, we need not review that challenge. We determine the trial court's findings do not support its decision to cease reunification efforts and make custody of D.A. with the foster parents permanent.

V. Conclusion

We vacate the trial court's order and remand for further proceedings. With respect to Respondent-father, the trial court is to make the statutory findings to determine whether Respondent-father is unfit or has acted inconsistently with his constitutionally protected status, and, if so, how. With respect to Respondent-mother, the trial court is to also make the necessary statutory findings and conclusions to determine whether to cease reunification efforts. All findings must be supported by clear, cogent and convincing evidence. *It is so ordered.*

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

IN RE HOFFMAN LIVING TRUST

[258 N.C. App. 255 (2018)]

IN THE MATTER OF THE ADMINISTRATION OF THE MAYETTE E. HOFFMAN LIVING TRUST U/A DATED AUGUST 4, 1997, AS AMENDED.
KIMBERLI HOFFMAN BULLARD, CO-TRUSTEE, PETITIONER
v.
JAMES HOFFMAN, CO-TRUSTEE, RESPONDENT

No. COA17-972

Filed 6 March 2018

Trusts—administration of trusts—costs and attorney fees

On appeal from an order of a superior court clerk awarding attorney fees and costs to petitioner trustee, the trial court did not err by finding there was a factual basis to support the award. The residence at issue, which was the primary asset of the trust, was wasting as it remained vacant, and respondent co-trustee obstructed efforts to repair and sell it, jeopardizing the health of the trust.

Appeal by respondent from order entered 23 May 2017 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 7 February 2018.

Booth Harrington & Johns of NC PLLC, by A. Frank Johns, for petitioner-appellee.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for respondent-appellant.

ARROWOOD, Judge.

James Hoffman ("respondent") appeals from an order entered in Guilford County Superior Court denying his appeal from the Guilford County Clerk of Superior Court's award of attorneys' fees in favor of Kimberli Hoffman Bullard ("petitioner"). For the following reasons, we affirm.

I. Background

This appeal of an attorneys' fees award arises out of a special proceeding between petitioner and respondent in their roles as co-trustees of a trust, the primary asset of which is a residence located at 4423 Oakcliffe Road in Greensboro, North Carolina. Petitioner and respondent became solely responsible for the property as co-trustees after their father, Mayette E. Hoffman, was adjudicated incompetent in September

2010 and suffered health issues in May 2012 that forced him to permanently move from the property into a retirement community, leaving the property unoccupied. Letters by the father's attorney, now petitioner's attorney, dated 10 May 2013 and by the father's guardian's attorney dated 3 December 2013 notified petitioner and respondent of their fiduciary duties as co-trustees to manage the property, including dealing with the repair and maintenance issues that plagued the property.

Over the next couple of years, because petitioner and respondent disagreed over the management of the trust, the property remained vacant, bills went unpaid, insurance lapsed, and the property continued to deteriorate. On 10 April 2015, petitioner sent a certified letter to respondent outlining alleged breaches of respondent's fiduciary duties and requesting that he voluntarily resign as co-trustee. Respondent signed a return receipt on 13 April 2015 acknowledging acceptance of the letter, but did not otherwise respond.

On 28 May 2015, petitioner filed a petition to remove respondent as co-trustee for cause. In addition to removal, petitioner sought damages, costs, and attorneys' fees. The petition sought removal and damages because

> [r]espondent, by failing [to] agree to repairs and renovations to ready and place the real property on the market; by allowing the assets to waste and to continue to deplete the cash assets of the guardianship estate; by acting unilaterally to place the home for sale; and by removing personal property of his father from the home, has acted with bad faith and with improper motive and has breached the duty to administer the trust in good faith, in accordance with its terms, purposes and interests of the beneficiaries in violation of N.C.G.S. § 36C-8-801 and 802.

Respondent filed a response and counterclaim on 4 June 2015. Respondent alleged that he had expended his own time and money on the upkeep of the property and to avert tax foreclosure. Thus, respondent sought reimbursement for amounts expended. Respondent also sought to prevent petitioner from "hampering and disrupting the efforts to sell the real estate." Petitioner answered respondent's counterclaim.

The matter first came on for hearing 18 and 19 April 2016 before the Honorable Lisa Johnson-Tonkins, Clerk of Guilford County Superior Court. That hearing concluded with the parties agreeing to sell the property and requesting that the clerk continue the matter to allow time for a sale. The clerk granted the continuance. The matter came back on

for hearing on 11 July 2016. At that time, issues in the sale of the property were explained to the clerk and the matter was continued again until 11 August 2016. Issues with the sale continued with the prospective buyer backing out of the purchase agreement and wanting a lower price. As a result of the issues and the need to have the property occupied with some source of income, petitioner's counsel recommended a lease to the potential buyer until they could proceed with a sale. Counsel for the parties worked together to construct a lease but respondent would not agree. Therefore, petitioner sought court approval of the lease by motion filed 26 July 2016. The clerk filed an order approving the lease on 1 August 2016 "in order to stop the wasting of the asset of the trust and to receive rental income." The matter then came back on for hearing on 11 August 2016 as scheduled. At that time, the clerk revisited petitioner's petition to remove respondent as co-trustee. An order granting the petition to remove respondent as co-trustee was filed 16 September 2016.

Following the removal of respondent as co-trustee, petitioner filed a motion for attorneys' fees and costs on 12 October 2016. Petitioner sought a total of $26,096.70, claiming it was expressly allowed under N.C. Gen. Stat. § 36C-10-1004.

Petitioner's motion for attorneys' fees and costs came on for hearing before the clerk on 18 November 2016. On 22 November 2016, the clerk filed an order awarding some attorneys' fees and costs to petitioner. Specifically, the clerk found "[t]hat [r]espondent's behavior as [c]o-[t]rustee during July and August 2016 was egregious and obstructionist, jeopardizing the health of the Mayette E. Hoffman Living Trust[.]" Therefore, the award was limited to $7,243.00 in attorneys' fees and costs for services rendered to petitioner from 7 July 2016 through 12 August 2016. The clerk concluded the limited award for "services rendered . . . during the period of July and August 2016[] is within the discretion of [the] [c]ourt and is appropriate because of [r]espondent's egregious and obstructionist behavior as [c]o-[t]rustee[.]" The clerk further concluded that "[c]osts before and after July and August 2016 are not relevant to the egregious and obstructionist behavior of . . . [r]espondent and are therefore denied[.]"

Respondent filed notice of appeal to the superior court on 30 November 2016. Following a hearing before the Honorable David L. Hall in Guilford County Superior Court, on 23 May 2017, an order was filed by the superior court denying respondent's appeal. Respondent filed notice of appeal to this Court on 22 June 2017.

II. Discussion

The sole issue raised by respondent on appeal to this Court is whether the superior court erred in finding there was a factual basis to support the clerk's award of attorneys' fees and costs. Respondent does not challenge his removal as co-trustee.

Pertinent to this case, the North Carolina Uniform Trust Code ("UTC"), Chapter 36C of the North Carolina General Statutes, provides that "[i]n a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, as provided in the General Statutes." N.C. Gen. Stat. § 36C-10-1004 (2017). The "North Carolina Comment" to N.C. Gen. Stat. § 36C-10-1004, in turn, directs attention specifically to N.C. Gen. Stat. § 6-21(2), which provides that "[c]osts . . . shall be taxed against either party, or apportioned among the parties, in the discretion of the court" in "any action or proceeding which may require the construction of any . . . trust agreement, or fix the rights and duties of parties thereunder . . . ." N.C. Gen. Stat. § 6-21(2) (2017).

Respondent acknowledges these statutes, but asserts the discretion of the court to award attorneys' fees and costs is "severely constrained" to those instances where there is egregious conduct, such as bad faith or fraud. Respondent relies on the "Official Comment" to N.C. Gen. Stat. § 36C-10-1004 and this Court's decision in *Belk v. Belk*, 221 N.C. App. 1, 728 S.E.2d 356 (2012). We are not convinced that the discretion of the court to award attorneys' fees and costs is so limited.

In *Belk*, the respondent was ordered to pay $138,043.55 in attorneys' fees in an action seeking an accounting of custodial funds. *Belk*, 221 N.C. App. at 5, 728 S.E.2d at 358. Among the issues raised on appeal, the respondent argued the trial court erred in awarding attorneys' fees because there is no statutory authority for such an award under the North Carolina Uniform Transfers to Minors Act ("UTMA"), Chapter 33A of our General Statutes. *Id.* at 12, 728 S.E.2d at 363. Recognizing that attorneys' fees are not ordinarily recoverable in North Carolina absent express statutory authority and that the UTMA is silent regarding attorneys' fees, this Court looked to N.C. Gen. Stat. § 6-21(2) and determined that "trust agreement" as used in that section was not limited to trusts governed under the UTC, but included custodial arrangements under the UTMA. *Id.* at 12-15, 728 S.E.2d at 363-64 ("[T]he generic provision in N.C. Gen. Stat. § 6-21(2) allowing for the award of attorney's fees in an action to fix the rights and duties of a party under a trust agreement encompasses actions under UTMA for the removal of a custodian and

resulting accounting[.]"). This Court bolstered its decision with a review of cases from other jurisdictions which have allowed attorneys' fees in actions to remove a custodian or for an accounting under the UTMA. *Id.* at 15-17, 728 S.E.2d at 365-66.

Upon finding attorneys' fees may be awarded in UTMA cases pursuant to N.C. Gen. Stat. § 6-21(2), this Court went a step further, stating that "we believe there is ample authority providing for not only an award of attorney's fees in this case, but also for that award to be assessed against respondent personally, as custodian, rather than against the corpus of [the] UTMA account." *Id.* at 18, 728 S.E.2d at 366. This Court explained that

> persuasive precedent from other jurisdictions on this issue reason that the goal of a breach of fiduciary duty action under UTMA is to make the minor beneficiary whole, which cannot be accomplished if the minor, either personally or by way of her account funds, must expend more in attorney's fees to recover the lost corpus of the account than its original value.

Id. This Court also, again, looked to the UTC and N.C. Gen. Stat. § 36C-10-1004, noting that the "Official Comment" to that section provides that

> [t]he court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. *Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud.*

Id. at 19, 728 S.E.2d at 367 (quoting N.C. Gen. Stat. § 36C-10-1004 official comment) (emphasis in original).

Respondent contends that, in *Belk*, this Court "adopted and confirmed that standard [in the official comment] and required egregious conduct on the part of the respondent in order to justify the award of fees against him." We disagree.

In *Belk*, this Court cited *In re Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988), explaining as follows:

> Finding the assessment of costs, including attorney's fees assessable to a fiduciary, *both as a matter of then-existing statutory law and as a matter of common law in North*

> *Carolina*, we stated in *Jacobs* that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred[,]" and therefore, "the court may fashion its order to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee."

Belk, 221 N.C. App. at 19, 728 S.E.2d at 367 (quoting *Jacobs*, 91 N.C. App. at 146, 370 S.E.2d at 865) (emphasis added).

In *Jacobs*¸ the Court affirmed the order awarding costs, witness fees, and attorneys' fees without mention of whether the conduct of the defendant was egregious. *Jacobs*, 91 N.C. App. at 145-46, 370 S.E.2d at 865. In fact, the Court noted there were no findings showing a breach of the UTC. *Id.* at 146, 370 S.E.2d at 865. Similarly, in *Belk*, this Court held that the trial court's finding of egregious conduct "indicates that respondent undoubtedly would have been personally liable for the attorney's fees at issue, were this an ordinary breach of trust action." *Belk*, 221 N.C. App. at 21, 728 S.E.2d at 368.

This Court never addressed whether conduct that is not egregious would support an award of attorneys' fees. Although this Court noted that in most instances an award of attorneys' fees will not be taxable personally against a trustee or custodian, *id.*, the Court's holding does not mandate that egregious conduct is required for an award of attorneys' fees.

Nowhere in N.C. Gen. Stat. §§ 36C-10-1004 or 6-21(2) is there a requirement that egregious conduct must be found before attorneys' fees are awarded. Read together, those statutes provide that in a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, in the discretion of the court. Furthermore, it is important to recognize that although *Belk* looks to the UTC for guidance, its decision that attorneys' fees may be awarded in a UTMA proceeding is not controlling in this case.

However, even if we had found that egregious conduct was necessary for awarding fees, we find there was sufficient evidence of egregious conduct to support the superior court's denial of respondent's appeal. N.C. Gen. Stat. § 1-301.3 governs the appeal of trust and estate matters determined by the clerk. Concerning the duty of the judge on appeal, it provides as follows:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law. . . .

N.C. Gen. Stat. § 1-301.3(d) (2017).

Here, the clerk's award of attorneys' fees was limited to $7,243.00 for services rendered from 7 July 2016 through 12 August 2016. The clerk found that during that time frame, "[r]espondent's behavior as [c]o-[t]rustee . . . was egregious, and obstructionist, jeopardizing the health of [the trust]." Upon review of the record on appeal to the superior court, the court determined that the clerk's findings were supported by the pleadings and hearings before her, that these findings supported the clerk's award of attorneys' fees, and the clerk did not abuse her discretion in awarding attorneys' fees.

Respondent now argues the superior court erred because there is no basis for the clerk's finding that his behavior was egregious and obstructionist. We disagree.

The record indicates that all parties were aware that there were issues with the property that were causing the property to waste as it remained vacant. The parties were attempting to sell the property and had an agreement to sell but the buyer had reservations. During the relevant period from 7 July 2016 through 12 August 2016, respondent refused to accept alternative arrangements, maintaining the position that the buyer must perform on the agreement to purchase. The record is clear that all parties were concerned that the property was deteriorating while it was vacant, without utilities, uninsured, and uninsurable. The lease agreement proposed by petitioner's counsel and negotiated by counsel for all parties addressed these concerns and generated income while the parties continued to work towards a sale of the property. Respondent's counsel indicated that they did not oppose petitioner's motion for the clerk to approve the lease, but explained that respondent refused to sign the lease as co-trustee. When the clerk made her decision to remove respondent as co-trustee, the clerk indicated it was this unwillingness and delay by respondent, which caused the clerk to intervene to approve the lease, that constituted the change in circumstances warranting removal.

Based on the record before this Court, we hold the superior court did not err in determining the record supported the clerk's finding that respondent's conduct "was egregious and obstructionist, jeopardizing the health of the [trust]." The clerk did not abuse her discretion in awarding attorneys' fees.

III. Conclusion

For the reasons discussed, we affirm the superior court's denial of respondent's appeal from the clerk's award of attorneys' fees.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF J.A.K.

No. COA17-574

Filed 6 March 2018

1. Appeal and Error—termination of parental rights—reunification—statutory requirements to appeal

An order in a termination of parental rights case that ceased reunification efforts with the father complied with the requirements of N.C.G.S. § 7B-1001(a)(5)(a) for appellate review by the Court of Appeals. The current statute, unlike the former version, does not require written notice that the parent was also appealing the reunification cessation order. Review by certiorari was not necessary. There was no statutory right to appeal a later order that merely continued a permanent plan.

2. Termination of Parental Rights—cessation of reunification efforts—findings

Although the father in a termination of parental rights case contended that the trial court erred in ceasing reunification efforts because its findings were not based on sufficient credible evidence, the transcript from the permanency planning hearing was not part of the record on appeal and the father did not reconstruct the proceedings by including a narrative of the hearing in the record. The uncontested findings demonstrated that the father had not made progress on the housing component of his case plan and was not

cooperative with the Department of Social Services. The trial court's uncontested findings were sufficient to show a lack of initiative by the father to demonstrate that reunification would be successful.

3. Termination of Parental Rights—grounds—willfully leaving juveniles in foster care—no reasonable progress to correct conditions

The trial court was justified in terminating a father's parental rights for willfully leaving juveniles in foster care for over twelve months and not making reasonable progress to correct the conditions that led to the removal of the juveniles from their home. The father cited no authority for his contention that the twelve-month period began only when he first appeared at a hearing with counsel. As for the father's challenges to particular findings of fact, it was apparent that the trial court weighed the evidence and drew inferences from it, and the Court of Appeals declined to reweigh the evidence.

4. Termination of Parental Rights—grounds—failure to make progress—willfulness

In a termination of parental rights case, the father's contentions that his conduct was not willful and that he had made reasonable progress under the circumstances was rejected. The father's argument regarding poverty was rebutted directly by the trial court's findings. The findings also demonstrated that the father fell short in achieving a major component of his case plan. The father's completion of parenting classes amounted to nothing more than limited progress and did not rebut his failure to obtain adequate housing.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Father from orders entered 18 April 2016, 19 October 2016, and 22 March 2017 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 18 January 2018.

Jennifer Cooke for Petitioner-Appellee New Hanover County Department of Social Services.

Jeffrey L. Miller for the Respondent-Appellant Father.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

DILLON, Judge.

Father appeals from three orders: the trial court's 22 March 2017 order (the "TPR Order") terminating his parental rights to J.A.K. ("Jack") [1] and two prior permanency planning orders entered in this matter; one entered on 18 April 2016 (the "April Order") eliminating reunification efforts and changing the permanent plan to adoption with a concurrent plan of guardianship; and one entered six months later on 19 October 2016 continuing the April Order (the "October Order"). We affirm the trial court's TPR Order and the April Order, and we dismiss Father's appeal of the October Order.

I. Background

In August 2014, the New Hanover County Department of Social Services ("DSS") obtained nonsecure custody of four-month-old Jack,[2] and filed a petition alleging that he was a neglected juvenile. Father was named in the petition, but, despite several attempts, was never served with process.

In September 2014, the trial court entered an order adjudicating Jack neglected based on the mother's stipulation to the allegations in the petition. Though Father still had not been served with process, the trial court ordered Father to present himself to DSS to enter into a case plan and establish a visitation agreement.

In June 2015, after paternity testing confirmed Father was Jack's biological father, Father was appointed counsel. Father also began visitation with Jack, and he entered into a case plan with DSS. His case plan required completion of parenting classes and maintaining stable and appropriate housing and employment. In a permanency planning order following a September 2015 hearing, the trial court ordered Father to comply with his case plan.

Months later, in the April Order, the trial court ordered DSS (1) to cease reunification efforts with Father; (2) pursue termination of Father's parental rights; and (3) changed the permanent plan for Jack from reunification to adoption by Jack's foster parents, with a concurrent plan of guardianship.

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1. Pseudonyms are used throughout this opinion to protect the identity of the juveniles and for ease of reading.

2. The petition also alleged that Jack's half-brother (who has a different biological father) was also neglected. However, neither the half-brother's father nor the children's mother is a party to this appeal.

In June 2016, DSS filed a petition to terminate Father's parental rights to Jack, alleging two grounds for termination. The petition also sought to terminate the parental rights of Jack's mother. In the October Order, a permanency planning order entered in October 2016, the trial court confirmed the permanent plan of adoption with the foster parents, with a concurrent plan of guardianship with the foster parents.

Following a hearing, the trial court entered the TPR Order, in which it found the existence of both grounds for termination alleged against Father and Jack's mother. The trial court also concluded that termination of the parental rights of Father and of Jack's mother was in the juvenile's best interest. Father appealed.

II. Analysis

[1] As an initial matter, we must determine whether Father's appeals from the April Order and October Order are properly before us. Father has filed an alternative petition for writ of *certiorari* in the event that they are not. We address each order in turn.

In the April Order, the trial court ceased reunification efforts with Father pursuant to N.C. Gen. Stat. § 7B-906.2(b) (2015). Section 7B-1001(a) of our juvenile code states that when our Court is reviewing a trial court order terminating parental rights, our Court shall also review any prior order by the trial court eliminating reunification as a permanent plan if *all* the following apply:

> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order eliminating reunification as a permanent plan is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2015). In this case, the appeal complies with all the requirements of Section 7B-1001(a)(5)(a).

We note that under the former version of N.C. Gen. Stat. § 7B-507(c) (2013), a party seeking review of the reunification order was required to give *written* notice that (s)he was also appealing the reunification cessation order. *See also* N.C. Gen. Stat. § 7B-1001(b). The new statutory scheme, however, does not appear to require written notice. Rather, the plain language of Section 7B-1001(a)(5) suggests that written notice

is no longer required: the statute expressly states that appeal may be taken from an order entered under Section 7B-906.2(b) so long as it is "properly preserved, *as follows*," then listing the three conditions quoted above. N.C. Gen. Stat. § 7B-1001(a)(5) (emphasis added).[3]

Because Father has complied with these requirements, review by *certiorari* is not necessary. Therefore, we dismiss his petition as to the trial court's April Order.

Father also requests issuance of the writ to review the October Order. In that order, however, the trial court merely continued the permanent plan announced in its April Order. Therefore, it is not an order eliminating reunification as a permanent plan pursuant to Section 7B-906.2(b). And Section 7B-1001(a) does not provide for appeal from an order that merely continues a permanent plan. Because Father has no statutory right to appeal from the October Order, we dismiss his appeal and, in our discretion, deny his petition for writ of *certiorari* as to the October Order.

A. April (Permanency Planning) Order

[2] In his first argument, Father contends that the trial court erred in ceasing reunification efforts[4] in the April Order. Specifically, Father contends that the trial court's findings are not based on sufficient credible evidence and are insufficient to comply with the statutory requirements of N.C. Gen. Stat. § 7B-906.2(b). For the following reasons, we disagree.

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010). Findings supported by competent evidence, as well as any uncontested findings, are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

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3. We note that N.C. Gen. Stat. § 7B-1001(b) still describes the manner in which notice to preserve the right to appeal must be made. However, given that the General Assembly eliminated the notice requirement from N.C. Gen. Stat. § 7B-906.2(b), we find that reference to the "notice to preserve" in Section 7B-1001(b) is surplusage. Simply stated, a statute governing the manner in which notice to preserve must be made is ineffectual where there is no statutory requirement that a party must actually give notice to preserve a right of appeal.

4. While the current Section 7B-906.2(b) no longer uses the term "ceasing reunification efforts," the parties and the trial court in the instant case still use this term, which is a vestige of the former Section 7B-507(c).

Pursuant to N.C. Gen. Stat. § 7B-906.2, if it determines that reunification should no longer be part of the permanent plan, the trial court is required to make "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety[.]" N.C. Gen. Stat. § 7B-906.2(b).

First, we note that the transcript from the permanency planning hearing was not made part of the record on appeal. "The burden is on the appellant to 'commence settlement of the record on appeal, including providing a verbatim transcript if available.' " *Sen Li v. Zhou*, ___ N.C. App. ___, ___, 797 S.E.2d 520, 524 (2017) (quoting *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006)). Father has likewise failed to reconstruct the proceedings by including a narrative of the hearing in the record on appeal. *See In re L.B.*, 184 N.C. App. 442, 454, 646 S.E.2d 411, 417 (2007). Without a verbatim transcript or narrative, the evidence Father "challenges as insufficient is not before us in the record." *Sen Li*, ___ N.C. App. at ___, 797 S.E.2d at 524. Consequently, we must deem the findings of fact as conclusive on appeal, and we limit our review to whether the findings of fact support the decision to cease reunification efforts with Father. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.[5]

Here, the trial court found that "a continuation of [reunification] efforts would be clearly futile and inconsistent with the Juveniles' health, safety, and need for a safe, permanent home within a reasonable period of time." While this language is slightly different than the statutory language contained in N.C. Gen. Stat. § 7B-906.2(b), it is sufficient to comply with the requirements of the statute. This ultimate finding

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5. Our Court ordered Father to provide the transcript by August 2017; however, Father failed to meet this deadline and never requested an extension. In November 2017, well after the record was settled and briefs were filed, the transcripts were provided to our Court. Father then filed a motion with our Court to amend the record to incorporate the transcript in December 2017.

A majority of our panel, in our discretion, has denied Father's motion. The dissent disagrees with our decision to deny Father's motion, while agreeing with our ultimate resolution of the appeal. It could be argued that our panel's split decision as to the resolution of Father's motion creates an appeal of right from our decision *on that motion* to the Supreme Court under the plain language of N.C. Gen. Stat. § 7A-30(2):

> Except as provided in [N.C. Gen. Stat. §] 7A-28, an appeal lies of right to the Supreme Court from *any decision* of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges.

N.C. Gen. Stat. § 7A-30 (2017) (emphasis added). A denial of a motion by our Court is arguably a "decision . . . rendered in a case[.]" *Id.*

was based on findings that Father had not progressed on his case plan, that he missed a recent Child and Family Team meeting, that he refused home visits by a social worker, and that his legal fees were a barrier to progress. The court also found that Father's visitation had not been expanded, and that inspection of his home was required prior to any unsupervised visitation with Jack. In another finding, the trial court noted that Father was still trying to obtain housing, from which one can infer that he did not have appropriate or independent housing at the time of the permanency planning hearing.

The uncontested findings of fact demonstrate that Father had not made progress on the housing component of his case plan and was uncooperative with DSS. Given that housing was an area of concern for DSS, and that a year had passed since Father became involved in the case, we conclude that the trial court's findings are sufficient to show a lack of initiative by Father to demonstrate that reunification would be successful and consistent with Jack's health and safety. Accordingly, we hold that the trial court did not err in its April Permanency Planning Order ceasing reunification efforts.[6]

B. TPR Order

[3] Next, Father challenges the trial court's grounds for terminating his parental rights in the TPR Order. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. If this Court determines that the findings of fact support one ground for termination, we need not review the other challenged grounds. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). Any unchallenged findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

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6. Father also claims that the trial court failed to make findings under N.C. Gen. Stat. § 7B-906.2(d), which requires the trial court to make certain findings regarding the parent's progress, cooperation, and other actions. However, Father has not provided any further argument as to the trial court's compliance with Section 7B-906.2(d), and therefore, we decline to address it on appeal. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

We conclude that the trial court was justified in terminating Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Under this subsection, the trial court must find that the parent *willfully* left the juveniles in foster care for over twelve months, and that the parent has not made reasonable progress to correct the conditions which led to the removal of the juveniles from their home. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005). And it is well-established that "willfulness" under this ground does not require a showing of fault by the parent. *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398 (citation omitted). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001).

As an initial matter, Father contends that he did not leave Jack in foster care for the requisite twelve-month period. Although Jack was taken into nonsecure custody on 18 August 2014, Father contends that as the "non-removal parent," the twelve-month period should not commence until 30 September 2015, when Father purportedly "first was recognized by the court and allowed to participate as a parent with counsel." We disagree.

First, we note that Father cites to no legal authority for his specific contention that the relevant statutory period commenced only when Father first appeared at a hearing with counsel. Indeed, the only case cited by Father supports the opposite conclusion—that the relevant period of time commences when the trial court enters a court order requiring that the juvenile be removed from the home. *In re A.C.F.*, 176 N.C. App. 520, 526, 626 S.E.2d 729, 734 (2006). In *A.C.F.*, this Court held "that 'for more than 12 months' in [N.C. Gen. Stat.] § 7B-1111(a)(2) means the duration of time beginning when the child was 'left' in foster care or placement outside the home *pursuant to a court order*, and ending when the motion or petition for termination of parental rights was filed." *Id.* at 527, 626 S.E.2d at 734-35 (emphasis added and omitted).

Next, we turn to Father's challenges to particular findings of fact. The trial court made finding of fact 11 regarding this ground for termination which outlines Father's behavior during the relevant one-year period, which included his lack of reasonable progress in his visitation with Jack, obtaining adequate housing, gaining employment, and completing parenting classes:

> His delay and lack of progress during the year and nine months prior to the filing of the Termination Petition leads the Court to find that [Father] has not put himself

> in a position to correct his lack of involvement with the child since birth, that he has disregarded the fact that the child's mother has made no progress to correct her issues by repeatedly having the child communicate with her during visitation despite warnings to stop this practice, and did not establish a home for himself and the child in a timely fashion as detailed in the Finding of Fact numbered 9 above.

In finding of fact number 9, the trial court detailed the inadequacies of Father's housing. The court found that Father did not obtain independent housing until 1 April 2016, a week after the permanency planning hearing at which reunification efforts were ceased, and that his residence was later deemed unsafe for Jack. Father told a social worker that his girlfriend often spent the night and that he intended to get a roommate. The lease was under a different name, and a Google search of that name revealed a mugshot of Father. Lastly, he failed to let the social worker visit his prior residence.

Father makes several challenges to findings of fact 9 and 11. First, he claims that most of the findings of fact in finding of fact 11 involve "stale matters and circumstances." Father again claims that the relevant time period began on 30 September 2015, after he attended his first hearing represented by counsel. Again, we are not persuaded, and Father cites no authority for his claim. Indeed, Father was on notice that he was Jack's putative father since April 2014, and he began participating in the juvenile proceedings as early as April 2015. Moreover, much of the finding of fact 11 pertains to Father's actions after his paternity was established. Therefore, we reject his argument that the evidence concerns stale matters.

Next, Father takes issue with the portion of finding of fact 11, quoted above, which provided that by allowing Jack's mother to communicate with Jack, Father disregarded the mother's failure to make progress. He essentially claims the trial court imputed her lack of progress onto him. Father, however, misses the point of this finding. A social worker warned Father several times to refrain from allowing Jack to speak to the mother, but he continued to do so despite the warnings. Thus, in making this finding, the trial court was not imputing the mother's actions to Father, but instead was demonstrating Father's poor judgment and lack of cooperation with DSS.

Father also attempts to challenge several portions of finding of fact number 9 pertaining to his inability to obtain independent and appropriate

housing. He argues that the trial court failed to account for his poverty and his legal woes. He also argues that his apartment was clean and well-decorated, and that DSS's concerns were speculative. In total, he contends that the trial court failed to consider these issues and resolve conflicts in the evidence. Thus, Father does not appear to challenge the factual basis for the findings pertaining to his housing, but instead argues that the trial court should have drawn different inferences from the evidence. However, it is apparent that the court simply weighed the evidence and drew certain inferences from it. This is the duty of the trial court, and we decline to reweigh the evidence. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). Given that the trial court's findings of fact are supported by the testimony of the social worker, we reject Father's challenges to the findings regarding housing.

Father also challenges finding of fact 12, in which the trial court found that Father would benefit from dismissal of the termination of parental rights action in his immigration case. Father argues that consideration of his immigration case was improper and that this finding is not supported by the evidence. However, we conclude that the other findings detailed above are sufficient to support termination of Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, we need not address his challenge to finding of fact 12. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.").

[4] Finally, we address Father's contentions that his conduct was not *willful* and that he made reasonable progress under the circumstances. Father argues that he became fully engaged as a father as soon as his paternity was established and made substantial progress by attending parenting classes and consistently visiting with Jack. Father also argues that his trouble in acquiring independent housing was due to his poverty, which the trial court failed to consider. We are not persuaded.

First, we note that Father's argument regarding poverty is rebutted directly by the trial court's finding of fact 11, in which the trial court found that Father's actions were not solely the result of poverty. Second, the findings of fact demonstrate that Father fell short in achieving a major component of his case plan. Father's case plan had

two main components: to attend parenting classes and to stabilize his housing situation and income. It took Father nearly a year after his initial participation in the case to obtain independent housing, and even then, his housing was not appropriate for Jack. Father used an alias to sign his lease and did not know who would be living in his residence. Without the name of a roommate, DSS had no way to verify whether the residence would provide a safe environment for Jack. Additionally, he had previously refused to allow home visits and he could not provide verification of his income beyond a single check. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). "Extremely limited progress is not reasonable progress." *Id.* at 700, 453 S.E.2d at 224-25. Thus, based on the findings by the trial court, Father's completion of parenting classes amounts to nothing more than limited progress and does not rebut his failure to obtain adequate housing.

III. Conclusion

In conclusion, we affirm the trial court's April Order and the TPR Order. We dismiss Father's appeal from the October Order entered 19 October 2016.

AFFIRMED IN PART; DISMISSED IN PART.

Judge HUNTER, JR. concurs.

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

MURPHY, Judge, concurring in part, but dissenting in the decision rendered as to Appellant's motion.

While I concur in the reasoning and the result based upon the Record and transcripts before us and join whole-heartedly with all but the first paragraph in footnote 5, the Majority's resolution of Father's *Motion for Consideration of Transcript as Part of Record on Appeal* improperly deprives Father of appellate review. Father was not required to act in accordance with our 7 July 2017 *Order*, but the transcriptionist was:

> The motion filed in this cause on the 5th of July 2017 and designated '[Father's] Motion for Transcripts . . .' is allowed. The Court Reporter shall prepare and deliver the transcript for the 24 March 2016 and 22 September 2016

> permanency planning hearings on or before 11 August 2017. The transcriptionist shall upload the transcript to this Court's Electronic Filing site, and shall provide copies 'to the respective parties to the appeal.'

Further, Father had been found indigent at the trial level and assigned the Appellate Defender who in turn assigned counsel of record. As revealed through Father's *Motion for Transcripts* and *Motion for Consideration of Transcript as Part of Record on Appeal*, neither Father nor his counsel could exercise control over the transcriptionist in this matter. The transcriptionist did not complete and upload the transcript until 20 November 2017, more than three months after the date we had ordered, and Father timely filed his motion on 6 December 2017. Therefore, justice requires that we grant Father's motion and consider his arguments in light of the transcripts. I respectfully dissent from that portion of the Majority's opinion that places the burden of the transcriptionist's failure to comply with our *Order* on the indigent party and denies his motion.

IN THE MATTER OF K.C., A MINOR CHILD

No. COA17-1079

Filed 6 March 2018

Termination of Parental Rights—abandonment—law of the case doctrine

> The trial court did not violate the law of the case doctrine where a new petition for termination of parental rights was filed after the Court of Appeals reversed an order that terminated the mother's parental rights based upon abandonment. The new petition was based on a new period of time and supported by new evidence of abandonment.

Appeal by respondent from judgment entered 5 July 2017 by Judge Roy J. Wijewickrama in District Court, Clay County. Heard in the Court of Appeals 22 February 2018.

James L. Blomeley, Jr., for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

STROUD Judge.

Respondent appeals from a judgment terminating her parental rights to her minor child. Because this Court's reversal of the trial court's 2015 order terminating respondent's parental rights based upon a petition filed in 2014 does not control the order on appeal, which was entered based upon a new petition for termination and based upon events during the six months next preceding the filing of the 2016 petition, the trial court's order does not violate the "law of the case" doctrine as argued by respondent. We therefore affirm.

The background of this case can be found in the opinion issued at *In re K.C.*, __ N.C. App. __, 805 S.E.2d 299 (2016) ("*K.C. I*") wherein this Court concluded the district court erred when it terminated mother's parental rights to her son Karl[1] on the basis of neglect by abandonment. About six months after issuance of the opinion reversing the 2015 termination, on 16 November 2016, father filed a new petition to terminate respondent's parental rights. *See generally id.* Following a hearing, the trial court entered judgment on 5 July 2017 terminating respondent's parental rights after adjudicating the existence of abandonment under North Carolina General Statute § 7B-1111(a)(7). Respondent appeals.

Respondent does not argue that the findings of facts regarding abandonment are not supported by the evidence, but instead argues that this Court's earlier reversal of the trial court's 2015 termination order based upon abandonment constitutes the law of the case such that the trial court could not again conclude that respondent abandoned Karl based at least in part upon her failure to visit with Karl. But "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *Bank of America, N.A. v. Rice*, __ N.C. App. __, __, 780 S.E.2d 873, 880 (2015) (citation and quotation marks omitted).

Petitioner filed a new petition for termination of parental rights six months after the filing of this Court's opinion reversing the 2015 order. *See generally K.C. I*, __ N.C. App. ___, 805 S.E.2d 299. Since the hearing on the first petition was held in May of 2015, *see id.* at ___, 805 S.E.2d at 300, a year and a half had elapsed after the first hearing until the filing of the second petition. The new petition alleges:

> As of the date of filing of this petition, the Respondent, the mother of the child, has willfully abandoned the child

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

> for at least six consecutive months immediately preceding the filing of this petition, by withholding her presence, her love, her care, and failing to take any opportunity to display maternal affection, as set forth in G.S. 7B-1111(a)(7), including, but not limited to, the following particulars[.]

The "particulars" alleged in part that respondent "has not asked to see the child since April 10, 2014" nor has she sent letters, gifts, or any other communication since then. The petition also listed respondent's few visits to see the child since 2012, the most recent being 12 October 2013.

Here, the trial court necessarily made some findings related to events that took place prior to the filing of the first petition to terminate parental rights in 2014; obviously, the child's date of birth and history leading up to the first petition's filing had not changed. But in the order on appeal, the district court made several unchallenged findings of fact about events occurring *after* the filing of the first petition. One finding is that respondent had not visited or spoken with Karl since 2013; although this time period – since 2013 – includes 2014, it also includes all of the time after the filing of the 2014 petition up to the filing of the new petition in 2016. In addition, the trial court found that respondent has not sent Karl any cards or gifts, and respondent has not contacted family members to ask about Karl. The trial court ultimately found respondent "has willfully abandoned the minor child for a period of *at least six consecutive months immediately preceding the filing of this petition*, by withholding her presence, her love, her care and failing to take any opportunity to display maternal affection, as set forth in G.S. 7B-1111 (a)(7)." (Emphasis added.) Although respondent's failure to visit with or communicate with the child continued from 2013 until the filing of the second petition (and even thereafter), the prior opinion of this Court does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority even if she never seeks to see him or communicate with him again.

In this Court's first opinion, we noted the trial court's findings regarding the reason for respondent's failure to visit:

> [Respondent] also requested in April 2014 to visit with Karl, but this request was denied based on the decision of Karl's therapist. These actions are not consistent with abandonment as defined under North Carolina law.
>
> Furthermore, the fact that Respondent did not visit Karl between 10 April 2014 and the 4 May 2015 hearing cannot be taken as evidence of abandonment. *The trial*

> *court's findings indicate that Respondent was denied visitation during that period because "the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely* . . . ." Thus, this lack of contact was not voluntary and therefore cannot support a finding that Respondent intended to abandon Karl. *See In re T.C.B.*, 166 N.C. App. 482, 486–87, 602 S.E.2d 17, 20 (2004) (holding that trial court's conclusion of abandonment was not supported by its findings regarding lack of visits given that respondent's attorney instructed him not to have any contact with child and subsequent protection plan disallowed visitation).

Id. at ___, 805 S.E.2d at 301-02 (emphasis added).

Even if respondent's reason for failing to visit with the child prior to the hearing in the 2014 termination action was the therapist's recommendation, there is no finding of fact in the order on appeal regarding respondent's reasons for her continued failure to visit or contact the child *in the six months prior to the filing of the new petition in 2016*. Despite reversal of the 2015 order terminating her parental rights – which essentially gave respondent a second chance to assert her rights as a parent – she *still* did not have even minimal contact with the child. The trial court made unchallenged findings of fact that petitioner has had the same cell phone number since 2006, and this number was the primary way respondent had contacted him in the past. In addition, the trial court found that respondent had in the past contacted the paternal grandmother, but she has "not done so in several years." The trial court also found that petitioner had the same "home phone number for over three years" but respondent did not call at that number either. Respondent also did not appear at the hearing of this matter, although her counsel had advised her several times, in writing and by telephone, of the court date and advised her "that she needed to be present." There was no evidence and no finding of fact that petitioner prevented respondent from having contact with the child since 2014.

The operative facts supporting the trial court's conclusion of abandonment were based upon the six months immediately preceding the filing of the 2016 petition. Although the history of the child and actions of the respondent prior to the filing of the 2014 petition is the same as it was in 2014, time does not stand still. The law of the case doctrine does not prevent termination of respondent's parental rights based upon her abandonment during the six months next preceding the filing of the

second petition. *See Bank of America, N.A.* at __, 780 S.E.2d at 880. Respondent has not presented any other issues for this Court's review. We affirm the trial court's termination judgment.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

IN THE MATTER OF S.J.T.H., MINOR CHILD

No. COA17-1009

Filed 6 March 2018

Child Abuse, Dependency, and Neglect—neglect—adjudication—paternity—findings

The Court of Appeals reversed an order of the trial court in a child neglect case to the extent that it placed respondent-father's son in the custody of the Department of Human Services and ordered respondent-father to comply with certain conditions to gain custody. The only evidence presented regarding respondent-father was establishment of paternity, and there were no substantive findings of fact regarding him.

Appeal by respondent from order entered 28 June 2017 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Court of Appeals 21 February 2018.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for petitioner-appellee Cabarrus County Department of Social Services.

Jeffrey L. Miller, for respondent-appellant.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent appeals an adjudication and disposition order placing his son in the custody of the Cabarrus County Department of Human Services and ordering him to comply with certain conditions to gain custody. DSS presented no evidence regarding respondent beyond that

supporting paternity, and the trial court made no substantive findings of fact about respondent other than those relevant to paternity. The trial court's findings and conclusions regarding the adjudication of neglect by the mother are not challenged on appeal. We affirm the adjudication of neglect, all portions of the order regarding the mother, and the adjudication of paternity, but we reverse the provisions of the order directing respondent to comply with the order's conditions and remand for entry of an order in compliance with respondent's constitutional and statutory rights as the minor child's father.

I. Background

In February of 2017, Sam[1] was born. Sam's mother identified Abel as his father and gave Sam Abel's last name. Because of mother's prior history with Cabarrus County Department of Human Services ("CCDHS") for her older child and her ongoing drug abuse, Sam could not be released to her custody. Abel initially said he would care for Sam but failed to show up when it was time for Sam's discharge from the hospital. Sam was placed with a family friend. In March of 2017, respondent contacted CCDHS; he reported that he may be Sam's father, and offered to care for him. In April of 2017, CCDHS filed a petition which identified both Abel and respondent as possible fathers, and alleged Sam was a neglected and dependent juvenile based upon mother's prior history with CCDHS and drug abuse; Sam was placed in non-secure custody. In May of 2017, a paternity test confirmed that respondent is Sam's father. In June of 2017, the trial court adjudicated Sam's paternity, adjudicated him as neglected based upon mother's drug abuse and other issues, and granted custody to CCDHS. CCDHS presented no evidence regarding respondent other than basic identification information and evidence to establish paternity.[2] The order -- incorrectly titled as a consent order -- ordered respondent to comply with the same eleven mandates as mother, including completing a substance abuse assessment, undergoing random drug testing, participating in parenting classes, and verifying that he had sufficient income. The order essentially makes no distinction between mother and respondent although all of the evidence addressed mother's issues, including her drug abuse, criminal history,

1. We will use pseudonyms for the child as well as the man Sam's mother initially identified as his father in order to protect the identity of the minor child.

2. The reports by CCDHS provided to the district court addressed mother's circumstances at length but did not address respondent's circumstances or ability to care for the child at all. Despite the absence of any information about respondent, CCDHS recommended exactly the same plan and requirements for respondent as it did for mother. No additional information regarding respondent was presented in testimony at the hearing.

and prior CCDHS involvement, with nothing presented about respondent, who had only been discovered as Sam's father in the prior month. Respondent appeals.

II. Adjudication Order

Respondent does not challenge the trial court's adjudication of paternity nor the adjudication of Sam as a neglected juvenile due to his mother's actions and thus we will not address those portions of the order and, they will remain in force. But respondent challenges the remainder of the order to the extent that it addresses him, particularly as to the trial court's determination that Sam should not be released to his custody and the conditions placed on respondent. *All* of respondent's challenges would require us to analyze whether the evidence supports the trial court's findings of fact and conclusions of law regarding respondent. *See generally In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) ("When an appellant asserts that an adjudication order of the trial court is unsupported by the evidence, this Court examines the evidence to determine whether there exists clear, cogent and convincing evidence to support the findings.")

As respondent points out, there was a total lack of evidence regarding him at the adjudication hearing other than the evidence to establish paternity. Here, there is nothing for this Court to analyze as the record and order are devoid of evidence and findings of fact regarding respondent beyond establishing paternity. There was no evidence about respondent's ability to parent, his home life, his ability to provide for Sam, or any other evidence a trial court must consider before finding a parent unfit or determining custody. While CCDHS urges this Court to ignore respondent's rights as a father and instead consider Sam's best interests, even a determination of his best interests would require evidence about respondent.

> A natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status. While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B.

In re D.M., 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citations, quotation marks, and brackets omitted). Our courts cannot presume a parent to be unfit or to have acted inconsistently with his constitutional

rights as a parent without clear, cogent, and convincing evidence to demonstrate why the parent cannot care for his child. *See id.*; *see also McCabe*, 157 N.C. App. at 679, 580 S.E.2d at 73. In *D.M.*, the minor child was only adjudicated as dependent and

> DSS's juvenile petition alleging dependency was based solely on the actions of Dana's mother and not respondent-father. Here, the trial court specifically found that neither parent is unfit to parent, and thus it could not award permanent custody to the maternal grandmother in the absence of findings of fact and conclusions of law that respondent-father had acted inconsistently with his constitutional rights as a parent. Because the trial court failed to make any findings of fact or conclusions of law as to whether respondent-father had acted inconsistently with his parental rights, it erred in awarding permanent custody to Dana's maternal grandmother. Accordingly, we reverse the 20 July 2010 order awarding custody of Dana to her maternal grandmother.

Id. (citations, quotation marks, and brackets omitted).

In summary, the trial court's adjudication of neglect and adjudication of respondent as father of Sam remain undisturbed. Mother did not appeal and all provisions of the order addressing mother remain in effect. We reverse the order to the extent that it mandates any action by respondent and grants custody to CCDHS. We remand this case for the trial court to enter a new order addressing respondent's rights and granting him custody unless DSS presents clear, cogent, and convincing evidence which would support another disposition. Upon request by any party, the trial court shall receive additional evidence on remand. Because we are reversing and remanding the order in its entirety as to respondent, other than the adjudication of paternity, we need not address respondent's other issues on appeal.

III. Conclusion

Because there was no evidence presented regarding respondent other than establishment of paternity and the trial court made no substantive findings of fact regarding him beyond paternity, we reverse the order to the extent that it requires any actions by respondent and grants custody to CCDHS. We affirm the adjudication of neglect and of paternity.

AFFIRMED in part; REVERSED in part; REMANDED.

Judges DAVIS and ARROWOOD concur.

MAHAFFEY v. BOYD

[258 N.C. App. 281 (2018)]

TODD ROBERT MAHAFFEY, Plaintiff
v.
CHRISTOPHER C. BOYD, Executor for the Estate of
DOROTHY COE BOYD, Defendant

No. COA17-812

Filed 6 March 2018

Civil Procedure—motion for new trial—untimely—improper motion for relief from summary judgment—writ of certiorari

The trial court did not abuse its discretion by denying plaintiff's N.C.G.S. § 1A-1, Rule 59 motion for a new trial where plaintiff exceeded the time permitted for serving and filing the motion by approximately nine months. Further, a Rule 59(a) motion was not a proper ground for relief from an entry of summary judgment, and instead, plaintiff should have filed a writ of certiorari with the Court of Appeals.

Appeal by Plaintiff from order entered 10 October 2016 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2017.

Todd Robert Mahaffey, Plaintiff-Appellant, pro se.

McGuire, Wood & Bissette, P.A., by Matthew S. Roberson, for the Defendant-Appellee.

DILLON, Judge.

I. Background

In February 2015, Todd Robert Mahaffey filed a complaint alleging that Christopher C. Boyd (the "Executor"), the executor for the estate of Dorothy C. Boyd, owed him payment for renovations Mr. Mahaffey made to Ms. Boyd's home.

The record shows as follows:

Ms. Boyd died in July 2014. However, in the years before she died, she engaged Mr. Mahaffey to perform work on her home and yard. Mr. Mahaffey continued to perform work on the property at Ms. Boyd's direction, and after Ms. Boyd's death, at the direction of the Executor.

In September 2014, two months after Ms. Boyd's death, Mr. Mahaffey delivered documents to the Executor's law firm consisting of receipts,

bills, and time sheets relating to projects he completed at Ms. Boyd's property. Shortly thereafter, an employee at the law firm asked Mr. Mahaffey to provide clearer documentation of the work he had completed and any payments which had already been made.

In a letter dated 19 November 2014, the Executor informed Mr. Mahaffey that, based on his lack of response to the law firm's request, he was denying Mr. Mahaffey's claim in accordance with N.C. Gen. Stat. § 28A-19-16, which requires that a claim against a decedent's estate be "in writing and state the amount or item claimed[.]" N.C. Gen. Stat. § 28A-19-1 (2013).

Three months later, in February 2015, Mr. Mahaffey commenced this action. In April 2015, the Executor answered the complaint and served requests for admissions, to which Mr. Mahaffey failed to respond in a timely fashion.

In May 2015, the Executor moved for summary judgment, contending that Mr. Mahaffey (1) failed to comply with the requirements of N.C. Gen. Stat. § 28A-19-1 in order to preserve his claim against Ms. Boyd's estate, and (2) performed illegal contracting services because he was not a licensed contractor[1] and undertook a project for which the cost of improvement was greater than $30,000.[2]

In June 2015, after a hearing on the matter, the trial court entered an order granting the Executor's summary judgment motion, based in part on Mr. Mahaffey's failure to respond to the requests for admissions. Mr. Mahaffey timely appealed from the order (the "Summary Judgment Order"); however, he failed to take steps to properly perfect the appeal.

Three months later, in September 2015, the Executor filed a motion to dismiss the appeal. In October 2015, after a hearing, the trial court entered an order dismissing Mr. Mahaffey's appeal of the Summary

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1. Section 87-1 of our General Statutes provides that a person who undertakes "the construction of any building . . . or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, . . . shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina." N.C. Gen. Stat. § 87-1 (2015). A person acting as a general contractor in North Carolina must be authorized and licensed by the State. N.C. Gen. Stat. § 87-13.

2. In his complaint, Mr. Mahaffey contended that Ms. Boyd requested that he undertake nine consecutive, separate projects on her property, none of which cost more than $30,000. We acknowledge that there certainly existed a material issue of fact as to whether Mr. Mahaffey completed one large project totaling $53,740 or nine separate projects which did not exceed $30,000 per project.

Judgment Order, concluding that Mr. Mahaffey had failed to comply with "the deadlines for presenting the appeal for decision under the North Carolina Rules of Appellate Procedure."

About a year later, on 9 September 2016, Mr. Mahaffey filed a motion titled "Rule 59 Motion for New Trial; Amend Judgment" (the "Rule 59 Motion"). In his Rule 59 Motion, Mr. Mahaffey requested that the trial court reverse its October 2015 order dismissing his appeal of the Summary Judgment Order. In October 2016, the trial court entered an order denying Mr. Mahaffey's Rule 59 Motion (the "Rule 59 Order"). Mr. Mahaffey timely appealed from the Rule 59 Order.

II. Analysis

This matter involves three orders: (1) the Summary Judgment Order entered June 2015; (2) the order entered in October 2015 dismissing Mr. Mahaffey's appeal of the Summary Judgment Order; and (3) the Rule 59 Order.

In his brief on appeal, Mr. Mahaffey seeks review of two of these orders: the Summary Judgment Order and the Rule 59 Order. However, he failed to properly perfect his appeal of the Summary Judgment Order. Our review is therefore limited to consideration of the Rule 59 Order. *See Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006) ("Appellate review of a denial of a Rule 59 motion for a new trial is distinct from review of the underlying judgment or order upon which such a motion may be based."). And after careful review, we affirm the trial court's Rule 59 Order.

A trial court's ruling on a motion for new trial under Rule 59 is reviewed for abuse of discretion:

> It has been long settled in our jurisdiction that an appellate court's review of 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.

Davis, 360 N.C. at 523, 631 S.E.2d at 118.

A motion for a new trial under Rule 59 must be served "not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(b). Here, Mr. Mahaffey exceeded the time permitted for serving and filing a Rule 59 Motion by approximately nine months. *See id.* Therefore, we hold that the trial court did not abuse its discretion in denying Mr. Mahaffey's motion.

We further hold, in the alternative, that Mr. Mahaffey's Rule 59 Motion was not an appropriate method of challenging the trial court's order dismissing his appeal from the Summary Judgment Order. Our Court has concluded that a "Rule 59(a) motion is not a proper ground for relief from an entry of summary judgment." *Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 294-95, 716 S.E.2d 67, 77 (2011) (holding that "[b]ecause both Rule 59(a)(8) and (9) are *post-trial* motions and because the instant case concluded at the summary judgment stage, the court did *not* err by concluding that it [would be improper] to set aside default against [the] Defendant [] and vacate the summary judgment pursuant to Rule 59(a)(8) and (9)" (emphasis added)); *see also Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 538 (2016) ("All of the enumerated grounds in Rule 59(a), and the concluding text addressing 'an action tried without a jury,' indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits.' ").[3] Because the order dismissing the appeal was based on Mr. Mahaffey's failure to perfect his appeal from the Summary Judgment Order within the proper time period – a procedural matter – it could not possibly be considered a judgment ending the case on its merits. *See id.*

Accordingly, we conclude that a Rule 59 motion was an inappropriate method of challenging the trial court's order dismissing Mr. Mahaffey's appeal in this case. In order to properly appeal the order dismissing his appeal, Mr. Mahaffey should have filed a petition for writ of *certiorari* with our Court. *See State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980). Recently, in *E. Brooks Wilkins Family Medicine, P.A. v. WakeMed*, ___ N.C. App. ___, 784 S.E.2d 178 (2016), our Court concluded that it has no jurisdiction to review an order dismissing an appeal, and thus there is no right of appeal from such an order. *E. Brooks Wilkins Family Medicine*, ___ N.C. App. at ___, 784 S.E.2d at 185. The proper remedy to obtain review of an order of the trial court dismissing an appeal for failure to perfect it within the appropriate time period is

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3. Between our decisions in *Bodie Island* and *Tetra Tech*, a different panel of our Court held that a trial court erred in denying a party's Rule 59 motion to amend a partial summary judgment order, thus sanctioning the use of a motion under Rule 59 to challenge a summary judgment order. *See Rutherford Plantation, LLC v. Challenge Golf Grp. of Carolinas, LLC*, 225 N.C. App. 79, 737 S.E.2d 409 (2013). On this point, *Rutherford* is clearly in direct conflict with *Bodie Island* and *Tetra Tech*. However, although *Rutherford* was affirmed *per curiam* by our Supreme Court, it was affirmed "without precedential value," with three Justices voting to affirm and three voting to reverse. *See Rutherford Plantation, LLC v. Golf Grp. of the Carolinas, LLC*, 367 N.C. 197, 753 S.E.2d 152 (2014). We conclude that the present case is controlled by *Bodie Island* and *Tetra Tech* on this issue.

"by petition for writ of *certiorari*[.]" *Evans*, 46 N.C. App. at 327, 264 S.E.2d at 767 (emphasis added).

In light of the foregoing, we are unable to conclude that the trial court abused its discretion in denying Mr. Mahaffey's Rule 59 Motion. We therefore affirm the ruling of the trial court.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY ALLEN

No. COA17-661

Filed 6 March 2018

1. Evidence—hearsay—exceptions—business records—authentication

The trial court did not err by admitting a notice banning defendant from all Belk department stores under the business records exception to the hearsay rule, where the notice was made in the ordinary course of business two months before the incident in question and was authenticated by a Belk employee familiar with such notices and the system under which they were made.

2. Burglary and Unlawful Breaking or Entering—felonious breaking or entering—elements—breaking or entering-ban from store

The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering where defendant had been banned from entering any Belk store for fifty years and, two months later, entered a Belk store.

Judge MURPHY concurring in the result only.

Appeal by defendant from judgment entered 1 February 2017 by Judge Lisa C. Bell in Catawba County Superior Court. Heard in the Court of Appeals 6 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tenisha S. Jacobs, and Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Where the notice prohibiting defendant's entry in all Belk Stores was made in the ordinary course of business at or near the time of the transaction involved and was authenticated at trial by a witness familiar with such notices and the system under which they are made, the document was properly authenticated and the trial court did not err in admitting it. Where the general license or privilege to enter a store open to the public was specifically revoked as to defendant, and his ban from the store was implemented and "personally communicated" to him and no evidence suggests it had been rescinded, defendant's entry to the Belk store in Hickory was unlawful, and therefore, the State's evidence was sufficient to support defendant's conviction for felonious breaking and entering.

On 21 January 2016, Renae Harris was on duty at her place of employment, Belk Store #26 in Hickory, North Carolina, where she was a loss prevention associate ("LPA"). In that position, she monitored cameras located throughout the store to ensure that "anybody behaving suspiciously" did not "try to exit without paying." Around 5:00 p.m., Harris was surveying the camera system when she observed defendant Billy Ray Allen in the men's shoe department. Defendant was wearing a blue and white hat. She continued monitoring other cameras when she noticed defendant again, this time in the menswear department wearing a black hat. She then watched as defendant walked to a rack of men's coats, removed his own coat, and put on a Michael Kors coat worth $240.00. Harris observed defendant "mak[ing] a motion that looked like he was pulling off the tag or the SKU number that the associate would ring at purchase . . . then [defendant] picked up his coat and went into the fitting room."

Harris and another LPA, Winston Faxon, proceeded to the fitting room area while defendant was inside. Defendant exited the fitting room a few minutes later with "[h]is jacket . . . on over the top of [the Michael Kors] jacket." Harris identified herself as a Belk LPA and escorted defendant back to her office. As they were about to enter the office area, however, defendant pushed against Harris and "ran towards the door to try to get out of the department. He tried to approach the doors." Defendant made it past the point where items could be purchased, but he tripped

before he could go any further, and Faxon was able to place him in handcuffs and take him to the office.

Harris entered defendant's name in a Belk store database. She found an entry for his name at Belk Store #329 in Charlotte, along with a photograph that resembled defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, defendant had been banned from Belk stores for a period of fifty years pursuant to a Notice of Prohibited Entry following an encounter at the Charlotte store (the "2015 Notice"). The notice contained a signature under the portion acknowledging receipt by "Billy Ray Allen."

Harris proceeded to complete another Notice of Prohibited Entry for the 21 January 2016 incident (the "2016 Notice"), banning defendant from Belk for a period of ninety-nine years. Defendant, Harris, and Faxon all signed the 2016 Notice. Thereafter, defendant was arrested and charged with "unlawfully, willfully[,] and feloniously" breaking and entering the Belk store and stealing property. Defendant was then indicted for (1) felonious breaking and entering in violation of N.C. Gen. Stat. § 14-54(a) and (2) felonious larceny in violation of N.C. Gen. Stat. § 14-72(b)(2) and 14-72(c).

At the 1 February 2017 Criminal Session for Catawba County, defendant's case was tried before a jury, the Honorable Lisa Bell, Superior Court Judge presiding. The jury found defendant guilty of both charges—breaking and entering, and larceny. The trial court consolidated the charges and sentenced defendant to six to seventeen months imprisonment. Defendant's sentence was suspended, and he was placed on supervised probation for eighteen months. Defendant was ordered to pay court costs and serve forty-eight hours of community service. Defendant appeals.

On appeal, defendant argues (I) the trial court erred by admitting the 2015 Notice banning defendant from all Belk stores without requiring proper authentication; (II) evidence of felony breaking and entering is insufficient where defendant entered a public area of a store during regular business hours; and (III) his conviction should be vacated where there is insufficient evidence that he entered the store unlawfully.

I

[1] Defendant first argues the trial court erred by admitting the 2015 Notice banning defendant from all Belk stores as a business

record without requiring proper authentication pursuant to Rule 901. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (quoting *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011)).

"Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (2001) (citing N.C. Gen. Stat. § 8C-1, Rule 901(a)). However, records of regularly conducted activity "are not excluded by the hearsay rule, even though the declarant is unavailable as a witness" if such records are "(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . ." N.C.G.S. § 8C-1, Rule 803(6) (2015). Thus, the business records exception recognizes "[t]he impossibility of producing in court all the persons who observed, reported and recorded each individual transaction . . . ." *State v. Springer*, 283 N.C. 627, 634, 197 S.E.2d 530, 535 (1973) (citation omitted).

The test for receiving business records into evidence is that they are "made in the ordinary course of business at or near the time of the transaction involved" and "authenticated by a witness who is familiar with them and the system under which they are made." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted). "The authenticity of such records may . . . be established by circumstantial evidence." *Id.* (citation omitted). However, "[t]here is no requirement that the records be authenticated by the person who made them." *Id.* (citations omitted).

In the instant case, the State presented evidence that the 2015 Notice was completed and maintained by Belk in the regular course of business and issued two months before the incident in question. Harris, a Belk employee and LPA, testified that she was familiar with Belk's procedures for issuing bans from its properties and with the computer system in which Belk maintained its information about the incidents reported on such forms. She also established her familiarity with the forms, including the 2015 Notice, and that such forms were executed in the regular course of business, as well as her knowledge that not all forms were handled exactly the same way by each store. Pursuant to *Wilson*, and contrary to defendant's argument, it is of no legal moment that Harris

did not herself make or execute the 2015 Notice about which she testified as it is clear she was "familiar . . . with the system under which they [were] made." *Id.* (citations omitted). Accordingly, the trial court did not err in admitting the 2015 Notice into evidence, as Harris's testimony satisfied this Court's test for receiving business records. Defendant's argument is overruled.

II & III

[2] Defendant argues (II) the trial court erred in denying his motion to dismiss because there is insufficient evidence of felony breaking and entering where defendant entered the public area of the Belk store during regular business hours. Specifically, defendant contends a person cannot be convicted of felonious entry into a place of business during normal hours because North Carolina case law states that this does not constitute an unlawful entry. As a result, defendant argues, (III) his conviction for felony breaking and entering should be vacated. We disagree.

This court reviews "the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010) (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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

Here, defendant was charged with felonious breaking or entering. The essential elements of this crime are "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Brooks*, 178 N.C. App. 211, 214, 631 S.E.2d 54, 57 (2006) (quoting *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262 (1987)). At issue in this case is the meaning of the first element, "breaking or entering."

"In order for an entry to be unlawful under N.C. Gen. Stat. § 14-54(a), the entry must be without the owner's consent." *State v. Rawlinson*, 198 N.C. App. 600, 607, 679 S.E.2d 878, 882 (2009) (citation omitted). "[A]n entry *with* consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under [N.C. Gen. Stat. §] 14-54(a)." *State v. Boone*, 297 N.C. 652, 659, 256 S.E.2d 693, 687 (1979) (emphasis added).

In *Boone*, the defendant argued that the trial court erred in denying his motion to dismiss the felonious entry charge where the evidence

showed he entered a store that was open to the public at the time. *Id.* at 655, 256 S.E.2d at 684. This Court concluded that "[h]is entry was thus *with the consent*, implied if not express, of the owner [of the store]." *Id.* at 659, 256 S.E.2d at 687 (emphasis added). Therefore, "[i]t [could not] serve as the basis for a conviction for felonious entry." *Id.*

Defendant attempts to draw from *Boone* a bright-line rule that if a person enters a store at a time when it is open to the public, that person's entry is with the consent, "implied if not express," of the owner of that store. *See id.* Defendant's argument, however, ignores certain facts present in the instant case which change the analysis completely and render *Boone* distinguishable.

Unlike the store the defendant entered in *Boone*, here, the State presented evidence from which the jury could—and did—infer that the Belk store did not consent to defendant's entering its property on 21 January 2016. Belk issued the 2015 Notice expressly prohibiting defendant "from re-entering the premise[s] of any property or facility under the control and ownership of Belk wherever located" for a period of fifty years. The State's witness, Harris, also testified that the 2015 Notice of the ban had not been rescinded, no one expressly allowed defendant to come back onto Belk store property, and no one gave defendant permission to enter the Belk store on 21 January 2016. In *Boone*, there was no evidence that the defendant in that case had ever been banned from the store in question. *See id.*

While defendant is correct in his assertion that "no case in North Carolina has held that this [precise] conduct constitutes felony breaking and entering," *cf. State v. Lindley*, 81 N.C. App. 490, 494, 344 S.E.2d 291, 293–94 (1986) (upholding conviction for felonious breaking and entering where the defendant entered the premises of his former residence without consent of the property owner pursuant to a marital separation agreement signed by the defendant), a Missouri Court of Appeals case with a nearly identical fact pattern is illustrative.

In *State v. Loggins*, the defendant entered a Wal-Mart property after having been previously banned indefinitely from all Wal-Mart properties two years before. 464 S.W.3d 281, 282 (Mo. App. 2015). Similar to defendant in the instant case, the defendant in *Loggins* had "signed a Wal-Mart-issued document titled, 'Notification of Restriction from Property[,]' " on the date he was initially banned from all Wal-Mart stores. *Id.* at 282 n.1. Upon entering a Wal-Mart store after his ban was implemented, the defendant attempted to steal a bottle of bourbon and conceal it under his shirt and leave the store. *Id.* at 282–83. The defendant was caught and

charged with first-degree burglary,[1] but at trial (and also later on appeal) the defendant attempted to argue that he could not be guilty of burglary "because there was no unlawful entry insofar as Wal-Mart consented to his entry." *Id.* at 283. In other words, the defendant argued, much as defendant does in the instant case, that "because Wal-Mart was open to the public, [he] generally had a license or privilege to enter, regardless of his purpose." *Id.*

The Missouri Court of Appeals disagreed, stating "that license or privilege was revoked on [the date] when Wal-Mart 'personally communicated' to [the defendant] (through the 'Notification of Restriction from Property') that he was no longer allowed to enter onto Wal-Mart Stores, Inc. property, unless and until the notice of restriction was rescinded." *Id.* Accordingly, the Missouri court held that because "there was no evidence that Wal-Mart either expressly or impliedly rescinded its notification banning [the defendant] from the property" the notice of his ban from the property "remained in effect, rendering [the defendant's] entry unlawful." *Id.* at 284.

We hold that the general license or privilege to enter the Belk store held by defendant was revoked on 14 November 2015, the date on which defendant was presented with and signed the 2015 Notice of Prohibited Entry banning defendant from entering "any Belk property" for a period of fifty years. As the incident in question occurred on 21 January 2016, two months after the ban was implemented and "personally communicated" to defendant, *see id.*, and no evidence suggests the ban had been rescinded, we conclude it remained in effect, rendering defendant's entry to the Belk store in Hickory unlawful. Accordingly, the State's evidence was sufficient to support the felonious breaking and entering charge, and defendant's argument that his conviction for the same should be vacated is overruled.

NO ERROR.

Judge BERGER concurs.

Judge MURPHY concurs in the result only.

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1. Missouri's burglary statute is markedly similar to North Carolina's felony breaking and entering statute: "A person commits the crime of burglary in the first degree if he knowingly enters unlawfully . . . a building . . . for the purpose of committing a crime therein, and . . . while in the building[,] . . . [t]here is present . . . another person who is not a participant in the crime." *State v. Loggins*, 464 S.W.3d 281, 283 (alterations in original) (quoting Mo. Rev. Stat. § 569.160.1(3)). *Compare id.*, *with* N.C. Gen. Stat. § 14-54(a) (2015) ("Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.").

STATE OF NORTH CAROLINA
v.
SAMUEL ANTHONY CAMPOLA, DEFENDANT

No. COA17-354

Filed 6 March 2018

Search and Seizure—traffic stop—lawfully extended

In a prosecution for heroin possession and possession of drug paraphernalia, the trial court's unchallenged findings and the uncontroverted evidence confirmed that the car in which defendant was riding was lawfully stopped for a traffic violation and that, before the stop was completed, the officer obtained reasonable suspicion of illegal drug activity and could lawfully extend the stop. The stop began when the car in which defendant was riding, which was in a parking lot in a high crime area, sped away and made an illegal turn when an officer drove by. After searching databases for information about the driver and the car, and waiting for backup, one officer had begun to give the driver a warning when the officer saw two syringe caps inside the car. A search of defendant and the car revealed the evidence of heroin and drug paraphernalia.

Appeal by Defendant from judgment entered 1 September 2016 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph A. Newsome, for the State.

Meghan Adelle Jones for Defendant-Appellant.

INMAN, Judge.

When a police officer initiates a traffic stop and, in the course of accomplishing the mission of the stop, develops reasonable suspicion that the driver or passenger is engaged in illegal drug activity, the officer may prolong the stop to investigate that suspicion without violating the passenger's Fourth Amendment rights.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant, a passenger in a vehicle stopped for a traffic violation, was indicted for possession of heroin and possession of drug

paraphernalia on 13 July 2015 after a search of the vehicle revealed the presence of the drug. Prior to trial, Defendant filed a motion to suppress all evidence obtained as a result of the traffic stop, contending that the police officer executing the stop had impermissibly and unconstitutionally extended the traffic stop without reasonable suspicion or probable cause. Following a hearing on the motion to suppress, the trial court orally denied the motion after making findings of fact and conclusions of law, and later entered a written order consistent with its oral ruling. In the course of trial, Defendant's counsel objected to the introduction of the evidence subject to the earlier motion and was overruled by the trial court. The jury found Defendant guilty on both charges, and the trial court entered its judgment on 1 September 2016. Defendant timely filed his notice of appeal on 8 September 2016.

The findings in the trial court's written order are summarized as follows:

On 26 November 2014, Officer Matthew Freeman ("Officer Freeman"), a patrol officer with the Charlotte-Mecklenburg Police Department ("CMPD"), was on patrol in a vehicle near Nations Ford Road in Charlotte, North Carolina. Officer Freeman had received training in the identification of drugs and had been a patrolman for almost six years, participating in 100 drug arrests. In the course of the patrol, Officer Freeman pulled into the parking lot of a Motel 6. He considered the location a high crime area. When Officer Freeman entered the parking lot, he saw two white males sitting in a green Honda. After Officer Freeman passed by, the Honda exited the parking lot at a high rate of speed. Officer Freeman followed the car out of the parking lot as it drove toward an intersection. At the intersection, the car turned right without yielding the right-of-way to oncoming traffic turning left through the intersection, nearly causing a collision. Officer Freeman turned on his emergency lights and siren and stopped the vehicle.

Once the car stopped, Officer Freeman observed that it displayed a temporary license tag. He approached the driver's side and asked the driver for his license, registration, and proof of insurance, observing that the driver was more nervous than usual. The driver provided Officer Freeman with his insurance information, the car's title, and a South Carolina driver's license, which identified him as Matthew Matchin ("Matchin").[1] When asked why they were at the motel, Matchin stated

1. The trial transcript identifies the driver's last name as "Meacham," while various filings in the printed record use the name "Matchin." Both the State and Defendant adopt the latter in their briefs, believing the transcript's spelling to be a typographical error.

that he and his passenger did not go into a room there. The passenger did not have any identifying documents, but identified himself by name to Officer Freeman. Officer Freeman then returned to his patrol car to run the above information through the onboard computer.

Once in his patrol car, Officer Freeman called for a back-up unit to assist him, as there were multiple occupants in the vehicle. While he waited for another officer to arrive, Officer Freeman entered the VIN number for the stopped vehicle through a 50-state database, as he did not have a state registration with which to search. This search took longer than a search using a state vehicle registration. As a result of the search, Officer Freeman determined that the vehicle was not stolen and that neither Matchin nor Defendant had any outstanding warrants. However, Officer Freeman found multiple prior drug arrests for both Matchin and Defendant.

Shortly after the above searches were completed, and twelve minutes after the stop was initiated, another CMPD officer, Damon Weston ("Officer Weston"), arrived in response to Officer Freeman's earlier call for back-up. Officer Freeman spoke with Officer Weston on his arrival, and told him about the stop as well as the information gleaned from Matchin, Defendant, and the database searches. Officer Freeman told Officer Weston that he was going to issue Matchin a warning for his unsafe movement, but asked Officer Weston to approach Defendant.

The officers approached the stopped vehicle together some fourteen minutes after the stop was initiated. Officer Freeman asked Matchin to step to the rear of the vehicle so that they could see the intersection where the illegal turn occurred while Officer Freeman explained his warning. Officer Freeman then gave Matchin a warning, returned the documents, and requested a search of the vehicle. Matchin declined the request. While Officer Freeman was speaking with Matchin, Officer Weston approached Defendant and observed a syringe cap in the driver's seat. Officer Weston asked Defendant to step out of the car and Defendant complied. At this time, Officer Weston observed a second syringe cap in the passenger's seat. Now four minutes into their respective conversations, Officer Weston approached Officer Freeman and informed him of the syringe caps. Officer Freeman asked Matchin if he was diabetic, and he responded that he was not. Officer Freeman then searched the vehicle, discovering two syringes and a spoon

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Because the name of the driver is not a fact at issue on appeal, we adopt the "Matchin" spelling used in the documents in the printed record and the parties' briefs for consistency and ease of reading.

with a brown "liquidy" substance. The officers then arrested Matchin and Defendant.

At the suppression hearing, the trial court received the benefit of testimony from Officer Freeman and Officer Weston, as well as documentary evidence in the form of a dash-cam video of the stop from Officer Freeman's patrol car.[2] Officer Freeman testified that this portion of Nations Ford Road was part of his usual patrol, and that he had personally responded to a high number of drug arrests, shootings, and robberies in the area. Officer Weston also testified that the motels around Nations Ford Road were "high crime, high drug areas." Officer Freeman testified that, when he pulled into the Motel 6 parking lot and spotted the green Honda, he intended to get out of his vehicle to speak with its occupants. But, before he could park his vehicle, the two men looked up at Officer Freeman with "a kind of surprised look on their face[s], wide[-] eyed type of look" and then exited the parking lot in the car at "a high rate of speed." The dash-cam video shows Officer Freeman following the green Honda out of the parking lot and the Honda can be observed turning right at a red light without yielding to oncoming traffic turning left through the intersection, nearly causing a collision. The video's timestamp shows Officer Freeman stopped the Honda and exited his vehicle at 4:25 P.M.

Officer Freeman testified that he saw the car had a temporary paper tag from Pennsylvania. He also testified that Matchin seemed "overly nervous, more than . . . on a normal traffic stop, more shaking of the hands. Kind of not really directly answering [questions] . . . . Just kind of stumbling a bit about the answer." Officer Freeman also detailed the contents of his conversation with Matchin in his testimony, stating that Matchin claimed that he went into the Motel 6 to meet a friend in the lobby, although he could not remember the friend's name. Per the dash-cam video, Officer Freeman returned to his patrol car at 4:26 P.M., less than two minutes into the stop.

Officer Freeman testified that he radioed for back-up upon returning to his vehicle, consistent with general safety and CMPD policy concerning traffic stops with multiple occupants. While he waited for another officer to arrive, Officer Freeman entered the VIN number for the stopped vehicle through a 50-state database, as he did not have a permanent state license plate number with which to search. This

2. Defendant filed a petition for writ of mandamus to compel the State to produce a copy of the dash-cam video in a format viewable by this Court. Because we are able to view the video in the format in which it was originally provided, we deny Defendant's motion.

national database search alone took between five to eight minutes, longer than a search using a permanent license plate registered in a single state. Officer Freeman also ran Matchin's and Defendant's names through a local database of arrest and other records, followed by a search of a statewide database. These searches revealed multiple prior drug arrests for both Matchin and Defendant. Officer Freeman testified that his conduct up to this point in the stop, including the questioning of Matchin and Defendant, his database searches, and his request for back-up, were standard procedure in the course of a traffic stop involving multiple occupants.

On the dash-cam video, chimes from Officer Freeman's onboard computer can be heard multiple times between 4:27 P.M., a minute after he returned to his patrol car, and 4:36 P.M. Officer Freeman testified that the chimes indicated the return of a result from one of his database searches. Less than a minute after the last chime played in the dash-cam excerpt, Officer Freeman can be heard talking in person with Officer Weston, and Officer Freeman testified that he was still searching for Defendant's information and receiving results from the statewide database when Officer Weston arrived on the scene.

The conversation between the officers was captured on the dash-cam video played for the trial court. It begins with Officer Freeman stating that "the guy in the front passenger seat is named Samuel Campola. I've heard that name before." After providing Defendant's prior arrest history to Officer Weston, Officer Freeman then describes his arrival at the Motel 6, where "as soon as they see me [Officer Freeman], his eyes get real big and [they] just take off." Officer Freeman is next heard describing the vehicle's failure to yield to oncoming traffic, and the officers discuss how to resolve the stop. Officer Freeman provides Officer Weston with Matchin's arrest history, and then reiterates that he had "heard of Samuel Campola before" and that Defendant's physical appearance indicated he was a heroin user. He then tells Officer Weston his suspicion that "they [Matchin and Defendant] were either buying or selling over there [at the Motel 6.]" Officers Freeman and Weston next agree that Officer Freeman will approach the driver, ask him to exit the vehicle, and issue him a warning while Officer Weston speaks with Defendant. The officers agree on the course of action, and leave the vehicle at 4:39 P.M.

The video shows the officers approach the vehicle, with Officer Freeman speaking to Matchin at the rear of the vehicle and Officer Weston talking to Defendant through the passenger window. Per his testimony, Officer Freeman asked Matchin to step out of the vehicle, which was his standard practice when explaining traffic violations to a driver. Once at

the rear of the vehicle, Officer Freeman returned the driver's license, the vehicle's title, and proof of insurance to Matchin and began explaining his traffic warning. Officer Freeman then asked the driver if there was anything illegal in the car and for consent to search the vehicle. Matchin refused the search.

While Officer Freeman was speaking to the driver at the rear of the vehicle, Officer Weston was speaking to Defendant through the passenger window. Officer Weston noticed an orange syringe cap in the driver's seat that Matchin had just vacated. Officer Weston asked Defendant if he possessed any weapons or drugs and if he consented to a search of his person. Defendant said that he had nothing illegal and gave Officer Weston permission to search him. When Defendant stepped out of the vehicle to allow Officer Weston to perform the search, Officer Weston noticed a second orange syringe cap, this time in the now-empty passenger's seat of the vehicle. Officer Weston informed Officer Freeman of his discovery, and resumed his search of Defendant. Officer Weston found nothing illegal on Defendant's person.

Officer Freeman then searched the vehicle while Officer Weston stood with Matchin and Defendant outside the vehicle. Officer Freeman opened the passenger door, where he observed a syringe cap in the driver's seat and a syringe cap in the passenger's seat. Officer Freeman also saw a spoon protruding from beneath the passenger's seat. The spoon had a brown substance on it in a partially liquid, partially solid state. Officer Freeman also saw uncapped syringes, a Q-tip with the cotton pulled off, and a belt in the front of the car, as well as an open bottle of liquor in the backseat. Officer Freeman photographed the items he found in the vehicle and radioed for an officer with more experience with heroin to assist. The third officer arrived and found a baggie containing black-tar heroin in Matchin's sock.[3] Both Matchin and Defendant were arrested at the scene.

II. ANALYSIS

Defendant argues on appeal that the trial court erred in denying his motion to dismiss, contending that the officers unconstitutionally extended the stop and that any reasonable suspicion that arose to justify an extension of the stop was not particularized to Defendant. Because reasonable suspicion sufficient to detain both Matchin and Defendant arose at the time Officer Freeman completed his record searches in the

3. The State presented evidence that the contents of the plastic bag were confirmed by chemical analysis to be heroin. Defendant does not challenge this evidence on appeal.

course of and prior to accomplishing the mission of the traffic stop, we hold there was no error.

A. Standard of Review

We review an order on a motion to suppress by determining whether the trial court's findings of fact are supported by competence evidence and whether those findings support the conclusions of law. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). "Our review of a trial court's conclusions of law on a motion to suppress is *de novo*[,]" *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)), meaning we consider the legal conclusion anew and freely substitute our judgment for that of the trial court. *Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff'd in part, discretionary review improvidently allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003).

The trial court did not distinguish between findings of fact or conclusions of law in its order; however, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (internal citations omitted).

B. The Constitutional Duration of Traffic Stops

The Fourth Amendment to the United States Constitution protects persons from "unreasonable searches and seizures," U.S. Const. amend. IV, and its protections extend to traffic stops. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). As established by the United States Supreme Court in *Rodriguez v. United States*, 575 U.S. ___, 191 L. Ed. 2d 492 (2015), the Amendment's "Constitution[al] shield" prohibits police from "exceeding the time needed to handle the matter for which the [traffic] stop was made[.]" *Id.* at ___, 191 L. Ed. 2d at 496. Thus, "[u]nder *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission . . . *unless reasonable suspicion of another crime arose before the mission was completed*[.]" *State v. Bullock*, ___ N.C. ___, ___, 805 S.E.2d 671, 673 (2017) (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499) (emphasis added).

In *Bullock*, the North Carolina Supreme Court set forth with clarity the parameters of a constitutional traffic stop post-*Rodriguez*:

> The reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " [*Rodriguez*] at ___, 135 S. Ct. at 1615[, 191 L. Ed. 2d at 499] (alteration in original) (quoting [*Illinois v.*] *Caballes*, 543 U.S. [405,] 408, 125 S.Ct. 834[, 160 L. Ed. 2d 842]). These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*
>
> In addition, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S.Ct. at 1616[, 191 L. Ed. 2d. at 500]. These precautions appear to include conducting criminal history checks, as *Rodriguez* favorably cited a Tenth Circuit case that allows officers to conduct those checks to protect officer safety. *See id.* (citing *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc), *abrogated on other grounds as recognized in United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007)); *see also United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996) ("Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive."), *quoted in Holt*, 264 F.3d at 1221. Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. *Rodriguez*, 575 U.S. at ___, 135 S.Ct. at 1616[, 191 L. Ed. 2d at 500]. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop. *See id.* at ___, ___, 135 S.Ct. at 1612, 1614[, 191 L. Ed. 2d at 499-500].

Bullock, ___ N.C. at ___, 805 S.E.2d at 673-74 (alterations to citations added).

Defendant argues that two unconstitutional extensions of the traffic stop occurred in this case: (1) when Officer Freeman waited roughly

twelve minutes after first speaking with Matchin and Defendant before issuing his warning to Matchin; and (2) when Officer Freeman questioned Matchin while Officer Weston questioned and searched Defendant.

We disagree with Defendant that Officer Freeman unconstitutionally extended the duration of the stop for several reasons. First, Officer Freeman was engaged in conduct within the scope of his mission until Officer Weston arrived roughly twelve minutes later. Defendant does not challenge any findings relating to Matchin's traffic violation or the trial court's finding that Officer Freeman was engaged in a series of database searches during this time, including a search of a 50-state database for the VIN number that "takes longer to process than a check of a registration card." As held by the United States Supreme Court in *Rodriguez* and recognized by the North Carolina Supreme Court in *Bullock*, database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop. *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499 ("Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " (alteration in original) (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d 842)); *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 ("These inquiries include 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.' " (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499)). As for his research into Matchin and Defendant's criminal histories, this too was permitted under *Rodriguez* and *Bullock* as a safety precaution related to the traffic stop. *Bullock*, ___ N.C. at ___, 805 S.E.2d at 674 (" '[A]n officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.' These precautions appear to include conducting criminal history checks . . . ." (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 500)). Because these searches were within the scope of his mission, no delay could occur until they were completed, and the uncontradicted evidence demonstrates that the database searches began within a minute of him returning to his vehicle with Matchin's and Defendant's information and continued up until Officer Weston arrived.[4]

4. While the trial court did not make a finding of fact as to the exact length of the searches, no such finding was required: "where there is no material conflict in the evidence as to a certain fact, the trial court is not required to make any finding at all as to that fact." *State v. Travis*, ___ N.C. App. ___, ___, 781 S.E.2d 674, 679 (2016) (citing *State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999)). In such situations, "[a] finding may be implied by the trial court's denial of defendant's motion to suppress where the evidence is uncontradicted." *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 (citation omitted). The uncontradicted evidence introduced at trial shows that Officer Freeman was engaged in these database searches at least until the time Officer Weston arrived.

Second, Officer Freeman's request for back-up by Officer Weston was itself a safety precaution. The trial court found that the back-up call was made "because there were two occupants in the vehicle[,]" and Officer Freeman testified that safety concerns and CMPD policy dictated that he request back-up when stopping a vehicle with multiple occupants. "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676. Even if we were to assume *arguendo* that Officer Freeman's call for back-up was a safety precaution divorced from the traffic stop, such a precaution is impermissible only "if [it] extend[s] the duration of the stop." *Id.* at ___, 805 S.E.2d at 674 (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 500). Here, no extension of the stop occurred because database searches within the scope of the mission were running from the time Officer Freeman returned to his car and until Officer Weston arrived.

In addition to holding that Officer Freeman was acting within the scope of his mission until Officer Weston arrived, we further hold that, by the time Officer Weston arrived on the scene, Officer Freeman had developed a reasonable suspicion of criminal activity sufficient to constitutionally extend the traffic stop. Reasonable suspicion arises where an officer possesses "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. ___, ___, 188 L. Ed. 2d 680, 686 (2014) (citations and quotation marks omitted). This requires "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (citation and quotation marks omitted). The reasonableness of such suspicion is measured by determining whether "a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citations and internal quotation marks omitted). In engaging in this analysis, "[a] reviewing court must consider the totality of the circumstances—the whole picture." *Id.* at 116, 726 S.E.2d at 167 (internal citations and quotation marks omitted).

A considerable body of case law has established what "specific and articulable facts" give rise to "rational inferences" supporting a determination of reasonable suspicion when considered in "the totality of the circumstances" with other such facts. *Id.* at 116, 726 S.E.2d at 167 (internal citations and quotation marks omitted). These include: (1) a person's history of criminal arrests, *State v. Watson*, 119 N.C. App. 395, 398, 458

S.E.2d 519, 522 (1995) (holding that a police officer had reasonable suspicion for an investigatory stop of a defendant in part because the officer knew of defendant's prior drug arrests); (2) a driver's questionable travel plans, *State v. Castillo*, ___ N.C. App. ___, 787 S.E.2d 48, 55-56, *appeal dismissed*, *review denied*, 369 N.C. 40, 792 S.E.2d 784 (2016) (holding that an officer's knowledge of defendant's prior DUI arrest, along with the presence of a cover scent, the defendant's extreme nervousness, registration of the vehicle to a third party, and inconsistent travel plans supported reasonable suspicion to extend a traffic stop); (3) a person's evasive action after noticing a police officer, *State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722-23 (1992) (holding that a defendant's presence at a location known for drug sales and apparent flight from officers upon making eye contact, among other facts, supported reasonable suspicion); (4) an officer's recognition of an individual as one previously involved in illegal activity, *Travis* at ___, 781 S.E.2d at 678-79 (holding reasonable suspicion existed where, among other facts, the officer recognized defendant as a former informant in drug purchases); (5) a person's unusual nervousness, *Castillo* at ___, 787 S.E.2d at 55; (6) registration of the vehicle to a third party, *id.* at ___, 787 S.E.2d at 55; and (7) presence in an area known for criminal activity. *Butler* at 233, 415 S.E.2d at 722-23.

Here, the trial court made findings of fact that: (1) Officer Freeman was a trained patrol officer of six years and had participated in 100 drug arrests; (2) Officer Freeman noticed Matchin and Defendant in a high crime area;[5] (3) after Officer Freeman drove by them, Matchin and Defendant took off at high speed and made an illegal right turn, nearly causing a collision; (4) Matchin informed Officer Freeman that he and Defendant were at the motel but did not go into a room there; (5) Matchin was unusually nervous; and (6) both Matchin and Defendant had multiple prior drug arrests. All of these findings are either unchallenged or supported by uncontradicted evidence, and Officer Freeman was apprised of each fact prior to the arrival of Officer Weston and the completion of his mission in initiating the traffic stop. Thus, by the time that Officer Freeman and Officer Weston approached Matchin and Defendant, Officer Freeman could rely on all of these facts, in their totality, in arriving at a reasonable suspicion that criminal activity beyond a

5. This is the only relevant finding challenged by Defendant, arguing that it constitutes a mere recitation of testimony. However, such recitative findings are "insufficient only where a material conflict actually exists on that particular issue." *Travis* at ___, 781 S.E.2d at 679 (emphasis added). Because the evidence is uncontradicted as to this fact, we reject Defendant's challenge.

traffic violation was afoot. *Watson* at 398, 458 S.E.2d at 522; *Castillo* at ___, 787 S.E.2d at 55; *Butler* at 233-34, 415 S.E.2d at 722-23; *Travis* at ___, 781 S.E.2d at 678-79; *Bullock* at ___, 805 S.E.2d at 677-78. We hold that Officer Freeman had a reasonable suspicion to extend the stop, and that such suspicion arose before he completed the mission for the stop.

Even if we were to assume *arguendo* that the facts found above were insufficient to support the extended stop, the uncontradicted evidence discloses further facts supporting reasonable suspicion that we may imply from the ruling of the trial court. *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 ("After conducting a hearing on a motion to suppress, a trial court should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." (citation and quotation marks omitted)). These include Matchin's and Defendant's surprise at seeing Officer Freeman in the motel parking lot, the titling of the vehicle to someone other than Matchin or Defendant, Matchin's statement that he met a friend at the motel but that he did not know the friend's name, and Officer Freeman's recognition of Defendant's name and appearance as someone involved in illegal drug activity. *Castillo* at ___, 787 S.E.2d at 55-56; *Travis* at ___, 781 S.E.2d at 678-79. Considering all the facts, both found and implied from the trial court's ruling, we hold that the totality of the circumstances supports a conclusion that Officer Freeman had reasonable suspicion to extend the traffic stop prior to the completion of his mission.

Finally, we note the similarity between the facts in this case and those confronting our Supreme Court in *Bullock*, its most recent decision on point. There, a police officer stopped a rental car for "speeding, following a truck too closely," and weaving over the line marking the outer bound of the interstate. *Bullock*, ___ N.C. at ___, 805 S.E.2d at 674. The officer knew the interstate was frequently used to traffic drugs between Georgia and Virginia. *Id.* at ___, 805 S.E.2d at 674. In asking the driver for his license and vehicle registration, the officer observed the driver appeared nervous and was not an authorized driver on the rental agreement. *Id.* at ___, 805 S.E.2d at 674. The officer also noticed multiple cell phones in the car. *Id.* at ___, 805 S.E.2d at 674. When the officer asked the driver where he was going, the driver responded that he had intended to visit his girlfriend but that he had missed his exit; however, the officer was aware that the driver had since passed at least three additional exits where he could have turned to reach his stated destination. *Id.* at ___, 805 S.E.2d at 674. The driver also made contradictory

statements about his girlfriend to the officer. *Id.* at ___, 805 S.E.2d at 675. The officer informed the defendant he would be receiving a warning, asked the defendant to exit the vehicle, frisked the defendant, and then asked him to sit in the patrol car while the officer ran his information through local, state, and national databases. *Id.* at ___, 805 S.E.2d at 675. The databases returned a criminal history contrary to prior statements made by the defendant. *Id.* at ___, 805 S.E.2d at 675. The officer asked if he could search the rental vehicle. *Id.* at ___, 805 S.E.2d at 675. The driver consented to a search of the vehicle but not the possessions therein; a trained police canine arrived a few minutes later and sniffed the possessions, signaling the presence of heroin. *Id.* at ___, 805 S.E.2d at 675. On these facts, the Supreme Court ruled that there existed sufficient circumstances to support a reasonable suspicion of drug activity prior to the arrival of the canine, so that no unconstitutional extension of the traffic stop occurred. *Id.* at ___, 805 S.E.2d at 676-78.

Defendant argues that any reasonable suspicion supporting an extension of the stop in this case was not particularized to him, and therefore any extended seizure of him individually was unlawful. We disagree. First, the record includes several circumstances, supported by uncontroverted evidence, sufficient to support a reasonable suspicion particularized to Defendant that he was engaged in drug activity, including Defendant's presence in a high crime area known by Officer Freeman to be the site of drug transactions, Defendant's history of drug arrests, his expression of surprise at seeing Officer Freeman in the Motel 6 parking lot, and Officer Freeman's recognition of Defendant's name and appearance in the context of prior illegal drug activity. *See*, *e.g.*, *State v. Stone*, 179 N.C. App. 297, 303-04, 634 S.E.2d 244, 248 (2006) (holding that an officer had reasonable suspicion of illegal activity particularized to a passenger in a vehicle stopped for a traffic violation where he was "moving from side to side inside the vehicle and [the officer] also recognized defendant as someone who had been identified to police as a drug dealer"), *aff'd*, 362 N.C. 50, 653 S.E.2d 414 (2007). Second, "[a] law enforcement officer may stop and briefly detain a vehicle *and its occupants* if the officer has reasonable, articulable suspicion that criminal activity may be afoot." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009) (citation omitted) (emphasis added). "[A] passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended[,]" *id.* at 240, 681 S.E.2d at 495, and it logically follows that a lawfully extended detention of the vehicle and driver due to a reasonable suspicion of drug activity includes a lawful extended detention of a passenger in that vehicle.

Because Officer Freeman had reasonable suspicion of drug activity to lawfully extend the traffic stop, he was permitted to ask additional questions of Matchin related to drug activity in addition to issuing his traffic warning. The trial court's unchallenged findings included the fact that Officer Weston observed an orange syringe cap in the driver's seat while Officer Freeman questioned Matchin. Officer Weston then asked Defendant to exit the vehicle, which he was lawfully permitted to do, even absent reasonable suspicion as to Defendant. *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000) ("[T]he United States Supreme Court has affirmed the right of police to order passengers from a vehicle in order to conduct a search of the driver's car, despite the complete absence of probable cause or reasonable suspicion concerning the passengers." (citing *Maryland v. Wilson*, 519 U.S. 408, 137 L. Ed. 2d 41 (1997))). The trial court also found, and Defendant does not challenge the fact, that when Defendant exited the vehicle per this lawful instruction, Officer Weston noticed a second syringe cap in the passenger's seat. Officer Weston informed Officer Freeman about the syringe caps and, following additional questioning of Matchin as to whether he was diabetic, Officer Freeman searched the vehicle and arrested Matchin and Defendant.[6] All of this conduct occurred within the course of a lawfully extended traffic stop based on reasonable suspicion of drug activity arising prior to the completion of the stop's original mission. Defendant's argument that Officers Freeman's and Weston's interactions with Matchin and Defendant after a warning was given to Matchin about his unsafe driving unconstitutionally extended the traffic stop is overruled.

Defendant challenges as unsupported or erroneous several additional findings of fact and conclusions of law. Specifically, Defendant challenges the trial court's findings that Officer Freeman was still explaining his warning when he was advised of the syringe caps, and that he had not completed his mission at that time. Because we hold on *de novo* review that the trial court properly concluded that "Officer Freeman had reasonable suspicion of illegal drug activity, namely the possession of drug paraphernalia, and that justified prolonging the stop to investigate that behavior," any error in the challenged findings was not prejudicial. *See, e.g.*, *State v. Williams*, 190 N.C. App. 301, 307, 680 S.E.2d 189, 193 (2008) (affirming a trial court's order which included an unsupported finding that was "unnecessary to the trial court's ultimate conclusions of

6. Defendant argues on appeal only that the traffic stop was unconstitutionally extended; he does not argue that the search of the vehicle was unconstitutional.

law and ruling"). The trial court properly denied Defendant's motion to suppress, and any error in making an unsupported finding unnecessary to that ruling does not demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." N.C. Gen. Stat. § 15A-1443 (2015). As to Defendant's argument that the trial court erred in concluding Officer Weston's removal of Defendant from the vehicle was lawful and that Officer Freeman had reasonable suspicion of illegal drug activity, we affirm those conclusions on *de novo* review as set forth *supra*.

III. CONCLUSION

The trial court's unchallenged findings and the uncontroverted evidence confirm that Officer Freeman lawfully stopped Matchin and Defendant for a traffic violation and that, before he completed the mission of the stop, Officer Freeman obtained reasonable suspicion of illegal drug activity and could lawfully extend the stop to investigate any wrongdoing. The lawful investigation yielded probative evidence of a crime, and the trial court did not err in denying Defendant's motion to suppress the evidence obtained as a result of the stop.

NO ERROR.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS NACOLEON HARDING

No. COA17-448

Filed 6 March 2018

1. Appeal and Error—preservation of issues—failure to object at trial—plain error

An alleged instructional error was not excluded from plain error review under the invited error doctrine in a prosecution for kidnapping and other offenses where the State alleged that defendant actively participated in crafting the instruction given and affirmed that it was "fine."

2. Kidnapping—release in a safe place—instructions—no plain error

The trial court's instructional error in a first-degree kidnapping prosecution was erroneous but not plain error where the indictment charged only the elevating element of sexual assault but the jury was also charged on the other two elements. However, the State presented compelling evidence to support the element of failure to release in a safe place, and the jury separately found defendant guilty of first-degree kidnapping based on all three elements. Defendant did not carry his burden of demonstrating plain error.

3. Appeal and Error—preservation of issues—double jeopardy—failure to object

The Court of Appeals declined to invoke Appellate Rule 2 to hear a kidnapping and sexual offense defendant's contentions on double jeopardy where defendant did not raise the issue at trial.

4. Appeal and Error—preservation of issues—sentencing for two assaults—failure to object below

Notwithstanding defendant's failure to object below to being sentenced for both assault on a female and assault by strangulation, defendant's argument was preserved for appellate review where the court acted contrary to a statutory mandate. N.C.G.S. § 14-33(c) contains a mandatory prefatory clause that prohibits the trial court from punishing defendant for assault on a female since he was also punished for the higher offense of assault by strangulation based on the same conduct.

5. Assault—assault on a female—assault by strangulation

The trial court did not violate N.C.G.S. § 14-33(c) by imposing sentences based on assault on a female and assault by strangulation. The convictions arose from separate and distinct acts constituting different assaults; furthermore, both assaults were consolidated with a higher class offense and the sentences imposed were based on those higher class offenses.

6. Sexual Offenses—first-degree sexual offense—elements—inflicting serious personal injury

In a prosecution for first-degree sexual offense, there was substantial evidence to support the challenged element of inflicting serious personal injury on the victim.

7. Appeal and Error—preservation of issues—failure to object—sentencing—satellite-based monitoring order—statutory mandate

Defendant's right to appeal a satellite-based monitoring order was preserved despite his failure to object at trial where the issue he raised implicated a statutory mandate.

8. Satellite-Based Monitoring—lifetime registration—findings

An order requiring lifetime registration as a sexual offender and satellite-based monitoring was reversed and remanded where the trial court found that defendant had not been convicted of an aggravated offense, was not a recidivist, and had not been classified as a sexually violent predator. The trial court did not render oral findings to explain its rationale and the Court of Appeals could not meaningfully assess whether any of the trial court court's findings were merely clerical errors or whether the trial court simply erred in ordering registration and monitoring.

9. Constitutional Law—ineffective assistance of counsel—-further investigation needed

Defendant's claims for ineffective assistance of counsel were dismissed without prejudice where the cold record was inadequate for meaningful review and further investigation was required.

Appeal by defendant from judgments and orders entered 18 August 2016 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

ELMORE, Judge.

Defendant Nicholas Nacoleon Harding appeals from judgments entered after a jury convicted him of first-degree sexual offense, first-degree kidnapping, assault on a female, and assault inflicting physical injury by strangulation. He also appeals the trial court's orders requiring him to enroll in lifetime sex offender registration and lifetime satellite-based monitoring (SBM).

Defendant contends the trial court erred by (1) instructing the jury on two unindicted first-degree kidnapping elements; (2) sentencing him, on double jeopardy grounds, for both kidnapping based on sexual assault and for first-degree sexual offense; (3) sentencing him for both assaults in violation of a statutory mandate requiring that only one sentence be imposed for the same conduct; (4) denying his motion to dismiss the first-degree sexual offense charge for insufficient evidence; and (5) ordering he enroll in lifetime registration and SBM on grounds that

the trial court's findings do not support its orders, and that the trial court failed to determine the reasonableness, under the Fourth Amendment, of imposing SBM pursuant to *Grady v. North Carolina*, ___ U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015). Defendant also advances (6) five separate claims of ineffective assistance of counsel (IAC) that allegedly occurred during sentencing.

We hold that defendant's first four alleged errors are meritless and thus that he received a fair trial, free of error, and the sentences imposed based upon the jury convictions were proper. However, based on the first issue of defendant's fifth alleged error, we reverse the trial court's registration and SBM orders and remand for further proceedings, including a new SBM hearing. We dismiss defendant's numerous IAC claims without prejudice to his right to reassert them in a subsequent motion for appropriate relief (MAR) proceeding.

I. Background

On 8 September 2014, defendant was indicted for first-degree sexual offense, first-degree kidnapping, assault on a female, and assault inflicting physical injury by strangulation. At trial, the State's evidence showed the following facts.

During the afternoon of 7 December 2013, Anna,[1] a twenty-two-year-old, ninety-five-pound female, was waiting at a bus stop when a stranger, defendant, struck up a conversation with her. Defendant followed Anna onto the bus, after she changed buses, and after she got off at a bus stop on Brevard Road in Asheville. Anna had never taken this route home before and started walking down Pond Road, in a non-residential and "somewhat . . . deserted" area. Defendant followed about ten feet behind. Eventually, defendant caught up to Anna, and the two began walking together and talking. As they continued walking down this isolated stretch of road, they came to an area surrounded by excavation machinery and overlooking a creek about twenty feet below, and Anna stopped to take off her fleece jacket.

Unexpectedly, defendant "grabbed [Anna's] hair and then . . . tossed [her] over the [em]bank[ment]." When Anna got up, she tried to run away, but defendant "grabbed [her] and started beating [her] face." Anna screamed for help as she fell to the ground. Defendant pinned her body down, grabbed her throat, and "kept choking . . . and hitting [her] until [she] stopped trying to fight him." Defendant agreed to stop his physical

1. A pseudonym is used to protect the victim's identity.

assault if Anna quit screaming and resisting. Anna calmed down briefly and begged defendant not to hurt her. Defendant warned Anna that he was a "mob boss," but instructed her that as long as she did what he demanded, everything would be okay. Anna started screaming again. Defendant "hit [her] in the head" and covered her mouth. When Anna bit defendant's hand, he "hit [her] again in the head multiple times." Eventually, Anna stopped resisting and defendant let her up. After threatening Anna's and her one-year-old child's life, defendant forced Anna to perform fellatio on him.

Defendant then instructed Anna to sit on a nearby rock near the creek with him while she calmed down. He eventually let Anna retrieve her cell phone and watched as she texted her partner that she was going to be late coming home. Defendant demanded that Anna meet him the next day at 11:00 a.m. in front of the post office downtown and that, if she did not, he "would send somebody to take care of [her] and [her] child." Defendant then instructed Anna to stay put until he walked away and demanded her not to call the police. Once defendant was out of sight, Anna immediately called 9-1-1. Responding officers found defendant walking down a nearby road and arrested him.

The State also presented Rule 404(b) evidence through the testimony of two other witnesses, Cindy and Lisa.[2] According to Cindy and Lisa, defendant had also attempted, unsuccessfully, to force himself on them only a few days apart from the incident with Anna. Defendant similarly targeted these women in the afternoon, while they were alone, attempted to befriend them and bring them to an isolated location, and demanded sexual favors. Defendant similarly warned these women that he was a "mob boss" when they refused his demands, and threatened their lives if they continued to deny him.

Defendant presented no evidence, and the jury convicted him on all counts. The trial court consolidated the first-degree-sexual-offense and assault-on-a-female convictions into one judgment, imposing an active sentence of 276 to 392 months in prison; it consolidated the first-degree-kidnapping and assault-by-strangulation convictions into another judgment, imposing a consecutive sentence of 83 to 112 months. The trial court also ordered, *inter alia*, that defendant enroll in lifetime sex offender registration and SBM. Defendant appeals from the judgments, and from the registration and SBM orders.

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2. Pseudonyms.

II. Alleged Errors

On appeal, defendant contends the trial court erred by (1) instructing the jury on two first-degree kidnapping elements which were not charged in the indictment; (2) sentencing him for both first-degree kidnapping and first-degree sexual offense on the double jeopardy grounds that the kidnapping conviction was based on the underlying sexual offense; (3) sentencing him for both assault on a female and assault by strangulation in violation of statutory mandates requiring only one punishment for the same conduct; (4) denying his motion to dismiss the first-degree sexual offense charge for insufficiency of the evidence; and (5) ordering he enroll in lifetime sex offender registration and SBM on the grounds that the trial court's findings were inadequate to support such orders, and a proper *Grady* hearing on the reasonableness of SBM was never conducted. Defendant also asserts (6) he was denied effective assistance of counsel several times.

III. Instructing on Unindicted First-Degree Kidnapping Elements

Defendant first contends the trial court plainly erred by instructing the jury it could find him guilty of first-degree kidnapping based on all three elevating elements of N.C. Gen. Stat. § 14-39(b) when the indictment only charged the subsection (b) element of sexual assault. We disagree.

A. Issue Preservation

[1] Defendant concedes his counsel failed to object to the instructions at trial and is thus entitled only to plain error review of this alleged error. *See* N.C. R. App. P. 10(b)(2), (c)(4). The State argues that defendant is precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was "fine." We disagree.

Even where the "trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not found the defendant invited his alleged instructional error but applied plain error review. *See State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (acknowledging that the defendant at multiple times failed to object and approved the challenged instruction but nonetheless electing to review his alleged instructional error for plain error). Further, the transcript excerpt the State cites to support its participating-in-crafting-the-instructions argument concerned the subsection (a) purpose element of kidnapping, not

any subsection (b) elements. Accordingly, we conclude this alleged instructional error is not precluded from plain error review.

B. Review Standard

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, internal quotation marks, and brackets omitted).

C. Discussion

[2] Kidnapping is the unlawful confinement, restraint, or removal, from one place to another, of any person over 16 years old without their consent, for one of six statutorily enumerated purposes. N.C. Gen. Stat. § 14-39(a) (2013). Kidnapping is elevated to the first-degree if the defendant (1) did not release the victim in a safe place, (2) seriously injured the victim, or (3) sexually assaulted the victim. N.C. Gen. Stat. § 14-39(b) (2013). "[T]he language of [N.C. Gen. Stat. §] 14-39(b) states essential elements of the offense of first-degree kidnapping . . . ." *State v. Jerrett*, 309 N.C. 239, 261, 307 S.E.2d 339, 351 (1983). Thus, "to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of both subsection (a) and subsection (b)." *Id.* (citation omitted).

"[I]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) (citations omitted); *see also id.* at 249, 321 S.E.2d at 863 (awarding new first-degree kidnapping trial under plain error review where trial court instructed on an different subsection (a) purpose theory, for which the State presented no supportive evidence, and a different subsection (b) elevating element, than those charged in the indictment). However, our Supreme Court has "found no plain error where the trial court's instruction included the [subsection (a)] purpose that was listed in the indictment and where compelling evidence had been presented to support an additional element or elements not included in the indictment as to which

the court had nevertheless instructed." *State v. Tirado*, 358 N.C. 551, 575, 599 S.E.2d 515, 532 (2004) (citing *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001)); *see also id.* at 575–76, 599 S.E.2d at 532–33 (finding no plain error where the trial court instructed on the subsection (a) kidnapping purpose theory charged in the indictment in addition to an unindicted purpose theory, on grounds that "the evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions").

Here, the indictment only charged the subsection (b) elevating element of sexual assault. Yet the trial court instructed the jury that it could find defendant guilty if it found "the [victim] was not released by the defendant in a safe place and/or had been sexually assaulted and/or had been seriously injured." Thus, the jury was instructed on the indicted subsection (b) elevating element of sexual assault, as well as the two remaining subsection (b) elements not charged in the indictment. The jury was then supplied a special verdict sheet that separately listed all three subsection (b) elements, and the jury indicated it found defendant guilty of first-degree kidnapping based on each individual subsection (b) element.

Because the instruction contained subsection (b) elements not charged in the indictment, it was erroneous. *See Brown*, 312 N.C. at 247, 321 S.E.2d at 862 (finding error where the judge "instructed the jury that to convict of first-degree kidnapping they must find that defendant 'sexually assaulted' the victim, rather than that he failed to release her in a safe place" as the indictment charged). However, after carefully examining the record, the instruction, and the jury's verdict, we hold that defendant failed to satisfy his burden of demonstrating this instructional error amounted to plain error. The State presented compelling evidence to support the subsection (b) element of not released in a safe place, and the jury separately found defendant guilty of first-degree kidnapping based on all three subsection (b) elements.

The subsection (b) element of not released in a safe place for first-degree kidnapping "require[s] a conscious, willful action on the part of the defendant to assure that [the] victim is released in a place of safety." *State v. Garner*, 330 N.C. 273, 294, 410 S.E.2d 861, 873 (1991) (citing *Jerrett*, 309 N.C. at 262, 307 S.E.2d at 351). Merely departing a premises is insufficient to effectuate a "release." *See State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242 (2006) (rejecting an argument that "release" merely requires a relinquishment of dominion or control over the victim, reasoning: "[I]n fact defendants may have physically left the premises, but through their active intimidation, they left the victims with a constructive presence"); *see also State v. Anderson*, 181 N.C. App. 655,

658–60, 640 S.E.2d 797, 800–02 (2007) (finding victim not released in a safe place when kidnapper left victims bound in their home after shooting his gun in the air and running out the back door, reasoning that he remained constructively present, since the victims, and later the police, were uncertain as to whether kidnapper actually relinquished the victims or vacated the premises). Additionally, an isolated location is generally not a "safe place." *See State v. Burrell*, 165 N.C. App. 134, 141, 598 S.E.2d 246, 250 (2004) (finding adult victim not released in a safe place when kidnappers pushed him out of their vehicle around 1:30 a.m. onto the side of an interstate located in an "isolated and wooded" area).

Here, the State's evidence showed that after defendant finished his assaults, he demanded Anna to meet him the next day and threatened that, if she refused, he would "send somebody to take care of [her] and [her] child." Defendant then merely departed the scene on foot, leaving Anna alone at the bottom of a rocky creek embankment under a bridge near a deserted stretch of road. Anna testified that after she watched defendant walk away, she continued to feel unsafe because she "didn't know whether [defendant] was going to come back or not." Anna further testified that when she called the police, they seemed to take a long time to arrive because she had difficulty explaining her location. No evidence indicated a conscious, willful effort on defendant's part to release Anna in a place of safety. Rather, compelling evidence was presented that, based on defendant's current and future threats, and Anna being uncertain of his whereabouts after he left, defendant may have left Anna's proximate location but remained constructively present. Compelling evidence was also presented that defendant left Anna in an isolated location. This evidence supported the subsection (b) element of not released in a safe place. Further, the jury indicated on its special verdict sheet that it separately found defendant guilty of first-degree kidnapping based on all three subsection (b) elements.

Based on the overwhelming and uncontroverted evidence, and the jury's special verdict sheet indicating it found him guilty based on all three subsection (b) elements, defendant has failed to show this instructional error "had a probable impact on the jury's finding that the defendant was guilty" of first-degree kidnapping. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). We thus hold that the trial court's instructional error did not amount to plain error.

IV. Sentencing on Both Kidnapping and Sexual Offense

[3] Defendant contends the trial court erred by imposing sentences for both first-degree kidnapping and first-degree sexual offense on double jeopardy grounds. The State retorts this issue is unpreserved because

defendant failed to object and raise this constitutional double jeopardy argument below. We agree.

A defendant's failure to object below on constitutional double jeopardy grounds typically waives his or her right to appellate review of the issue. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." (citations, internal quotation marks, and brackets omitted)). Further, our Rules of Appellate Procedure require a defendant to make "a timely request, objection, or motion [below], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). Additionally, despite defendant's argument to the contrary, this Court recently reaffirmed that Rule 10(a)(1)'s issue preservation requirements apply to alleged errors at sentencing. *See State v. Meadows*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 33 (No. 16-1207) (Oct. 17, 2017) (deeming waived under Rule 10(a)(1) the defendant's alleged constitutional error that arose during sentencing based on her "fail[ure] to object at sentencing" (citation omitted)).

Nonetheless, defendant asks us to invoke Rule 2 of our Rules of Appellate Procedure to address the merits of his unpreserved constitutional double jeopardy argument. *See* N.C. R. App. P. 2 (granting this Court discretionary authority under exceptional circumstances to vary or suspend any of the appellate rules, including Rule 10(a)(1)'s issue-preservation requirement). After thoughtfully considering the record and this argument, we conclude that defendant has failed to satisfy his heavy burden of demonstrating that his is the "rare case meriting suspension of our appellate rules . . . ." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017). We thus decline to invoke Rule 2 and dismiss this unpreserved argument.

V. Sentencing on Both Assaults

Defendant contends the trial court erred by sentencing him for both assault on a female and assault by strangulation. The State does not address the merits of defendant's argument but contends this issue is not preserved for appellate review.

A. Issue Preservation

[4] Defendant concedes his trial counsel failed to object below but claims a right to appellate review on statutory mandate grounds. He

argues in relevant part that the assault on a female statute contains a mandatory prefatory clause, *see* N.C. Gen. Stat. § 14-33(c) (2013) ("*Unless the conduct is covered under some other provision of law providing greater punishment*, any person who [assaults a female] is guilty of a Class A1 misdemeanor . . . ." (emphasis added)), which prohibited the trial court from punishing him for that offense since he was also punished for the higher class offense of assault by strangulation based on the same conduct. The State argues N.C. Gen. Stat. § 14-33(c) does not impose a "statutory mandate" for issue preservation purposes.

"When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citations and quotation marks omitted). This Court has interpreted N.C. Gen. Stat. § 14-33(c)'s prefatory clause as imposing a statutory mandate that preserved for appellate review an analytically identical argument notwithstanding the defendant's failure to object below. *See State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014) (deeming preserved, absent an objection below and on statutory mandate grounds, the defendant's argument that he was improperly sentenced for both assault on a female, and for the higher class offense of assault inflicting serious bodily injury based on the same underlying conduct). While this argument implicates similar double jeopardy principles as the unpreserved allegation of constitutional error we dismissed above, under *Jamison*, this argument is preserved for our review. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

B. Discussion

[5] We review *de novo* statutory construction and application issues. *Jamison*, 234 N.C. App. at 238, 758 S.E.2d at 671 (citation omitted). While the prefatory clause of N.C. Gen. Stat. § 14-33(c) mandates that a person cannot be punished for both assault on a female and for the higher class offense of assault by strangulation, this mandate is triggered only if both assaults were based on the same "conduct."

Additionally, where multiple assaults occur during one altercation may be "deemed separate and distinct," multiple sentences based on those assaults may be imposed. *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (explaining that where multiple assault convictions arise from "one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first" (citation omitted)).

In *State v. Rambert*, our Supreme Court identified three factors it considered in rejecting the defendant's double jeopardy argument that he was improperly sentenced for three counts of discharging a firearm into occupied property that arose from three gunshots he fired at the victim's car during a single altercation. 341 N.C. 173, 459 S.E.2d 510 (1995); *see also id.* at 176, 459 S.E.2d at 512 (concluding that "defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts"). Those three factors follow: (1) "[e]ach shot . . . required that [the] defendant employ his thought processes each time he fired the weapon"; (2) "[e]ach act was distinct in time"; and (3) "each bullet hit the vehicle in a different place." *Id.* at 176–77, 459 S.E.2d at 513 (citation omitted).

In *State v. Wilkes*, we applied the *Rambert* Court's separate-and-distinct-act analysis in the assault context. 225 N.C. App. 233, 239, 736 S.E.2d 582, 587, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013) (per curiam). There, the defendant was convicted and sentenced for both assault with a deadly weapon with intent to kill inflicting serious injury, and for assault with a deadly weapon inflicting serious injury, based on a single brutal altercation with his wife. *Id.* at 236, 736 S.E.2d at 585. On appeal, the defendant similarly argued that he was improperly convicted and sentenced for both assaults on double jeopardy grounds. *Id.* at 238, 736 S.E.2d at 586–87. We applied *Rambert*'s three factors to reach our holding that, because certain assault conduct required a separate thought process, they were distinct in time, and the victim sustained injuries to different parts of her body, the defendant had committed two distinct assaults. *Id.* at 239–40, 736 S.E.2d at 587–88. We thus held the defendant's two assault convictions did not violate his double jeopardy rights. *Id.*

Here, the assault on a female and the assault by strangulation convictions were based on different conduct. Defendant's act of pinning down Anna and choking her throat with his hands to stop her from screaming supported the assault by strangulation conviction. Defendant's acts of grabbing Anna by her hair, tossing her down the rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The trial court specifically instructed the jury on assault on a female based on this evidence.

Furthermore, when applying *Rambert*'s three factors, the two assaults were sufficiently separate and distinct to sustain both convictions. First, defendant's assaults required different thought processes. Defendant's decisions to grab Anna's hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down Anna while she was

on the ground and strangle her throat to quiet her screaming. Second, the assaults were distinct in time. After defendant's initial physical assault, and then the strangulation, he briefly ceased his physical assault after Anna stopped screaming and resisting. But after defendant informed Anna that he was a "mob boss" and threatened her life if she refused his sexual demand, Anna screamed again, and defendant "hit [her] again in the head multiple times." Third, Anna sustained injuries to different parts of her body. The evidence showed that Anna suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation.

The trial evidence here shows that both convictions arose not from the same conduct but from separate and distinct acts constituting different assaults. Accordingly, the trial court did not violate N.C. Gen. Stat. § 14-33(c)'s mandate by imposing sentences based on the two assault convictions. Furthermore, both assaults were consolidated with a higher class offense, and the sentences imposed were based on those higher class offenses. Thus, even assuming the two assault convictions could not support two sentences on the ground they were based on the same conduct, defendant cannot establish prejudice from this alleged sentencing error.

VI. Denying Motion to Dismiss Sexual Offense Charge

[6] Defendant contends the trial court erred by denying his motion to dismiss the first-degree sex offense for insufficiency of the evidence. We disagree.

A. Review Standard

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 "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Denny*, 361 N.C. 662, 664, 652 S.E.2d 212, 213 (2007) (citations 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). All evidence must be viewed "in the light most favorable to the State and . . . all contradictions and discrepancies [resolved] in the State's favor." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citation omitted).

B. Discussion

Defendant was charged with first-degree sexual offense under N.C. Gen. Stat. § 14-27.4 (2013) (recodified as N.C. Gen. Stat. § 14-27.26 by

S.L. 2015-181, § 3(a), eff. Dec. 1, 2015). Relevant here, one essential element of that crime is that the defendant "inflict[ ] serious personal injury upon the victim . . . ." *Id.* § 14-27.4(a)(2)(b). Serious personal injury may be proved by showing physical injury, or mental or emotional injury, *see State v. Baker*, 336 N.C. 58, 64, 441 S.E.2d 551, 554 (1994) (citation omitted), or a combination of both, *see State v. Ackerman*, 144 N.C. App. 452, 461, 551 S.E.2d 139, 145 (2001).

> [I]n order to prove a serious personal injury based [solely] on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the '*res gestae*' results present in every forcible rape. *Res gestae* results are those so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.

State v. Finney, 358 N.C. 79, 90, 591 S.E.2d 863, 869 (2004) (internal quotation marks omitted) (quoting *Baker*, 336 N.C. 58, 62–63, 441 S.E.2d 551, 554). "In determining whether serious personal injury has been inflicted for purposes of satisfying the elements of first-degree rape, the court must consider the particular facts of each case." *State v. Richmond*, 347 N.C. 412, 429, 495 S.E.2d 677, 686 (1998) (citation and internal quotation marks omitted).

Here, evidence was presented that defendant, a forty-three-year-old male, approximately 5'10" tall with a medium build, physically and sexually assaulted Anna, a twenty-two-year-old female, approximately 5'1" tall, and weighing only ninety-six pounds. After what Anna perceived was a friendly conversation, defendant unexpectedly grabbed her and threw her down a steep, rocky embankment about ten to twelve feet below. Defendant punched Anna's face and head numerous times, straddled her when she fell to the ground, and pinned her down as he strangled her throat. After Anna stopped resisting, defendant briefly stopped his physical assault, but after she started screaming and resisting again, defendant continued punching Anna's face and head again before finally forcing her to perform oral sex on him.

The State presented evidence that Anna was diagnosed with a head injury at the hospital, and that for days after the incident, Anna experienced pain throughout her body. Her head hurt "extremely bad," her neck and shoulders hurt, she suffered two black eyes and bruises on her body, she had hoarseness in her voice from the strangulation, and she had "an extremely difficult time concentrating on things." The

incident occurred on 7 December 2013. As of Anna's trial testimony on 15 August 2016, she continues to have a hard time trusting people, has difficulty opening up to others, and is unable to maintain many friendships. Additionally, the State's evidence showed that Anna still is unable to concentrate as effectively, has difficulty remembering things, and suffers from short-term memory loss as a result of the attack, all of which have caused her problems at work.

Viewing this evidence in the light most favorable to the State and giving it the benefit of all reasonable inferences arising therefrom, we conclude that the State presented substantial evidence to support the challenged element of inflicting serious personal injury. The trial court thus properly denied defendant's dismissal motion.

VII. Ordering Lifetime Registration and SBM

Defendant next contends the trial court erred by ordering him to enroll in lifetime sex offender registration and lifetime SBM on grounds that the trial court's findings do not statutorily support such orders, and that it never made a determination as to the reasonableness of SBM under the Fourth Amendment pursuant to *Grady*. The State does not address the merits of either argument but contends that because defendant failed to object at sentencing, he failed to preserve these issues for appellate review.

A. Grounds for Appellate Review

[7] As an initial matter, defendant gave oral notice of appeal at the 19 August 2016 sentencing hearing but failed to file a written notice of appeal as required to preserve his right to appeal from an SBM order. *See State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010) (holding oral notice of appeal at SBM hearing is insufficient to confer appellate jurisdiction to review SBM order and requiring a defendant to file written notice of appeal pursuant to N.C. R. App. P. 3(a)).

However, on 2 May 2017, defendant filed a petition for a writ of *certiorari* to preserve his right to appellate review of the registration and SBM orders despite his failure to file a timely written appeal. Under Appellate Rule 21, this Court may issue a writ of *certiorari* "in appropriate circumstances . . . 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[.] . . ." N.C. R. App. P. 21(a)(1). Because we deem defendant's first challenge concerning the sufficiency of the trial court's findings to support its registration and SBM orders to be meritorious, in our discretion, we allow defendant's petition to review these orders.

B. Issue Preservation

In *State v. Johnson*, we held that despite the defendant's failure to object at sentencing, his right to appeal an SBM order was nonetheless preserved on statutory mandate grounds because we determined the issue he raised, that the trial court's erroneous "aggravating offense" finding did not support the imposition of lifetime registration, implicated the trial court's failure to follow N.C. Gen. Stat. § 14-208.23's mandate as to when a defendant "shall" maintain lifetime registration. ___ N.C. App. ___, ___, 801 S.E.2d 123, 128 (2017). Accordingly, under *Johnson*, notwithstanding defendant's failure to raise this issue at sentencing, his argument that the trial court's findings were insufficient to support its lifetime registration and SBM orders is preserved for appellate review. Because we hold that the registration and SBM orders must be reversed and remanded for resentencing based on this error, defendant's *Grady* argument becomes moot.

C. Discussion

[8] Defendant contends that although the trial court found that he was neither a (1) sexually violent predator, nor (2) a recidivist, and that (3) none of his convictions were "aggravated offenses" under N.C. Gen. Stat. § 16-208.6(1a), nor (4) involved a minor, it nonetheless erroneously ordered him to enroll in lifetime sex offender registration and SBM.

"On appeal from an order imposing satellite-based monitoring, this Court reviews 'the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *State v. Springle*, 244 N.C. App. 760, 765, 781 S.E.2d 518, 521–22 (2016) (citations omitted). Additionally, "[a]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 128 (citation and quotation marks omitted).

Where, as here, a trial court finds a person was convicted of a "reportable conviction," it must order that person to maintain sex offender registration for a period of at least thirty years. N.C. Gen. Stat. § 14-208.7(a) (2013). If a trial court also finds that the person has been classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense, it must order lifetime registration. N.C. Gen. Stat. § 14-208.23 (2013). Where a trial court enters an order imposing lifetime registration based upon an erroneous finding that a conviction constituted a statutory aggravating offense, we have reversed the order and remanded to the trial court "for entry of a registration order based upon proper findings." *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 130.

Under N.C. Gen. Stat. § 14-208.40A, before a trial court may impose SBM, it must make factual findings determining whether

> (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(b) (2013) (amended in 2015 and 2017). "[T]he five categories of offenders referenced [above] constitute the only types of offenders that the Generally Assembly has made eligible for enrollment in the SBM program." *State v. Hadden*, 226 N.C. App. 330, 335, 741 S.E.2d 466, 469 (2013) (citations omitted).

Because Anna was not a minor, the first three categories are relevant here. As to those categories, a trial court "shall order" lifetime SBM if it finds that the offender (1) "has been classified as a sexually violent predator," (2) "is a recidivist," (3) or "has committed an aggravated offense[.]" N.C. Gen. Stat. § 14-208.40A(c) (2013). However, where a trial court finds an offender does not fall within any of the five categories, it is error to impose SBM. *Hadden*, 226 N.C. App. at 335, 741 S.E.2d at 469 (vacating SBM order and remanding for reconsideration where the trial court "expressly found that defendant did not fall within any of the [five] statutorily enumerated categories of offenders requiring monitoring, but nonetheless ordered defendant to enroll in the SBM program due to [its findings of other non-statutorily listed factors]").

Here, in its registration and SBM orders, the trial court found that defendant had not been convicted of an aggravated offense, was not a recidivist, nor had he been classified a sexually violent predator. But the trial court nonetheless ordered that defendant enroll in lifetime registration and lifetime SBM. As these findings, standing alone, do not support either lifetime registration, or enrollment in SBM for any duration, we reverse the trial court's registration and SBM orders.

As defendant correctly argues, this Court has held that first-degree sexual offense is not an "aggravated offense" under N.C. Gen. Stat. § 14-208.6(1a) triggering lifetime registration or SBM. *See State v. Green*, 229 N.C. App. 121, 129, 746 S.E.2d 457, 464 (2013). But the sentencing hearing transcript does not indicate whether the State and trial court were under a misapprehension that first-degree sexual offense constituted such an aggravating offense. At sentencing, but during its request that the trial court run the sentences consecutively, the State argued in relevant part:

> [T]he defendant's behavior in this situation shows that he is a very dangerous individual. He is a threat to the members of our community. He chose to assault a young, very small, defenseless person . . . .
>
> Also, the fact that the 404(b) evidence from the two other women that he has assaulted in Asheville, the State has reason to believe that he had only been in Asheville for about three months. . . . [H]e chose to perpetrate on three different individuals, all strangers to him, all in broad daylight. The boldness of his actions and the dangerousness of what he has done is truly concerning to the State, Your Honor, on behalf of the citizens of Buncombe County, and would . . . respectfully request that Your Honor take all of those factors into consideration.

Additionally, evidence was presented that defendant suffers from mental illness, and in its judgment the trial court recommended defendant receive "psychiatric and/or psychological counseling" while incarcerated, which may implicate "sexually violent predator" classification. *See* N.C. Gen. Stat. § 14-208.6(6) (2013) (defining a "[s]exually violent predator" in relevant part as "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers . . . .").

However, the trial court did not render oral findings or explain its rationale for ordering lifetime registration and SBM, and those orders merely contain the bare statutorily required findings that defendant was neither a sexually violent predator, a recidivist, nor had been convicted of an aggravating offense. Accordingly, we cannot meaningfully assess whether any of the trial court's findings were merely clerical errors, or whether the trial court simply erred in ordering lifetime registration and SBM. We therefore reverse the registration and SBM orders, and remand only those issues for resentencing.

If the State pursues SBM on remand, it must satisfy its burden of presenting evidence, *inter alia*, from which the trial court can fulfill its judicial duty to make findings concerning the reasonableness of SBM under the Fourth Amendment pursuant to *Grady*. *See*, *e.g.*, *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 131 (reversing SBM order and remanding for a new SBM hearing where the trial court failed to conduct a proper *Grady* hearing); *see also State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016) (holding that "the State shall bear the burden of proving that the SBM program is reasonable").

VIII. Ineffective Assistance of Counsel

[9] Defendant also contends that he suffered five separate instances of IAC at sentencing based on his trial counsel's alleged failures to: (1) object when he was sentenced to first-degree kidnapping and first-degree sexual assault because the indictment only charged the subsection (b) element of sexual assault; (2) object when he was sentenced twice for the same assault; (3) object when he was sentenced to lifetime SBM, although he was not eligible for lifetime SBM; (4) present expert testimony allegedly supporting a particular statutory mitigating factor; and (5) request that the trial court consider that particular statutory mitigating factor, rather than a non-statutory mitigating factor his trial counsel raised during sentencing.

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

After carefully considering the cold record and defendant's IAC claims, we conclude that each claim requires further investigation and were thus asserted prematurely. We therefore dismiss defendant's IAC claims without prejudice to his right to reassert those claims in a subsequent MAR proceeding. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

IX. Conclusion

As to defendant's first four alleged errors, we hold that defendant received a fair trial, free of error, and valid sentences based upon the jury's convictions. However, because the trial court's findings, without more, do not support its orders imposing lifetime registration or enrollment in SBM, and the record precludes meaningful appellate review, we reverse these orders and remand for resentencing solely on the issues of registration and SBM. If the State pursues SBM on remand, it must satisfy its burden of presenting evidence from which the trial court can make its required findings concerning the reasonableness of imposing SBM pursuant to *Grady*. We dismiss defendant's numerous IAC

claims without prejudice to his right to reassert them in a subsequent MAR proceeding.

NO ERROR IN PART; REVERSED AND REMANDED IN PART; DISMISSED IN PART.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
KENNETH WILLIAM MILLER

No. COA17-405

Filed 6 March 2018

Motor Vehicles—driving while impaired—driving golf cart on highway—defense of necessity—distinct from duress

A conviction for driving while impaired was remanded for a new trial where the trial refused to instruct the jury on necessity. Defense counsel requested an instruction on duress and necessity and specifically the pattern jury instruction on duress. There is no pattern jury instruction on necessity, but the defenses are separate and distinct and the trial judge was not relieved of the duty to give a correct instruction if there was evidence to support it. Here, the trial court clearly considered an additional element—fear—that is not an element of necessity but makes sense in the context of duress. On the specific facts of this case, defendant and his wife drove a golf cart to a nearby bar along a path that was not a highway but later fled along a highway when a fight broke out and a gun was pulled. Taken in the light most favorable to defendant, the evidence was such that the jury could find the elements of necessity, and the failure to give the instruction was prejudicial.

Judge DILLON concurring with separate opinion.

Appeal by Defendant from judgment entered 8 April 2016 by Judge Michael R. Morgan in Superior Court, Wake County. Heard in the Court of Appeals 2 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Lennon, for the State.

Chetson Hiltzheimer, PLLC, by Damon Chetson, for Defendant.

McGEE, Chief Judge.

I. *Brief Factual Background*

Kenneth William Miller ("Defendant") and his wife, Heather Miller ("Heather") drove their golf cart (the "golf cart") from their house (the "house") to a nearby bar called Bones' Place ("Bones") on the evening of 1 March 2014 to hear a band. According to the evidence taken in the light most favorable to Defendant, there was a path between the house and Bones that permitted the drive to be conducted without travelling on any public roadways. At approximately midnight, Heather decided she wanted to leave Bones. Defendant went outside while Heather went to the restroom, and an altercation occurred between Defendant and some men in the Bones parking lot (the "parking lot"). When Heather walked out of Bones and onto the parking lot, she witnessed the altercation. The situation escalated and one of the men drew a handgun and threatened Defendant, causing Defendant and Heather to get into the golf cart, and Defendant then drove away from the parking lot.

Wake County Sheriff's Deputy Joshua Legan ("Deputy Legan") was on patrol shortly after midnight on 2 March 2014, when he observed the golf cart heading toward him. Deputy Legan testified that the golf cart was being driven without lights and was straddling the center line on Old U.S. Highway 1. Deputy Legan immediately turned around and drove to intercept the golf cart. By the time Deputy Legan activated his lights and caught up to the golf cart, it had turned off of the highway onto a dirt path. Deputy Legan noticed the odor of alcohol emanating from Defendant and that Defendant's speech was slurred and his eyes were "red and bloodshot[.]" Additional deputies arrived at the scene. Defendant was administered tests for impairment and, based upon all the factors Deputy Legan observed, Defendant was arrested for driving while impaired and driving left of the center line.

Defendant was found guilty of driving while impaired and responsible for driving left of center in district court on 11 June 2015, and he appealed to superior court. Defendant was tried before a jury at the 6 April 2016 session of Wake County Superior Court, and was again found guilty of driving while impaired and responsible for driving left of center. Defendant appeals. Additional relevant facts will be discussed in the analysis portion of this opinion.

II. *Analysis*

In Defendant's sole argument, he contends the trial court erred by refusing to instruct the jury on the defense of necessity when the evidence presented at trial supported giving the instruction. We agree.

A. Case Law

The affirmative defense of necessity is available to defendants charged with driving while under the influence ("DWI"). *State v. Hudgins*, 167 N.C. App. 705, 710 606 S.E.2d 443, 447 (2005). As an affirmative defense, "the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury." *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). It is well established:

> A trial court must give a requested instruction if it is a correct statement of the law and supported by the evidence. "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when *viewing the evidence in a light most favorable to the defendant*. "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

State v. Brown, 182 N.C. App. 115, 117–18, 646 S.E.2d 775, 777 (2007) (citations omitted) (emphasis added). However, "'a trial court is not obligated to give a defendant's exact instruction so long as the instruction actually given delivers the substance of the request to the jury.'" *State v. Holloman*, 369 N.C. 615, 625, 799 S.E.2d 824, 831 (2017) (citations omitted). Further,

> a trial judge's jury charge shall "give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." For that reason, "the judge has the duty to instruct the jury on the law arising from all the evidence presented." 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*."

Id. at 625, 799 S.E.2d at 831 (citations omitted) (emphasis added).

"A defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Hudgins*, 167 N.C. App.at 710–11, 606 S.E.2d at 447.

> The rationale behind the defense is based upon the public policy that "the law ought to promote the achievement of higher values at the expense of lesser values, and [that] sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person] is justified in violating it."

State v. Thomas, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991) (citations omitted) (alterations in original).

The question before this Court, which we review *de novo*, is whether, when viewed in the light most favorable to Defendant, substantial evidence was presented at trial that Defendant took "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available" to Defendant. *Hudgins*, 167 N.C. App.at 710–11, 606 S.E.2d at 447. Therefore, if the evidence presented at trial, viewed in the light most favorable to Defendant and ignoring all contradictory evidence, was sufficient to permit the jury to *reasonably infer* the existence of these three elements, the trial court was required to give the instruction on necessity. It would then be the sole province of the jury to determine whether, based upon those facts, Defendant had met his burden of proving necessity to the satisfaction of the jury:

> [Our appellate] cases enunciate and reiterate the rule – established in our law for over one hundred years, – that when the burden rests upon an accused to establish an affirmative defense . . . the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied.

State v. Freeman, 275 N.C. 662, 666, 170 S.E.2d 461, 464 (1969) (citations omitted).

We now address a potential issue that arises from the present appeal. During the charge conference, Defendant requested that the trial court give an instruction on necessity and duress, but specifically requested N.C.P.I. Crim. 310.10, the instruction for "Compulsion, Duress, or Coercion." In North Carolina, there is no pattern jury instruction that expressly addresses the defense of necessity. At the charge conference, both Defendant and the State discussed a recent unpublished opinion of this Court, *State v. Badson*, 242 N.C. App. 384, 776 S.E.2d 364, 2015 WL 4430202 (2015) (unpublished).[1] In *Badson*, this Court stated: "Although the defenses of duress and necessity were 'historically distinguished' under common law, '[m]odern cases have tended to blur the distinction[.]' *State v. Monroe*, 233 N.C. App. 563, 565, 756 S.E.2d 376, 378 (2014). Thus, for purposes of this opinion, the two defenses are discussed interchangeably." *Badson*, 242 N.C. App. 384, 776 S.E.2d 364, 2015 WL 4430202 at *3.[2] We note that the language quoted from *Monroe* is language discussing federal law, not the law of North Carolina. *Monroe*, 233 N.C. App.at 565, 756 S.E.2d at 378 (2014). Further, in *Badson* this Court quotes *Hudgins* for the proposition that the "defense of necessity is available in a DWI prosecution[,]" *Badson*, 2015 WL 4430202 at *4 (citation omitted), and sets forth the elements of *necessity* as found in *Hudgins*: "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Id.* (citation omitted).

The elements of *duress* have been stated as follows:

> "In order to successfully invoke the duress defense, a defendant would have to show that his 'actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.'" Furthermore, a defense of duress "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm."

State v. Smarr, 146 N.C. App. 44, 54–55, 551 S.E.2d 881, 888 (2001) (citations omitted). The pattern jury instruction for compulsion, duress, or coercion states, partially tracking the language of *Smarr* and other opinions involving duress:

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1. In the transcript the case is identified as "*State v. Batson*;" however, it is clear that the case discussed was *Badson*.

2. *See also State v. Smith*, __ N.C. App. __, 791 S.E.2d 544, 2016 WL 6081424, at *3 (2016) (unpublished opinion conflating duress and necessity).

> 310.10 COMPULSION, DURESS, OR COERCION.
>
> There is evidence in this case tending to show that the defendant acted only because of [compulsion] [duress] [coercion]. The burden of proving [compulsion] [duress] [coercion] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if *his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime*. His assertion of [compulsion] [duress] [coercion] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I. Crim. 310.10 (emphasis added).

We find no binding precedent supporting the proposition that duress and necessity have ceased to be distinct defenses in North Carolina.[3] In recognizing the availability of the necessity defense in trials for DWI, this Court in *Hudgins* held that the defense of necessity was available based in part on the fact that other "common law defenses are available in DWI prosecutions." *Hudgins*, 167 N.C. App. at 709, 606 S.E.2d at 447. Countering the State's argument that the necessity defense should not be allowed, this Court held:

> The State's argument cannot be reconciled with decisions of this Court indicating that common law defenses are available in DWI prosecutions. This Court recently held that "[i]n appropriate factual circumstances, the defense of entrapment is available in a DWI trial." This Court has also implicitly acknowledged that *the defense of duress* would be appropriate in a DWI trial. *See State v. Cooke*, 94 N.C. App. 386, 387, 380 S.E.2d 382, 382-83[.]
>
> Moreover, courts in other jurisdictions have specifically held that the defense of necessity is available in a DWI prosecution. We likewise hold that the defense of necessity is available in a DWI prosecution.

Id. at 709–10, 606 S.E.2d at 447 (citations omitted) (emphasis added). If necessity and duress have ceased to be distinct defenses in North

3. We note that on appeal, both Defendant and the State limit their arguments to whether the trial court erred by failing to give an instruction on *necessity*, and do not discuss the defense of duress.

Carolina, this Court in *Hudgins* could have simply cited *Cooke* as having implicitly established the viability of the merged necessity/duress defense instead of relying on *Cooke*'s implicit acceptance of the duress defense, along with this Court's explicit recognition of the defense of entrapment, in order to hold that the defense of necessity is also available to defendants on trial for DWI. In addition, reference to the acceptance of necessity as a defense to DWI in other jurisdictions would have been superfluous. We hold the defense of necessity is recognized as a defense separate and distinct from the defense of duress (compulsion or coercion).

In the present case, both parties and the trial court, while discussing the elements of the requested instruction at the charge conference, solely discussed the elements of necessity as set forth in *Badson* – and thus *Hudgins*. However, the elements in *Hudgins* do not track the language in N.C.P.I. Crim. 310.10, the pattern jury instruction for duress. The State argued the required elements as follows: "That it first must be a reasonable act taken to . . . protect the life, limb, or health of a person. . . . . And to the third action, that [there] must be no other acceptable choices available." The State then suggested that this Court's opinion in *Cooke* recognized a fourth element: "That [D]efendant [continued to face] threatening conduct of any kind at the time the officer saw him while driving while intoxicated."

Despite the fact that the elements discussed by the parties at the hearing were those for necessity, the trial court, clearly relying on language from N.C.P.I. Crim. 310.10, denied Defendant's request to instruct the jury on the defense of necessity based upon its determination that no evidence had been presented demonstrating that Defendant was in actual "fear" at the time he drove the golf cart on the highway:

> [THE COURT:] While the issue appears on it sure to be quite detailed and involved really, *a look at the instruction* makes it fairly simple in terms of the resolution here. The instruction 310.10 reads in pertinent part to the extent that it influences the decision here, quote:
>
> . . . .
>
> [] [D]efendant would not be guilty of this crime if his actions were caused by a reasonable *fear* that he or another would suffer immediate death or serious bodily injury if he did not commit the crime. Unquote.
>
> Of course there is reasonable dispute concerning the length of time that was involved here in terms of when

> that fear still is recognized by the law to be present and existent in terms of the length of time or the length of participation as to where there was a fear that began as opposed to the point where it was still considered to be ongoing until such time as the deputy effected the stop here.
>
> There's also the aspect as to whether or not, as the [S]tate argues as well, whether there was such a serious threat that would connote immediate death or serious bodily injury being a potential outcome but for [] [D]efendant's actions.
>
> *But all of that presupposes something that's not even in evidence, and that is, in terms of looking at the plain language of the instruction, [] [D]efendant will not be guilty of this crime if his actions were caused by reasonable fear.*
>
> *There is no evidence that [] [D]efendant was in fear.* There's evidence that the testimony was his wife was in fear, but *there's no evidence that [] [D]efendant was in fear* for me to consider over this instruction being given, so as to instruction about that, this point 310.30 will not be given because there is no evidence that [] [D]efendant had a reasonable fear which would have him to commit the alleged crime.
>
> . . . .
>
> [DEFENDANT'S COUNSEL:] To say that the only way that [Defendant] can mount the defense is to actually hear from [him] would be a violation of his right against self-incrimination.
>
> THE COURT: I didn't say that [Defendant] had to testify that he was in fear. I said there is *no evidence that he was in fear*, whether that would come from him or anybody else that he was in fear. But you can make your statements for the record, but I've made the decision. (Emphasis added).

The trial court clearly considered there to be an additional element requiring that Defendant was motivated by emotional "fear" to drive the golf cart on the highway. Our case law does not include fear as an element of the defense of necessity. "A defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable

choices available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). Although Defendant's mental state could be potentially relevant in analyzing the required elements, fear itself is simply not an element of the defense.

We are not called upon in the present appeal to determine whether "fear," as implicitly defined by the trial court in the present case – an emotional or mental state – is an element of the defense of duress.[4] However, in the interest of being thorough, we compare the elements of the defenses of necessity and duress as set forth in appellate opinions of this State. The elements of necessity are that the defendant engaged in "(1) reasonable [though illegal] action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available[.]" *Hudgins*, 167 N.C. App. at 710-11, 606 S.E.2d at 447 (citations omitted). The elements of duress are (1) that a defendant's illegal "'actions were caused by [the defendant's] reasonable fear that [the defendant or another] would suffer'" (2) "'immediate death or serious bodily injury[,]'" (3) "'if [the defendant had] not so act[ed][,]'" and (4) the defendant had no "reasonable opportunity to avoid doing the [illegal] act without undue exposure to death or serious bodily harm." *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted). Both necessity and duress require that a defendant demonstrate an absence of reasonable alternatives to the course of action actually undertaken.[5]

Though not expressly stated in any precedent that we have found, the manner in which the elements of necessity are worded implies that they are analyzed pursuant to an objective standard of reasonableness, not a subjective standard: "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). In potential contrast, the first element of duress, as established by precedent and as presented in N.C.P.I. Crim. 310.10, suggests a

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4. However, if the trial court in the present case correctly interpreted "fear" as it relates to duress, and the instruction for duress, then the defenses of necessity and duress have clearly not merged in North Carolina since necessity requires no proof of any state of mind.

5. We make no attempt to answer whether the showing required to prove "no other acceptable choices were available" to a defendant is the same as the showing required to prove a defendant had no "reasonable opportunity to avoid doing the [illegal] act without undue exposure to death or serious bodily harm." We also note that N.C.P.I. Crim. 310.10 includes no express requirement that the jury find an absence of reasonable alternatives: "The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime." N.C.P.I. Crim. 310.10.

subjective standard — that the defendant acted based upon *his* "reasonable fear that [he or another] would suffer immediate death or serious bodily injury" absent his actions. *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted).

This focus on a defendant's "fear" makes sense in the context of duress, coercion or compulsion, because this defense is generally used to justify the actions of a defendant based upon intentional threats from a third party for the express purpose of coercing the defendant to act in an illegal manner. For example, in *State v. Cheek*, 351 N.C. 48, 520 S.E.2d 545 (1999), our Supreme Court, in rejecting the defendant's duress argument, reasoned:

> Defendant contends that the Nelson diary was material to defendant's defense because it supported defendant's contention that Nelson was a violent person, which in turn supported defendant's defense that he accompanied Nelson only out of fear. . . . .
>
> . . . .
>
> [T]he affirmative defense of duress, if proven, would serve as a complete defense to the kidnapping and robbery charges. In order to successfully invoke the duress defense, a defendant would have to show that his "actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act."
>
> In the case *sub judice*, the record contains no evidence which indicates that defendant participated in the kidnapping and robbery of Oxendine as a result of *coercion*. During the extended course of the crimes against Oxendine, defendant had several opportunities to report that he had been *forced by duress* to commit these crimes and to seek help. The record shows that defendant went to New Hanover Hospital after the murder, where he could have sought help, but he failed to do so.

Id. at 61–62, 520 S.E.2d at 553 (citations omitted); *see also State v. Shields*, COA17-69, 2017 WL 6460104, at *4 (2017) (unpublished opinion) ("defendant presented evidence that he remained afraid of Travis even after he entered the home with the other men, and that his continued fear precluded any reasonable opportunity to retreat").

Necessity, however, tends to be used to excuse actions that were based upon a defendant's reasonable response to some *event* or

occurrence, not necessarily involving a third-party, that threatens the life or health of any person. For example, in *Hudgins*, the defendant was convicted of driving while impaired, but argued that the trial court should have instructed the jury on the defense of necessity. *Hudgins*, 167 N.C. App. at 708, 606 S.E.2d at 446. According to the defendant's evidence, he was intoxicated, but was being driven home by his sober friend "Maney," in Maney's truck, when Maney pulled off the road and stopped to examine a fallen tree. *Id.* at 707, 606 S.E.2d at 445. While both Maney and the defendant were outside the truck, the defendant "looked back and saw that the truck was rolling. *Id.* He ran to the truck, jumped in the passenger door, slid over to the driver's side, and unsuccessfully tried to stop the truck[,]" which ended up hitting another vehicle and a house. *Id.* The defendant's actions in *Hudgins* were clearly not the result of coercion by a third-party, nor the result of fear of any bodily harm to himself. *Id.* In fact, the defendant's actions removed the defendant from a place of safety and placed him in a place of physical danger. *Id.* at 711, 606 S.E.2d at 448 ("The fact that defendant and Maney were themselves safely out of harm's way, as the State argues, is irrelevant if the jury believed that defendant's actions were necessary to protect others.").

In *Hudgins*, this Court held that the evidence, taken in the light most favorable to the defendant, was sufficient to allow a proper inference that he acted reasonably under the circumstances – for the purpose of protecting others from the runaway truck – and that no other acceptable choices were available. *Id.* at 711–12, 606 S.E.2d at 448 ("because the record contains substantial evidence of each element of the necessity defense, the trial court should have instructed the jury on that defense").

Presumably, in the present case, Defendant requested N.C.P.I. Crim. 310.10 because no specific North Carolina Pattern Jury Instruction exists for the defense of necessity. Although Defendant could have requested a non-pattern jury instruction correctly stating the elements of necessity, it was not fatal to his argument that he failed to do so. "[A] trial judge [is] not . . . relieved of his duty to give a correct . . . instruction, there being evidence to support it, merely because [a] defendant's request was not altogether correct." *State v. White*, 288 N.C. 44, 48, 215 S.E.2d 557, 560 (1975) (citation omitted). With these issues in mind, we look *de novo* to determine whether there was evidence sufficient to support Defendant's requested necessity instruction.

B. Additional Facts

The evidence viewed in the light most favorable to Defendant was as follows: Defendant and Heather lived in close proximity to Bones.

There were "paths" that connected the house with Bones, and it was possible to travel between the house and Bones without ever travelling on any public roadway. Defendant and Heather had utilized the paths on multiple prior occasions, either by walking or by driving the golf cart. The purpose of utilizing the golf cart and the paths was to avoid driving a car, and further to avoid the use of public roadways, after consuming alcohol. Bones attracted varied clientele, and had become "kind of a rough place" where there could be "fights and it was just very unpredictable." Deputy Legan testified that he had known Bones "to be an establishment that serves the biker crowd."

Defendant and Heather arrived at Bones' parking lot in the golf cart at approximately 9:30 p.m. on 1 March 2014. Heather testified that they planned on returning home "[t]he same way we came. I knew I probably would be driving the golf cart home, but just the same we came through the back path." Heather testified that she would probably drive home because it was likely that Defendant would drink more alcohol than she. According to Heather, as the night progressed the atmosphere at Bones "became intense; it became kind of mean. It just wasn't a place I wanted to be in anymore." Heather testified that while at Bones – a period of less than three hours – she consumed "more than four, less than seven" alcoholic drinks, and that she did not eat anything during that time because she had eaten dinner before leaving the house that evening. Defendant and Heather decided to leave shortly after midnight, 2 March 2014, and Heather went to the restroom while Defendant went outside to wait for her.

When Heather walked out of Bones, she noticed Defendant was in the parking lot arguing with "several guys" that she did not know. There were at least three men with whom Defendant was arguing, and there may have been as many as five. The arguing was intense, involving shouting and cursing, and Defendant eventually punched one of the men ("the man"), who was in his "late 20s, maybe early 30s[,]" causing the man to fall to the ground. Defendant later described the man to Deputy Legan as "the baddest motherf_cker in the bar[.]" Heather further testified that when the man "got up he was extremely red-faced and he pulled a gun from his waistband" and "[r]aised it in the air." Heather testified that Defendant did not have a gun and, that as far as she knew, Bones did not have security guards or bouncers. Heather testified:

> It got very, very chaotic at that point. There was a woman [who] was next to me who was – she said "you need to get out of here. He's crazy."[6] [Defendant] had turned around

6. The woman was referring to the man with the gun.

> and was screaming at me "go, go, go, go, go." We got going. When [the man] pulled the gun I just wanted to get out of there.

Heather further testified that, after the man raised the gun, she started screaming and just "wanted to get out." When she saw the gun she wanted "[j]ust to get away. To get – to get away. That's all I wanted." Heather testified that she was "not a runner" because she had "broken [her] leg area" at some time in the past.

At trial, the following colloquy transpired between Heather and Defendant's attorney:

> Q. Are you aware of what [sic] he was going to shoot at you, or anyone else for that matter, do you recognize at this point that [Defendant] was sort of the target of this guy?
>
> A. Yes.
>
> Q. What did you do next?
>
> A. I got in the golf cart and we left.

Defendant still had the keys to the golf cart, so he got behind the wheel and Heather got in the passenger seat. The parking lot was packed with vehicles and people, which prevented Defendant from driving around the back of Bones toward the path they had taken from the house earlier that evening. Heather was not really thinking about what direction they should drive because she was still focused on the "altercation" that had just taken place; however, she saw that the way to the back path was blocked and therefore "was not the fastest out." Defendant "pulled out of the parking lot the only way we could in the golf cart." When asked on cross-examination whether she believed it was safer for them to drive the golf cart through the parking lot and onto the road instead of running away, Heather stated: "The golf cart can go faster than I can go. It was a split-second decision and it seemed the only option." Heather was asked the following, and then answered:

> Q. . . . Do you have any doubt that had you not taken the actions that [Defendant] and you took that evening in getting into that golf cart and fleeing through the open area of the parking lot, that you might have been hurt or killed by that person who pulled the gun?
>
> A. I have no doubt.

Heather testified that she did not notice Deputy Legan until after they had turned off the road and onto the dirt path to head home. She stated: "We went along the road along the clump of trees and then on to the dirt path and that's where we were pulled over." Where they had turned onto the dirt path was a short distance from Bones' parking lot, and Heather first saw Deputy Legan "within minutes" of the altercation in the parking lot. Although she did not know, Heather assumed they had been pulled over initially because of the altercation in the Bones' parking lot.

Deputy Legan testified that he passed Defendant driving the golf cart on Old U.S. 1, turned around in the Bones parking lot, which was crowded, then pulled up behind Defendant after Defendant had turned the golf cart off the highway and onto a dirt path that connected Old U.S. 1 to Friendship Road. Deputy Legan testified that the distance from Bones parking lot to where Defendant stopped "was no more than point two-tenths of a mile[,]" and that Defendant was stopped "maybe fifty to a hundred feet" down the dirt path connecting Old U.S. 1 highway to Friendship Road. A map of the relevant area, introduced for illustrative purposes, shows that the distance from the north end of the parking lot to the dirt path was just over 500 feet, or approximately one-tenth of a mile, and the spot marked on the map as the place Deputy Legan first contacted Defendant was approximately fifty feet down the dirt path.

Heather testified that after being pulled over:

> It was all happening so fast. It was just very chaotic. I was telling the deputy what I was thinking. I told him everything that just happened.
>
> Q. When you say "everything" what does that mean?
>
> A. The fight, the gun, the chaos.[7]
>
> Q. Did you think that there was any other reasonable solution to what you and [Defendant] did in fleeing?
>
> A. No, I don't.
>
> Q. Had you been able to get back through that grass, – was that your intention, to drive through the night, you know, either have you drive or [Defendant] drive on a grass path?

7. On cross-examination, Heather appears to contradict this testimony that she had told a deputy about the fight and the gun, but because we are reviewing the evidence in the light most favorable to Defendant, we do not consider that testimony. Contradictions in the evidence and issues of credibility were for the jury to decide.

A. The way we came, yes.

Q. You have cars, actual cars?

A. Vehicles, yes.

Q. Why did you choose to drive basically a glorified golf cart on that evening?

A. Because it was not far. It's, you know, a close drive and if we're going to be drinking it's probably the smarter thing to do.

Heather testified that she did not talk much to the deputies because she "was crying and was upset[.]" Heather did not know if Defendant discussed the gun with the deputies, but she clearly heard Defendant tell them about the fight. Deputy Legan testified Defendant stated he had been in an altercation and that Deputy Legan would probably be receiving a call about it. Deputy Legan testified that Defendant had referred to the man as "the baddest motherf_cker in the bar[,]" and "seemed a bit agitated" at the time. Defendant exercised his right not to testify at his trial.

C. Elements of Necessity

1. Reasonable Action Taken to Protect Life, Limb, or Health

We address the first two elements of the defense of necessity – (1) reasonable action (2) taken to protect life, limb, or health of a person – together. Defendant did not testify at trial; therefore, all evidence relating to the reasonableness of the actions he took, and the legitimacy of his concerns that people's lives were in jeopardy, was introduced through the testimony of Heather and Deputy Legan. When viewed in the light most favorable to Defendant, this testimony indicated the following: Bones attracted a potentially rough clientele, including, according to Deputy Legan, "the biker crowd." It was not unusual for fights to break out between patrons, but Bones employed no obvious security. While Defendant was at Bones for close to three hours on the evening of 1 March 2014 and into the early morning of 2 March 2014, the atmosphere in Bones became increasingly "intense" and "mean" to a degree that Heather testified she wanted to leave, and Defendant agreed that they should do so. Defendant got into an argument with between three and five men in the Bones' parking lot which escalated from arguing to shouting and cursing. The main individual with whom Defendant was arguing, "the man," was in his late twenties to early thirties, and Defendant described him as "the baddest motherf_cker in the bar[.]" This altercation escalated to the point that Defendant punched the man,

knocking him to the ground. The man got back up, "extremely red-faced," drew a handgun from his waistband, and threatened Defendant. Neither Defendant nor Heather were armed.

In response to the man's threatening actions with the gun, the scene turned "chaotic." A woman nearby told Heather – and likely Defendant as well – that the man was "crazy" and they needed to "get out of [t]here."[8] Heather started screaming, and just wanted to get away from what was clearly a dangerous and volatile situation. Heather testified to the obvious concern that the man might shoot Defendant, her, or someone else with his gun, and further testified that Defendant would have been the most obvious potential target. When Defendant became aware of the gun, and the obvious danger associated with a man he had just assaulted brandishing a firearm, he "screamed" at Heather "go, go, go, go, go." During her testimony, Heather stated that she had "no doubt" that had she and Defendant "not taken the actions that [they] took that evening in getting into [the] golf cart and fleeing through the open area of the parking lot, that [they] might have been hurt or killed by [the man] who pulled the gun[.]" Deputy Legan testified that Defendant "seemed agitated" when speaking with Deputy Legan immediately after the incident, and that Defendant described the man with the gun as "the baddest motherf_cker in the bar."

As our Supreme Court has stated:

> Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence. . . . .
>
> Circumstantial evidence is often made up of independent circumstances that point in the same direction. These independent circumstances are like
>
> > "strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the [element at issue]. . . . [E]very individual circumstance must in itself at least tend to prove the [relevant element] before it can be admitted as evidence.

State v. Parker, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). Further, "[t]his Court has held that it is fundamental to

8. The jury was free to make the inference that Defendant, who was standing next to Heather, would have heard these comments too.

a fair trial that a witness's credibility be determined by a jury," *State v. Crabtree*, __ N.C. App. __, __, 790 S.E.2d 709, 715 (2016) (citation omitted), and issues of common sense are for the jury to decide. *State v. Zuniga*, 320 N.C. 233, 251, 357 S.E.2d 898, 910 (1987). This Court cannot decide issues of credibility, must take all proper testimony favorable to Defendant as true, and resolve any conflict in the evidence in Defendant's favor.

When viewed in the light most favorable to Defendant, we hold that substantial evidence was presented that could have supported a jury determination that a man drawing a previously concealed handgun, immediately after having been knocked to the ground by Defendant, presented an immediate threat of death or serious bodily injury to Defendant, Heather, or a bystander, and that attempting to escape from that danger by driving the golf cart for a brief period on the highway was a reasonable action taken to protect life, limb, or health. *Hudgins*, 167 N.C. App. at 710-11, 606 S.E.2d at 447, *see also Cooke*, 94 N.C. App. at 387, 380 S.E.2d at 382–83 (evidence that the defendant "drove the vehicle away from a drunken party in the country because several irate people were chasing him on foot" "tend[ed] to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian pursuers").

Further, even assuming *arguendo* that "fear" of some sort is an element of necessity, we hold that substantial evidence was presented at trial upon which the jury could have made a common sense determination that a reasonable person in Defendant's position would become frightened by the appearance of a gun in the hand of the man Defendant had just punched in the face. Based on the evidence presented at trial, the jury could have reasonably inferred that Defendant was afraid for his life, Heather's life, or the lives of others present in the parking lot, and that this fear was objectively reasonable. Because substantial evidence of these two elements was produced at trial, final determination of "[w]hether [Defendant's actions were] reasonable under the circumstances . . . w[as a] question[] for the jury." *Hudgins*, 167 N.C. App. at 711, 606 S.E.2d at 448.

2. No Other Acceptable Choices

We now review the record to determine if substantial evidence was presented at trial from which the jury could have determined that there were "no other acceptable choices available" to Defendant at the time he chose to drive the golf cart while intoxicated. *Id.* at 711, 606 S.E.2d at 447 (citation omitted). This element is closely associated with the "reasonable action" element, and we include our analysis above in our analysis of this element.

Initially, the State, in its argument, relies on evidence favorable to the State while discounting evidence favorable to Defendant, which is not permissible on appellate review. *Brown*, 182 N.C. App. at 117–18, 646 S.E.2d at 777. For example, the State argues that Defendant (and Heather) were capable of running and that the golf cart could not travel much more than five miles-per-hour. Based upon this evidence favorable to the State, the State argues that Defendant and Heather should have run away instead of having Defendant drive, or that, if Defendant was going to drive, he should have taken a route that did not involve the highway. However, Heather testified they would have driven the golf cart back the way they had come had that had been an option – and thereby would have avoided driving on the highway – but the route that would have allowed them to avoid driving on the highway was blocked by automobiles and people. Heather testified she did not believe there "was any other reasonable solution to what [she and Defendant] did in fleeing[.]" Heather also testified that Defendant "pulled out of the parking lot *the only way we could* in the golf cart." (Emphasis added).

In support of another argument, the State improperly quotes Deputy Legan's testimony that Heather did not appear to have been intoxicated. The State argues that even if it was reasonable to use the golf cart to get away, and even if the only available open route was onto the highway for at least a brief period, it should have been the more sober Heather, not Defendant, who did the driving. However, there was evidence presented strongly suggesting Heather would have been intoxicated at the relevant time, and it was for the jury, not the trial court, to weigh that evidence. Heather testified that while at Bones – a period of less than three hours – she consumed "more than four, less than seven" alcoholic drinks, and that she did not eat anything during that time because she had "eaten dinner before leaving the house that evening." The jury could use their common sense and lay knowledge to determine that Heather was also likely intoxicated at the time of the incident. Defendant's evidence was that he had the keys to the golf cart; that he was a military veteran trained to make quick, reasoned decisions in a crisis; that Heather was panicking, as evidenced by her testimony that she was screaming and not really focusing on anything other than the desire to get away; that Defendant instigated their departure from the scene by yelling at Heather "go, go, go, go, go."

At the charge conference, the State argued the following in support of denying the necessity instruction:

> Well, [Defendant's] witness[] has stated there was nothing else we could do. It's still in the [trial c]ourt's view to

> analyze the circumstances and come to that same conclusion. In this case it's not been shown why it was not simply available to these individuals who their own witness testified we can both run. The bar was still – that they could have gone back into the bar or simply run and disperse into this crowd of people.

It was not the province of the trial court to analyze the evidence and come to a conclusion concerning whether driving away in the golf cart constituted a reasonable option for Defendant, or whether running into the crowd, or back into Bones, constituted viable alternatives to driving away in the golf cart. Those decisions, based on credibility analysis and weighing of the evidence, were the sole province of the jury. The only role of the trial court at that point was to determine whether sufficient evidence had been admitted upon which *the jury* could decide in favor of Defendant on those contested issues. Though the jury *might* have rejected some or all of the testimony favorable to Defendant, it was the province of the jury to make those determinations. Just like the trial court in this instance, this Court cannot make any determinations concerning the weight to be given Defendant's evidence, or the credibility of any witness. After reviewing the facts before us in the light most favorable to Defendant, we hold that Defendant met his burden of introducing "evidence that a reasonable person would find sufficient to support" the "no other acceptable choices" element. *Hudgins*, 167 N.C. App. at 709, 711, 606 S.E.2d at 446-47 (citations omitted).

3. Abatement of the Perceived Danger

We further hold there was substantial evidence from which the jury could determine that a reasonable person in Defendant's position could have maintained the concern that both Defendant's and Heather's lives were in jeopardy, and further maintained the concern that the danger had not clearly abated by the time Deputy Legan stopped the golf cart. In *Cooke*, *supra*, involving the defense of duress, the defendant presented evidence "that he drove the vehicle away from a drunken party in the country [while intoxicated] because several irate people were chasing him on foot[.]" *Cooke*, 94 N.C. App. at 387, 380 S.E.2d at 382. This Court held on those facts:

> [Evidence was presented that the defendant] had been driving on different public highways for about thirty minutes when the officer stopped him. While this evidence *tends to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian*

> *pursuers*, it does not tend to show that he was still justifiably fearful *thirty minutes later after his pursuers had been left many miles behind*. [N]othing in the record suggests that defendant would have exposed himself to harm of any kind if he had stopped driving the car long before the officer saw him.

Id. at 387, 380 S.E.2d at 382–83 (emphasis added) (citations omitted); *see also State v. Kapec*, 234 N.C. App. 117, 761 S.E.2d 754, 2014 WL 2116530, *5 (2014) (unpublished) (Distinguishing *Cooke*, and holding evidence was sufficient to require an instruction on the defense of necessity: "[W]e do not agree with the State that the result in this case is controlled by *State v. Cooke*. In *Cooke*, the defendant was stopped by police after 'he had been driving on different public highways for about thirty minutes.' We held that although the 'evidence tends to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian pursuers,' there was no evidence that 'he was still justifiably fearful thirty minutes later after his pursuers had been left many miles behind.' In this case, defendant was stopped by Officer Mobley about three blocks from Mr. Cayson's house and within five minutes of leaving. *Cooke* is factually distinguishable and does not control the outcome of the present case.").

In the present case, Deputy Legan testified that Defendant had pulled off the highway approximately two-tenths of a mile from Bones' parking lot, and Heather testified that she saw Deputy Legan "within minutes" after the altercation in the parking lot. On the facts of this case, including the fact that Defendant's evidence was that there was a man with a firearm who had threatened to shoot Defendant, and who would likely have access to a vehicle, we hold two-tenths of a mile was not, *as a matter of law*, an unreasonable distance to drive before pulling off the highway. That determination should have been made by the jury following a correct instruction on the defense of necessity.

4. Duress

Finally, were we to conduct our analysis applying the elements of duress, the result would not change. We hold that there was substantial evidence, when viewed in the light most favorable to Defendant, to have supported a jury determination that (1) Defendant's "'actions [briefly driving the golf cart on the highway while intoxicated] were caused by [Defendant's] reasonable fear that [Defendant or another] would suffer [(2)] immediate death or serious bodily injury[,]" (3) had Defendant did not taken those actions, and (4) Defendant had no "reasonable

opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted).

5. Prejudice

Defendant must still demonstrate that the trial court's failure to give an instruction on necessity prejudiced him:

> Even if a trial court errs by failing to give a requested and legally correct instruction, the defendant is not entitled to a new trial unless there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial."

State v. Fletcher, __ N.C. __, __, 807 S.E.2d 528, 537 (2017) (citations omitted). We hold, on the facts before us, that "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." N.C. Gen. Stat. § 15A-1443(a) (2017).

III. *Conclusion*

We vacate Defendant's conviction for DWI and remand for a new trial on that charge. Defendant's adjudication of responsible for driving left of the center line is not affected by our holding. If Defendant is retried on the DWI charge and he requests an instruction on the defense of necessity, the trial court shall issue a proper instruction on the defense of necessity if, when viewed in the light most favorable to Defendant, the evidence is such that the jury *could* reasonably find, to its satisfaction, that Defendant's actions constituted (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). If the trial court instructs the jury on necessity, the instruction shall be in accordance with the established elements of that defense. The same mandate also applies should the trial court instruct the jury on the defense of duress.

NEW TRIAL.

Judges CALABRIA concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, concurring.

Our jurisprudence compels us to view the evidence in the light most favorable to Defendant in determining whether to give the requested instruction. And in viewing the evidence in such light, we are to determine only whether it is possible that at least one juror would have concluded that Defendant acted out of necessity or duress.

The trial court based its decision not to instruct the jury on necessity/duress on its conclusion that, though Defendant's wife testified that she was in fear, there was no evidence that Defendant, himself, acted out of fear. Regarding this decision, I agree with the majority that there *was* enough evidence from which a juror could have concluded that Defendant was in fear. True, no one specifically testified that (s)he thought Defendant was in fear. However, there was evidence that Defendant had just punched a man; the man pulled a gun; in response, Defendant immediately exclaimed to his wife to "go, go, go, go, go;" and Defendant sped away in the golf cart. From this evidence, I conclude that at least one juror could have reasonably found that Defendant acted out of fear. I note the other evidence which strongly suggests that Defendant was not in fear; however, it is not our job to weigh the evidence.

I do find some merit in the State's argument that driving the golf cart in the direction of and then past the gunman to escape was not the only acceptable means of escape, but that Defendant and his wife could have simply run in the other direction. However, the evidence also showed that Defendant's wife was not a strong runner, that they both had been drinking, and that the gunman was much younger (around 30 years old) than Defendant (who was 43). Based on this evidence, I must again conclude that it is reasonably possible that a juror could have concluded that Defendant reasonably determined that running was not a reasonable alternative to driving the golf cart in their quest to reach a safe location.

In conclusion, I agree with the majority's determination that the trial court should have given the requested instruction and that its failure to do so warrants a new trial.

STATE v. WATSON

[258 N.C. App. 347 (2018)]

STATE OF NORTH CAROLINA
v.
JAMAL M. WATSON, DEFENDANT

No. COA17-253

Filed 6 March 2018

1. Evidence—judicial notice—documents from federal case

The State's motion to take judicial notice of documents from defendant's federal case was granted where defendant was charged with state and unrelated federal charges. The documents met the requirements for judicial notice and there was no apparent prejudice to defendant.

2. Appeal and Error—standard of review—motion for appropriate relief—interpretation of statute

Although the denial of a motion for appropriate relief (MAR) is, as a general matter, reviewed under the abuse of discretion standard, de novo review was used here because the appeal required interpretation of a statute.

3. Sentencing—orders of commitment—date sentence begins

Defendant's state sentence did not run while he was in federal custody where his state judgment did not enter an order of commitment for the N.C. Department of Correction to take custody of defendant. Under the plain language of N.C.G.S. § 15A-1353(a), the trial court must issue an order of commitment when the sentence includes imprisonment; the date of the order is the date the service of sentence is to begin.

4. Sentencing—plea bargain—active sentence—date sentence begins

Where defendant received state and federal sentences but the there was no commitment order for the state sentence, calculating his state sentence to begin after his federal sentence was not contrary to his plea bargain for an "active sentence." Such a sentence was imposed; properly calculating when it began was not related to whether the sentence was active or suspended.

5. Sentencing—state and federal sentences—not concurrent—federal sentence served first

Precedent cited by a defendant with state and federal sentences did not support his argument that his sentences were concurrent.

At the time defendant received his state sentence, defendant had pleaded guilty to the federal charge but had not yet been sentenced, so that the state sentence was neither concurrent nor consecutive when it was entered. However, defendant served his federal sentence first because a state commitment order was not entered at that time. North Carolina does not allow time in federal custody to be credited toward a state sentence, and the state judgment was effectuated by defendant serving his sentence in state custody without consideration of the federal charge. The federal court had evinced an intent that the federal sentence run separately from and consecutively to any state sentence.

Appeal by Defendant from order entered 26 September 2016 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 5 September 2017.

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

Daniel F. Read, for Defendant.

INMAN, Judge.

North Carolina law requires a sentencing criminal court to enter an order of commitment consistent with the judgment entered, and a defendant is entitled to entry of such order *nunc pro tunc* where no such order is entered. However, a commitment order entered *nunc pro tunc* may not vary the terms of the underlying judgment, including a requirement that the defendant serve his sentence in the custody of a state agency. Therefore, a defendant's sentence does not begin until he is actually remitted to the custody of the agency designated in and as required by the judgment.

Jamal M. Watson ("Defendant") appeals from an order denying his Motion for Appropriate Relief ("MAR"), requesting the superior court strike a detainer filed against him and enter an order calculating his sentence as served. On appeal, Defendant, who was in federal custody prior to and following his sentencing in state court, argues that the trial court was required to enter a commitment order effective the date of the entry of the underlying criminal judgment, as no commitment order was entered at that time. As a result, Defendant reasons, the mandate in N.C. Gen. Stat. § 15A-1353(a) (2009) that "the date of the [commitment] order is the date service of the sentence is to begin" would require the trial

court to hold that Defendant's state sentence is served, as he has been in federal custody for the entire length of his state sentence. We agree with Defendant that the sentencing court was required by state law to enter a commitment order at the time of judgment and sentencing. However, because the judgment required his sentence be served "in the custody of: N.C. DOC[,]" i.e., the North Carolina Department of Correction,[1] and an order of commitment cannot vary the terms of a judgment, we remand for entry of a commitment order *nunc pro tunc* requiring his sentence begin upon his release from federal custody.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant committed the offense of Possession of a Firearm by a Felon on 21 December 2006 and was taken into state custody. Defendant posted bond and was released from custody the following day. Defendant was indicted on that charge and as a Habitual Felon on 2 January 2007.

On 1 May 2007, Defendant was again arrested for Possession of a Firearm by a Felon and taken into state custody. Defendant again posted bond, and was released from custody on 2 May 2007. Defendant was indicted on the second Possession of a Firearm by a Felon charge and a second Habitual Felon charge on 5 May 2008. The two Possession of a Firearm by a Felon charges and the two Habitual Felon charges are referred to collectively as the "State Charges."

While Defendant's State Charges were pending, Defendant was indicted on felony charges in the United States District Court for the Eastern District of North Carolina on 24 September 2008 (the "Federal Case").[2] Per the indictment filed in federal court, the Federal Case was unrelated to the State Charges. Defendant was arrested and taken

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1. In 2012, the North Carolina General Assembly consolidated the North Carolina Department of Correction with several other state agencies to form the Department of Public Safety, which includes the "The Division of Adult Correction, which shall consist of the former Department of Correction." Current Operations and Capital Improvements Appropriations Act of 2011, ch. 145, sec. 19.1.(b), 2011 N.C. Sess. Laws 535. *See also* N.C. Gen. Stat. §§ 143B-600 & 143B-630 (2017) (establishing the Department of Public Safety and creating the Division of Adult Correction and Juvenile Justice therein). Thus, we use "N.C. DOC" to refer to both the North Carolina Department of Corrections and its successor agency, the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice.

2. The State filed a motion to take judicial notice of public records contemporaneously with its brief. The motion requests this Court take judicial notice of various indictments, a warrant, and several orders filed and entered in the Federal Case. As set forth *infra* Part II.A., we grant the State's order and include facts contained in these records throughout our recitation of the procedural history of the case.

into federal custody by a special agent with the Federal Bureau of Investigation on 29 September 2009. A detention order was entered in the Federal Case on 30 September 2008, and Defendant waived a detention hearing on 15 October 2008. Defendant pleaded guilty in the Federal Case on 2 March 2009 and, following a continuance, was scheduled for sentencing on 6 July 2009.

After he pleaded guilty and while awaiting sentencing in the Federal Case, Defendant pleaded guilty to the State Charges on 18 May 2009. The trial court held a sentencing hearing that day, and, per the plea, Defendant agreed to a consolidated sentence of 80 months minimum and 105 months maximum imprisonment. On 19 May 2009, the trial court entered its judgment (the "Judgment") using Administrative Office of the Courts form AOC-CR-601. Per the language of the form, the Judgment ordered that Defendant "be imprisoned . . . for a minimum term of: 80 months [and] for a maximum term of: 105 months in the custody of: N.C. DOC[.]" The trial court left unchecked boxes on the form indicating Defendant's sentence would begin consecutive to any other imposed sentences. The trial court also left unchecked the boxes on the reverse of the form in the section titled "ORDER OF COMMITMENT/APPEAL ENTRIES[,]" which would have either denoted notice of appeal of the judgment by Defendant or ordered "the sheriff or other qualified officer . . . [to] cause the [D]efendant to be delivered . . . to the custody of the agency named [in the Judgment] *to serve the sentence imposed* . . ." (emphasis added).

Following his sentencing in state court, judgment was entered against the Defendant in the Federal Case on 12 November 2009, sentencing him to concurrent sentences of 180 and 120 months in the custody of the United States Bureau of Prisons. Defendant began service of his federal sentence but, on 30 March 2016, the North Carolina Department of Public Safety provided a detainer action letter to the United States Department of Justice indicating a detainer was filed concerning Defendant's sentence on the State Charges.[3] The letter, contrary to the Judgment, stated that the Defendant's term of imprisonment for the State Charges was "to run consecutive."

Upon learning of the detainer, Defendant filed an MAR on 20 July 2016, requesting that he "be adjudged to have served all his North Carolina time." At the MAR hearing, counsel for Defendant stated that he was not asking for jail credit towards the term of imprisonment imposed

3. Defendant included the detainer action letter, but not the detainer itself, in the record on appeal.

in the Judgment. Instead, counsel for Defendant stated he was seeking entry of a commitment order *nunc pro tunc* 12 May 2009, the date of the Judgment, because no such order had been entered at that time as required by N.C. Gen. Stat. § 15A-1353(a). Defendant's counsel further reasoned that, because the statute stated "[u]nless otherwise specified, the date of the [commitment] order is the date service of the sentence is to begin[,]" N.C. Gen. Stat. § 15A-1353(a), Defendant's sentence under the Judgment should be calculated to have run beginning 12 May 2009.

The trial court denied Defendant's motion by order entered 26 September 2016. Defendant filed a petition for writ of certiorari to this Court for review of the trial court's order, which was granted 29 December 2016.

II. ANALYSIS

A. State's Motion for Judicial Notice

[1] The State, by motion filed with its brief, requests this Court take judicial notice of the following documents from the Federal Case: (1) an indictment; (2) an arrest warrant; (3) an order of detention; (4) a waiver of detention hearing; (5) a superseding indictment; (6) a plea agreement; and (7) a motion and order continuing sentencing. We grant the State's motion.

Our Rules of Evidence set forth certain specific requirements allowing for judicial notice in our state's trial courts. Rule 201(b) requires that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2015). A trial court must take judicial notice under Rule 201 where it is "requested by a party and [the court is] supplied with the necessary information." N.C. Gen. Stat. § 8C-1, Rule 201(d) (2015).

As for appellate courts, Rule 9 of the North Carolina Rules of Appellate Procedure states that our "review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2017). However, "[a]ppellate courts may take judicial notice *ex mero motu* on 'any occasion where the existence of a particular fact is important . . . .' " *Lineberger v. N.C. Dep't of Correction*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677 (2008) (quoting *West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981)). Facts subject to judicial notice are those

"which are either so notoriously true as not to be the subject of reasonable dispute or 'capable of demonstration by readily accessible sources of indisputable accuracy[.]' " *Lineberger*, 189 N.C. App. at 6, 657 S.E.2d at 677 (quoting *West*, 302 N.C. at 203, 274 S.E.2d at 223).

North Carolina law clearly contemplates that our courts, both trial and appellate, may take judicial notice of documents filed in federal courts. For example, the North Carolina Utilities Commission is permitted by statute to take judicial notice of "decisions of State and federal courts, . . . public information and data published by official State and federal agencies . . . , and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice." N.C. Gen. Stat. § 62-65(b) (2015). We have also held that questions relating to criminal custody and dates of incarceration may warrant the taking of judicial notice of such facts. *See State v. Surratt*, 241 N.C. App. 380, 385, 773 S.E.2d 327, 331 (2015) ("[T]his court elects to take judicial notice of defendant's release date for the indecent liberties conviction . . . . We also take judicial notice of the fact that defendant was not actually released from incarceration on 24 September 1995.").

The facts and documents introduced with the State's motion are "capable of demonstration by reference to a readily accessible source of indisputable accuracy." West, 302 N.C. at 203, 274 S.E.2d at 223. The federal court filings are all retrievable in the form provided by the State from Public Access to Court Electronic Records ("PACER")[4] and, with the exception of Defendant's motion to continue sentencing, they all bear file stamps from the Clerk of the U.S. District Court for the Eastern District of North Carolina or the signature of a district court judge. Further, they all display the file number referenced by Defendant in his brief and displayed on other federal filings already included in the record on appeal.

The documents and the contents thereof also bear upon a fact critical to the disposition of this case: when and whether Defendant was in the custody of the State. Both parties' arguments reflect that the issue

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4. PACER is "an electric public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts . . . ." PACER, Public Access to Court Electronic Records, https://www.pacer.gov/ (last visited 19 February 2018). The service "is available to anyone who registers for an account[,]" *id.*, and a PACER account permits attorneys and *pro se* parties to file documents directly with the federal court. Administrative Office of the U.S. Courts, PACER User Manual 24 (June 2017). It is "available 24 hours a day, seven days a week, including weekends and holidays[,]" and "provides real-time access to information entered into the court's database." *Id.* at 24-25.

of State custody is material to the disposition of this appeal and, as set forth *infra* Part II.C., we agree. The documents provided therefore meet the requirements necessary to take judicial notice on appeal upon the State's motion. *Lineberger*, 189 N.C. App. at 6-7, 657 S.E.2d at 677-78 (outlining the requirements for taking judicial notice on appeal but declining to do so where no motion for judicial notice was filed and the fact in question was not important to resolution of the appeal).

Lastly, we note that there is no apparent prejudice to Defendant in taking judicial notice of these documents. Defendant did not oppose the State's motion to take judicial notice, as was his right under our Rules. N.C. R. App. P. 37(a) (2017). Nor did Defendant file a reply brief to the State's appellee brief, which relied on the documents in the motion to take judicial notice in arguing that Defendant's initial brief contained factual errors concerning custody. N.C. R. App. P. 28(h) (2017). Furthermore, both parties provided the MAR court with documents from the Federal Case at the hearing, and several such documents are already included in the record on appeal.[5] Given that the documents provided are subject to judicial notice and in the absence of any apparent prejudice to Defendant, we grant the State's motion and take judicial notice of the provided documents from the Federal Case.

B. Standard of Review

[2] Defendant contends that this appeal is subject to *de novo* review, while the State argues abuse of discretion is the proper standard. The State is correct that, as a general matter, a denial of an MAR is subject to review under the abuse of discretion standard. *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006). However, "[t]his Court reviews the trial court's conclusions of law in an order denying an MAR *de novo*." *State v. Martin*, ___ N.C. App. ___, ___, 781 S.E.2d 339, 344 (2016) (citing *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012)). Thus, "if the issues raised by Defendant's challenge to [the trial court's] decision to deny his [MAR] are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *Jackson*, 220 N.C. App. at

5. Specifically, the judgment in the Federal Case was attached to Defendant's MAR and introduced as an exhibit at the MAR hearing. Defendant's counsel also provided at least two "packet[s] of documents" to the MAR court, but it is unclear from the transcript how many such packets were provided or what was in them. At the very least, Defendant's counsel's comments at the hearing demonstrate that one packet included a document showing that a detainer had been filed against Defendant. However, we are unable to determine from the record and transcripts whether all the documents provided by Defendant's counsel to the MAR court have been included in this appeal.

8, 727 S.E.2d at 329 (first and third alteration in original) (internal citation and quotation marks omitted).

Here, Defendant challenges the trial court's MAR order on legal, rather than factual grounds, asserting that N.C. Gen. Stat. § 15A-1353(a) requires the entry of a commitment order in this action and determines when his sentence for the State Charges begins to run. *See, e.g.*, *State v. Hayes*, ___ N.C. App. ___, ___, 788 S.E.2d 651, 652 (2016) ("issues of statutory construction are questions of law which we review *de novo* on appeal[.]" (internal citation omitted)). Because resolution of Defendant's appeal requires interpretation of the statute in question to resolve whether denial of the MAR was proper, we employ *de novo* review.

C. The Trial Court Erred in Denying Defendant's Request for Entry of a Commitment Order Nunc Pro Tunc Consistent With the Judgment

[3] N.C. Gen. Stat. § 15A-1353 governs orders of commitment upon sentences of imprisonment, which "remand[] a defendant to prison in order to carry out a judgment and sentence." Black's Law Dictionary (10th ed. 2014) (defining "Commitment Document"). Under the plain language of the statute, "[w]hen a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin." N.C. Gen. Stat. § 15A-1353(a).

Defendant argues that the statute's language is mandatory, and requires entry of an order of commitment. We agree. "[O]rdinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]" *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978). Thus, the statute's command that "the court *must* issue an order of commitment setting forth the judgment" mandates entry of such an order upon imposition of a term of imprisonment. N.C. Gen. Stat. § 15A-1353(a) (emphasis added).

Here, the trial court entered its Judgment imposing a term of imprisonment on Defendant, but it failed to enter an order of commitment for N.C. DOC to take custody of Defendant for service of that term. Defendant requested entry of such an order at his MAR hearing, but his motion was denied. Because the trial court was required to enter a commitment order but did not, Defendant was entitled to the "other appropriate relief" of a commitment order entered *nunc pro tunc* 19 May 2009 at his MAR hearing. N.C. Gen. Stat. § 15A-1417(a)(4) (2015).

Defendant is incorrect, however, in asserting that his sentence should be calculated beginning 19 May 2009. The statute provides that "[u]nless otherwise specified in the order of commitment, the date of the order is the date service of the sentence *is to begin*[,]" not the date that the sentence "does begin" or "begins." N.C. Gen. Stat. § 15A-1353(a) (emphasis added). Indeed, we doubt that an order of commitment could conclusively establish the date that a term of imprisonment begins at all, as it is the judgment that authorizes imprisonment and sets forth its length, terms, and conditions. Our Supreme Court has held that:

> A valid judgment of a court of competent jurisdiction is the *real and only authority* for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense. . . . The purpose of a commitment is to advise the prison authorities of the provisions of the judgment. Since a commitment has no validity except that derived from the judgment, to the extent it fails to set forth or certify the judgment accurately the commitment is void and the judgment itself controls.

In re Swink, 243 N.C. 86, 90, 89 S.E.2d 792, 795 (1955) (emphasis added) (citation omitted); *see also State v. McAfee*, 198 N.C. 507, 508-09, 152 S.E. 391, 392 (1930) ("The essential point of a judgment imposed in a criminal action is the punishment and the time when the sentence shall actually begin is not material because it is only directory. *If for any cause the sentence is not executed at the time named the defendant may again be brought before the court and a new period may be prescribed.*" (emphasis added)); *State v. Jackson*, 14 N.C. App. 579, 582, 188 S.E.2d 539, 541 (1972) ("A valid judgment is the only authority for the lawful imprisonment of a person and when the commitment fails to set forth the judgment correctly it is void and the judgment itself controls." (citing *Swink*, 243 N.C. 86, 89 S.E.2d 792)). Thus, if a judgment establishes that a term of imprisonment must be served in the custody of a particular State agency, it follows that such a term cannot begin until custody is actually remitted to that agency or its successor. As such, the commitment order's date setting forth when a term "is to begin," N.C. Gen. Stat. § 15A-1353(a), simply "advise[s]" the authorities as to when custody should be remitted to the designated custodial agency, and its terms cannot vary or depart from the provisions of the underlying judgment. *Swink*, 243 N.C. at 90, 89 S.E.2d at 795. This reading comports with another subsection of the same statute, which establishes that "[u]nless a later time is directed in the order of commitment, . . . the

sheriff must cause the defendant to be placed in custody of the agency specified in the judgment on the day service of [the] sentence is to begin or as soon thereafter as practicable." N.C. Gen. Stat. § 15A-1353(c) (2015).

Our holding is consistent with our Supreme Court's decision in *State v. Cockerham*, 2 Ired. Law 204, 24 N.C. 204 (1842). There, a defendant was sentenced to two months imprisonment "from and after 1 November next[,]" but was not actually taken into custody and imprisoned consistent with that language. *Id.* at 205, 24 N.C. at 205. After those two months had elapsed, the defendant was ordered taken into custody at the next term of court to serve his two month sentence. *Id.* at 204, 24 N.C. at 204. On appeal, our Supreme Court drew essentially the same distinction that we draw between modern judgments and orders of commitment, holding that "[t]he judgment is the penalty of the law, as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution[.]" *Id.* at 205, 24 N.C. at 205. On such a distinction, and irrespective of the fact that the two months had elapsed, the Supreme Court held that "[u]pon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution." *Id.* at 205, 24 N.C. at 205.

Here, the Judgment sentenced Defendant to a minimum of 80 months and maximum of 105 months imprisonment "in the custody of: N.C. DOC[.]" By the very terms of the Judgment, Defendant's sentence requires him to spend at least 80 months in the custody of the N.C. DOC, and such a term necessarily cannot begin to run until he is actually remitted into the agency's custody. Thus, while Defendant is entitled to a commitment order under N.C. Gen. Stat. § 15A-1353(a), neither the date of that order nor the delay in its entry can begin Defendant's sentence in contravention of the express terms of the Judgment. *See McAfee*, 198 N.C. at 508, 152 S.E. at 392 ("Why a commitment was not issued promptly . . . does not appear; *but the delay cannot defeat the object of the prosecution or exempt the defendant from liability to punishment.*" (emphasis added)); *see also Swink*, 243 N.C. at 90, 89 S.E.2d at 795; *Cockerham*, 2 Ired. Law at 205, 24 N.C. at 205; *Jackson*, 14 N.C. App. at 582, 188 S.E.2d at 541. The date Defendant's sentence begins (or began) to run is therefore the date at which he is (or was) actually taken into custody by the N.C. DOC.

Reviewing the record, transcripts, and the documents of which we take judicial notice, it appears Defendant was not remitted into the

custody of the N.C. DOC, let alone State custody, at the time he was sentenced and the Judgment was entered or anytime thereafter. While Defendant was in State custody on the two dates he was arrested for the different State Charges, Defendant was released from custody on bond on the day following each arrest. *See*, *e.g.*, *Burgwyn v. Hall*, 108 N.C. 489, 490, 348,13 S.E. 222, 222 (1891) ("[T]he defendant may, under an order of arrest duly obtained, be arrested and held in custody, unless he shall, as he may do in the way prescribed, give bail . . . ."); *State v. Howell*, 166 N.C. App. 751, 753, 603 S.E.2d 901, 903 (2004) (construing "release" as used in a statute within the article of the Criminal Procedure Act governing bail to mean " 'to set or make free' from the supervision and control of the court, as well as from imprisonment" (citation omitted)). Defendant was next taken into custody by the federal government when he was arrested by an FBI agent on 29 September 2008. The federal government's custody of Defendant continued, as an order of temporary detention pending hearing was entered on 30 September 2008, and Defendant waived the subsequent detention hearing on 15 October 2008. Nothing in the record indicates Defendant was ever released from federal custody, and he did not contest this fact, introduced by the State in its brief and motion to take judicial notice, through a reply brief or opposition to the State's motion.

Defendant's sole basis for arguing that he was in State custody at the time he was sentenced on the State Charges is a statement from the judge at sentencing that "[Defendant's] in custody." We are unpersuaded. First, the transcript of the sentencing hearing appears incomplete, as it begins *in medias res* rather than at the calling of Defendant's case. Second, the transcript failed to capture a bench conference that occurred immediately following this statement. Third, the statement does not disclose whose custody Defendant was in, and fourth, a state court judge cannot, by oral proclamation, place a defendant already in un-relinquished federal custody into state custody. *See*, *e.g.*, *Ponzi v. Fessenden*, 258 U.S. 254, 260-61, 66 L.Ed. 607, 611 (1922) ("[A defendant] may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. Such a waiver is a matter that addresses itself *solely to the discretion of the sovereignty making it* . . . . In the case at bar, the Federal District Court first took custody of Ponzi. . . . Until the end of his term and his discharge, *no state court could assume control of his body without the consent of the United States*." (citation omitted) (emphasis added)). Thus, absent any indication that the federal

government relinquished or waived custody of Defendant, the trial court was without authority to order the State to assume it.[6]

Indeed, the record below shows that the State did not assume custody of Defendant. As noted by the Defendant, no order of commitment was ever entered directing the sheriff to take Defendant under his control and deliver Defendant to N.C. DOC. Nor did the N.C. DOC take Defendant into custody by other means between his sentencing and the time of the MAR hearing. At that hearing, the State introduced as an exhibit a certified copy of Defendant's "pen pack" maintained by the N.C. DOC, which shows Defendant was last in the agency's custody on 21 July 2006. Defendant's counsel acknowledged at the MAR hearing that the State did not assume custody at the time of sentencing, stating "[s]ometime in May of 2009 he was transferred from court here back to federal – to federal custody to await trial there." Because the evidence shows Defendant was never remitted into the custody of the N.C. DOC and his sentence cannot begin to run consistent with the Judgment until he is so remitted, we hold that Defendant's sentence for the State Charges had not begun to run at the time of the MAR hearing.

[4] Defendant argues that the result of our holding is contrary to the plea agreed to by Defendant and the State, as he pleaded guilty to an "active sentence." However, the designation of a sentence as active has no bearing on the issues raised by Defendant on appeal. The relevant definitional statute governing Defendant's sentencing defines "[a]ctive punishment" as "[a] sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended." N.C. Gen. Stat. § 15A-1340.11 (2015). Such a sentence was imposed on Defendant by the Judgment, and he must serve it. Properly calculating when Defendant's service of that sentence begins is entirely unrelated to whether the sentence is active or suspended.

[5] Defendant cites *Kiendra v. Hadden*, 763 F.2d 69, 72-73 (2nd Cir. 1985), to support his argument that his sentence has already been served. We are not bound by federal circuit court decisions. *See In re Truesdell*, 313 N.C. 421, 428-29, 329 S.E.2d 630, 634-35 (1985). Also, Defendant's reliance on *Kiendra* is otherwise misplaced. The Fourth Circuit discussed but did not adopt *Kiendra* in *United States v. Grant*,

6. While Defendant was present in state court for entry of his plea and sentencing, this alone does not demonstrate a waiver of custody by the United States. *See, e.g.*, *United States v. Evans*, 159 F.3d 908, 912 (4th Cir. 1998) (noting that a writ of habeas corpus *ad prosequendum* allows a federal prisoner to appear in state court to face state criminal charges, but that the United States "does not relinquish its custodial authority over the prisoner when the prisoner is sent to the receiving jurisdiction").

862 F.3d 417 (4th Cir. 2017), when it upheld a district court's denial of a prisoner's request for credit towards a federal sentence. 862 F.3d at 420-21 ("We note at the outset of our analysis that we are not at all sure a federal common law right to credit for time erroneously spent at liberty currently exists. As the First Circuit has noted, legal developments in the decades since *White* [*v. Pearlman*, 42 F.2d 788 (10th Cir. 1930),] cast some doubt on the current validity of the doctrine." (citation omitted)). Finally, two other federal circuit courts have categorically rejected the argument that a defendant should be deemed to have served his sentence as of the date of sentencing due to a delay in commencement. *Little v. Holder*, 396 F.3d 1319, 1321-22 (11th Cir. 2005) ("[A] delay in the commencement of a sentence cannot, by itself, constitute service of that sentence." (citation omitted)); *Leggett v. Fleming*, 380 F.3d 232, 235 (5th Cir. 2004) ("[T]his court has expressly held that a prisoner is not entitled to a credit when there is merely a delay in the execution of one's sentence." (citations omitted)).[7]

Here, there is no indication that the federal government surrendered Defendant to State custody and the State refused to exercise it. Furthermore, the petitioner in *Kiendra* was committed at the time of his federal sentencing to federal custody, and that order was not followed; here, no commitment order was entered, and, even if it had been, it could not have contravened the Judgment's mandate that Defendant serve his sentence in the custody of N.C. DOC. Rather than frustrate the judgments of the state and federal courts in this case, our decision vindicates them. The state court ordered Defendant to serve his sentence in the custody of N.C. DOC prior to the imposition of any federal sentence, meaning it was neither consecutive nor concurrent to the

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7. The facts in *Kiendra* are also distinguishable. There, the petitioner was convicted of a federal crime, with the sentence to begin upon expiration of a state sentence he was then serving. 763 F.2d at 70. The federal government filed a detainer with the state where the petitioner was imprisoned but, when the state authorities presented him to federal marshals, the marshals refused to accept him into their custody. *Id.* at 70. The petitioner was later arrested and convicted again in state court, which, aware of the unserved federal sentence, sentenced defendant to serve his state sentence in a federal penitentiary concurrent with the unserved federal sentence. *Id.* at 70-71. The state presented the petitioner to federal marshals for imprisonment on three more occasions, and the marshals refused custody each time. *Id.* at 71. However, once the petitioner had served his state sentence in state prison rather than the intended federal prison, the marshals took custody of the petitioner and imprisoned him in a federal penitentiary to serve his federal sentence. *Id.* at 71. The *Kiendra* court held that the petitioner should receive credit on his federal sentence running from the date he was first committed by the federal court, as holding otherwise would be contrary to the federal court's intention that the petitioner's sentence begin on the date he was originally committed and to the state court's intention that his state sentence run concurrently with the federal sentence. *Id.* at 72-73.

as-yet non-existent federal sentence.[8] And North Carolina law does not allow time in federal custody to be credited towards a state sentence. *See*, *e.g.*, *State v. Lewis*, 231 N.C. App. 438, 447, 752 S.E.2d 216, 222 (2013) ("Because no statute specifically authorizes credit for time spent in federal custody, the trial court had no discretion under the Structured Sentencing Act to reduce defendant's sentence for his time in federal custody."). Thus, the Judgment is effectuated by Defendant serving his sentence in N.C. DOC custody without consideration of the federal sentence. As to the federal sentence itself, the United States District Court for the Eastern District of North Carolina ordered that sentence "be served consecutively with any state charges the defendant is currently serving time for[,]" obviously evincing an intention that the federal sentence run separate and consecutive with any state sentence, such as the Judgment.

III. CONCLUSION

Defendant is entitled to the appropriate relief of an order of commitment entered *nunc pro tunc* 19 May 2009, the date he was sentenced under the Judgment, and the trial court which initially sentenced Defendant, as well as the trial court presiding at his MAR hearing, erred in failing to do so contrary to a statutory mandate. N.C. Gen. Stat. § 15A-1353(a). However, the Judgment requires Defendant to serve a minimum of 80 months and maximum of 105 months imprisonment in the custody of the N.C. DOC, and his sentence cannot be said to run until he is remitted into the agency's custody. We therefore remand for entry of such an order of commitment, with the instruction that the order state Defendant's sentence is to begin on the date he is released from federal custody.

REMANDED WITH INSTRUCTIONS.

Judges BRYANT and DAVIS concur.

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8. "When multiple sentences of imprisonment are imposed on a person *at the same time* or when a term of imprisonment is imposed on a person who is *already subject to an undischarged term of imprisonment*, *including a term of imprisonment in another jurisdiction*, the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354 (2009) (emphasis added).

STATE v. WEBB

[258 N.C. App. 361 (2018)]

STATE OF NORTH CAROLINA
v.
MAURICE JASON WEBB, DEFENDANT

No. COA17-612

Filed 6 March 2018

1. Burglary and Unlawful Breaking or Entering—felony breaking or entering—sufficiency of evidence—identity of perpetrator

The trial court did not err by denying defendant's motions to dismiss the charges of felony breaking or entering, felony larceny, and misdemeanor injury to real property where there was sufficient evidence, given by multiple witnesses, that defendant himself perpetrated each offense.

2. Larceny—felony larceny—sufficiency of evidence—value of property taken

The trial court did not err in its jury instruction on felony larceny where the State produced sufficient evidence, from multiple witnesses, that defendant personally committed the crime and that he took property in excess of $1,000.

Appeal by Defendant from judgments entered 25 January 2017 by Judge Ebern T. Watson III in New Hanover County Superior Court. Heard in the Court of Appeals 13 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

MURPHY, Judge.

The issue underlying Maurice Jason Webb-Sholar's[1] (Defendant) arguments on appeal is whether the State put forth sufficient substantial evidence that he *personally* committed the crimes appealed herein. For the reasons that follow, we hold that this case is analogous to *State v. Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325 (2005), and, thus, there

1. Defendant is sometimes referred to as "Maurice Sholar," "Maurice Webb-Sholar," or "Maurice Webb-Scholar" in various court documents. On the Judgments, Defendant's name appears as "Maurice Jason Webb."

was sufficient evidence that Defendant perpetrated the crimes to support a jury finding, of each essential element of the offense charged, and of Defendant being the perpetrator of each offense.

Defendant argues that: (1) there was insufficient evidence that Defendant personally committed the offenses of felony breaking or entering, felony larceny, and misdemeanor injury to real property, and, thus, it was error for the trial court to deny Defendant's motion to dismiss; and (2) as a result of this error, the trial court plainly erred in its jury instructions on felonious larceny. We disagree, and analyze each argument in turn.

Background

During Fall 2015, Defendant introduced himself to Lasonia Melvin as "Jason Young." The two dated "casually" for about one month. Defendant visited her apartment several times throughout the relationship, which was located on the ground floor of an apartment complex in Wilmington.

Defendant asked Melvin about her plans for Thanksgiving. Melvin told Defendant that she and her daughter were traveling out of town. When Defendant asked to accompany Melvin on this trip, she declined. Shortly thereafter, Melvin ended the relationship because Defendant was always asking for money, although Defendant told Melvin he had a job.

The day before Thanksgiving, Melvin and her daughter left her apartment at approximately 5:00 p.m. for their trip out of town. Melvin locked the apartment door when she left, and asked a neighbor, Henrietta McKoy, to watch her apartment. McKoy lived across the parking lot from Melvin. Between 10:00 p.m. and 11:00 p.m., McKoy saw a dark blue or black vehicle backed into the parking space where Melvin parks. At the time, McKoy thought the car belonged to Melvin. McKoy went outside a second time, approximately 30 minutes after first seeing the vehicle, and the vehicle was still parked in the same space.

Around the same time, another neighbor, Matthew Lofty (Lofty), sat outside on his porch, directly above Melvin's apartment. Throughout the night, Lofty saw a four-door, dark blue Hyundai parked and backed into Melvin's parking spot, with the trunk facing Melvin's apartment. Lofty saw Defendant and another unidentified male near Melvin's apartment. Lofty observed Defendant twice that evening: first standing in the parking lot, and second, standing directly in front of Melvin's apartment door. Lofty also noted he saw the unidentified male in the area each time he looked down from the porch. Lofty told police that he saw the

unidentified male and Defendant going in and out of the apartment.[2] Lofty also stated that, sometime during the night, he saw a flat screen television in the open trunk of the dark blue Hyundai.

Heather Wilson (Wilson), who lived with Lofty, exchanged brief pleasantries with Defendant as she smoked on the upstairs porch. Wilson thought Defendant seemed nervous during this exchange. Wilson claimed the sunroof and trunk were open on the vehicle, and that she saw "stuff" in the trunk on at least one occasion.

Over the course of roughly three hours, Lofty observed Defendant and the unidentified male went to and from Melvin's residence four to five times in the dark blue Hyundai. During one of these visits, as Lofty and Wilson watched, Defendant noticed he was being observed, appeared "startled," slammed the trunk closed, entered the passenger side of the vehicle, and slowly pulled out of the parking lot. Both Lofty and Wilson heard a lot of noise throughout the night and would look outside, but could not identify its source.

The next day Wilson and Lofty noticed the door to Melvin's apartment was open, and alerted McKoy, who called the police. When Officer Carly Tate of the Wilmington Police Department arrived on scene, she noticed Melvin's door frame was broken and appeared to have been pried open. Officer Tate entered the apartment and noticed several items were missing or had been "disturbed." Melvin later determined that three TVs (one of which was an older, 55-inch model), a sapphire diamond bracelet, a microwave, two laptops (including her work laptop), an Amazon Fire Stick, several DVDs, and $900 dollars in cash were missing. Melvin's insurance company valued her stolen items at approximately $4,000, and paid her roughly $3,000 after a $1,000 deductible. Sometime later Wilson picked Defendant out of a photo lineup, and Lofty also identified Defendant as the perpetrator.

During the trial, Defendant made a motion to dismiss at the close of the State's evidence, and renewed his motion to dismiss at the close of all evidence. The trial court denied both motions. The trial court instructed the jury on the charges of felony breaking or entering, felony larceny, and misdemeanor injury to real property. The jury subsequently returned a verdict of guilty on all counts. The trial court entered judgments upon

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2. At trial, Officer Carly Tate testified about Lofty's statement without objection. We note that Lofty's statement to police is inconsistent with his trial testimony. At one point in his testimony, Lofty stated that he saw Defendant standing outside and the unidentified male going in and out of the apartment. Later in his testimony, Lofty stated he did not see anyone going back and forth from the apartment.

the verdicts and sentenced Defendant to 11 to 23 months of imprisonment for each felony conviction, consolidated; and a consecutive term of 120 days imprisonment for the injury to real property conviction. Defendant timely appealed in open court.

Analysis

Defendant presented two arguments on appeal: (1) there was insufficient evidence that Defendant personally committed the offenses of felony breaking or entering, felony larceny, and misdemeanor injury to real property, and, thus, it was error for the trial court to deny Defendant's motion to dismiss; and (2) as a result of this error, the trial court plainly erred in its jury instructions on felonious larceny. We disagree and hold that Defendant received a fair trial, free from error.

A. Motions to Dismiss

[1] Defendant argues the State presented insufficient evidence he *personally* broke into or entered Melvin's apartment, *personally* committed larceny, or *personally* injured the apartment door.

We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding, of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

Id. at 523, 644 S.E.2d at 621 (citations, quotation marks, and alterations 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 (2000) (citation 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).

> 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 (quotation marks, citations, brackets, and emphasis omitted).

Here, at the State's request, the trial court did not instruct the jury on acting in concert or aiding and abetting. Thus, in order for the jury to find Defendant guilty of felony breaking and entering, felony larceny, and misdemeanor injury to real property, "the State was required to prove that defendant committed the offenses himself." *State v. Haymond*, 203 N.C. App. 151, 168, 691 S.E.2d 108, 122 (2010); *see also State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986) ("The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense.").[3]

The jury convicted Defendant of felonious breaking or entering, felonious larceny, and injury to real property. The elements of felonious breaking or entering are: "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986); *see also* N.C.G.S. § 14-54(a) (2017). For larceny, the State must prove Defendant: "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d

3. We note the logical inconsistency in conducting a de novo review of a motion to dismiss raised during trial retroactively through a filter of the ultimate jury instructions. However, this is the standard that we adopted in our prior published opinions and we are bound to follow this retroactive analysis of a defendant's motion to dismiss. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

810, 815 (1982); *see also* N.C.G.S. § 14-72 (2017). The State charged Defendant with felonious larceny, alleging he took property worth more than $1,000 or acted pursuant to a breaking or entering. *See* N.C.G.S. § 14-72(a), (b)(2). It is a misdemeanor to "willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature[.]" N.C.G.S. § 14-127 (2017).

Defendant cites to *State v. Cunningham*, 140 N.C. App. 315, 536 S.E.2d 341 (2000), in support of his argument. In *Cunningham*, the defendant was convicted of first-degree burglary. *Id.* at 320, 536 S.E.2d at 345. On appeal, Cunningham argued the State failed to present sufficient evidence to support the charge. *Id.* at 320, 536 S.E.2d at 346. The trial court did not instruct the jury as to acting in concert, and, thus, we reviewed for sufficient evidence that Cunningham personally committed the crime. *Id.* at 321-22, 536 S.E.2d at 345.

When reviewing the evidence in *Cunningham*, we noted, "[t]he only evidence with regard to the alleged burglary came from two sources: (1) defendant's own confession . . . and (2) the testimony of Sherry Atwell, the owner of the house and daughter of the victim[.]" *Id.* at 322, 536 S.E.2d at 346. In Cunningham's confession, he did not admit "he broke down or otherwise opened any of the exterior or interior doors." *Id.* at 322, 536 S.E.2d at 347. Indeed, the confession stated another person with Cunningham kicked the door and opened it. *Id.* at 322, 536 S.E.2d at 346. The State asked us to accept certain portions of Cunningham's confession—that he carried a shotgun—and reject the portions of his confession implicating another for the breaking. *Id.* at 322, 536 S.E.2d at 347. The State also pointed to Atwell's testimony, but her testimony only supported constructive breaking, a theory upon which the jury was not instructed. *Id.* at 324, 536 S.E.2d at 347-48. Accordingly, we held that the State failed to present sufficient evidence of a "breaking" and vacated Cunningham's conviction. *Id.* at 321-22, 324, 536 S.E.2d at 345, 347-48.

In contrast, the State argues that the instant case is more analogous to *Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325. In *Ethridge*, the defendant argued the trial court erred by denying his motion to dismiss a number of charges. *Id.* at 362, 607 S.E.2d at 327. Ethridge alleged "the evidence was insufficient to prove [he] was the perpetrator." *Id.* We disagreed and pointed to the following evidence:

> A vehicle registered to [Ethridge] and identified by others as belonging to [Ethridge], was seen at the crime scene. The vehicle, with its tailgate open, was pulled up to the door of the house. A coffee table was seen in the car.

> [Ethridge] was placed . . . next door to the crime scene on the day the offenses occurred.

Id.

Here, Melvin was not at her apartment the day of the robbery. A neighbor, McKoy, saw a vehicle backed up to the victim's patio door. Neighbors told Officer Tate they saw two males "going in and out of the apartment" while outside smoking. One of the men, Defendant, was recognized by neighbors because of his relationship to Melvin. When one of the neighbors, Wilson, spoke to Defendant, he seemed "startled and anxious." Melvin told the officer that only three people knew she was going to be out of town—one of whom was Defendant.

Lofty saw Defendant and another male in the following places: by the victim's apartment, on the front porch, right in front of the apartment door, and then in the parking lot, next to a vehicle. The vehicle "kept coming and going." At one point, Lofty saw Defendant in the driver's side of the vehicle. Defendant "got startled[,]" the two slammed the trunk, and then they left. At some point, Lofty saw a television in the trunk. Lofty saw the other male "standing there" and Defendant would be "gone" at some points. That night, Lofty also heard a lot of noise ("banging on the walls"). The next morning, Lofty's daughter noticed the victim's apartment door was open and crime scene investigators confirmed that the door had been pried open.

Wilson also testified that she saw Defendant and another man parked with a car backed up to the victim's door. She saw "stuff" in the trunk of the car. She testified: "It caught them off guard when we walked out on the porch and they closed the trunk very, very fast. The sunroof was open, [Defendant] was in the driver's seat, the other guy was in the passenger and they took off and went down the road." Wilson saw the vehicle come and go at least four, and maybe five, times.

When the victim called Defendant to ask about that night, he told her he was out of town—a fact contradicted by the several witnesses' testimonies. When Melvin returned home, her 55-inch television was missing—a television so big she said it would take more than one person to carry out.

We conclude there was sufficient evidence Defendant was the perpetrator of the crimes and individually committed the crimes. The case *sub judice* more closely aligns with *Ethridge* than with *Cunningham*. Witnesses saw Defendant driving a car that came to the victim's apartment at least four times. At times, Defendant was standing by the car,

and at other times, witnesses did not see Defendant. Defendant did not have permission to be there. A witness saw a television in the trunk of the car Defendant drove. Televisions were stolen from the victim's apartment. When spoken to, Defendant acted "startled[,]" slammed the trunk, which contained the television, and drove away. Considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, there is sufficient evidence that Defendant perpetrated the crimes. As such, we hold the trial court did not err in denying Defendant's motions to dismiss.

B. Jury Instructions

[2] Next, Defendant argues the trial court plainly erred in its jury instructions on felonious larceny.

"[A]n issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action question is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error exists when: (1) there is an error; (2) that is plain; (3) that affects a substantial right; (4) that must seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* at 515-16, 723 S.E.2d at 332-33. "[P]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333.

As discussed *supra*, Defendant argues the State presented insufficient evidence that he personally took property worth over $1,000. However, we find that the State produced sufficient evidence Defendant personally committed these crimes, and that he took property in excess of $1,000. As the trial court did not err in its jury instructions on felonious larceny, we need not review whether the alleged error amounted to plain error.

Conclusion

Defendant received a fair trial, free of prejudicial error.

NO ERROR.

Chief Judge McGEE and Judge ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 MARCH 2018)

AMIR v. AMIR No. 17-431	Wake (14CVD6809)	Affirmed in part, remanded in part.
BARNHILL v. FARRELL No. 17-402	Wake (11CVS17551)	Affirmed
CAPPS v. McSWAIN No. 16-1264	Forsyth (16CVS4309)	Reversed
CAUDILL v. HUITT MILLS, INC. No. 16-1281	N.C. Industrial Commission (931518)	Affirmed
IN RE A.G.D. No. 17-719	Durham (16JT77-78)	Vacated
IN RE B.L.A. No. 17-978	Cumberland (12JT332)	Affirmed
IN RE D.A.C. No. 17-889	Haywood (06JA63) (06JA64) (14JA79)	Affirmed in part; Reversed in part; Vacated and remanded in part
IN RE F.S. No. 17-959	Orange (10JA6)	Reversed
IN RE J.D. No. 17-954	Durham (16JB23)	Dismissed
IN RE J.L.S. No. 17-994	Person (12J72-74)	Affirmed
IN RE J.R.G. No. 17-1106	Caldwell (16JT161)	Vacated
IN RE J.W.M. No. 17-777	Harnett (13JT26)	Affirmed
JOHNSON v. HAYNES No. 17-890	Buncombe (15CVS289)	Dismissed
MALONE v. HUTCHISON-MALONE No. 17-241	Durham (06CVD2127)	Affirmed; Remanded for correction of clerical error

McCALL v. MILLION No. 17-403	Watauga (16CVD209)	Vacated and Remanded
McGUIRE v. McGUIRE No. 17-432	Union (12CVD2483)	Affirmed in part; Reversed and Remanded in part
NUNN v. BARO No. 17-798	Surry (14CVS1476)	No Error
O'NEAL v. FOX No. 17-754	Johnston (15CVS3612)	Affirmed
OXENDINE v. LOCKLEAR No. 17-259	N.C. Industrial Commission (Y14644)	Affirmed
PEREZ v. PEREZ No. 17-512	Rowan (15CVD2015)	Reversed and Remanded
STATE v. ADAMS No. 17-601	Durham (11CRS59338-39) (11CRS8963-64)	Dismissed
STATE v. CLOER No. 17-23	Iredell (14CRS54217-19) (16CRS1415)	No Error
STATE v. CROOMS No. 17-317	Wilson (12CRS53186-87) (13CRS82-83) (13CRS85-86) (13CRS88-89)	Vacated in Part and Remanded in Part.
STATE v. DAVIS No. 17-615	Wake (15CRS6349)	Affirmed
STATE v. DAVIS No. 17-385	Brunswick (13CRS680)	No Error
STATE v. EVANS No. 17-840	Onslow (14CRS1110) (14CRS52011) (14CRS52041-42) (14CRS52052) (16CRS2955)	No Error
STATE v. FOX No. 17-711	Rowan (15CRS53604)	Affirmed

STATE v. FREEMAN No. 17-751	Orange (16CRS50130)	Vacated and Remanded.
STATE v. HARRISON No. 17-805	Rockingham (16CRS50479-80) (16CRS701243)	Affirmed
STATE v. HILL No. 17-758	Mecklenburg (15CRS241826-28) (16CRS9095)	No Error
STATE v. JEFFERIES No. 17-775	Cleveland (10CRS50118-20)	No Error
STATE v. McMANNUS No. 17-900	Wake (15CRS207674) (15CRS207675)	Affirmed
STATE v. RUSSELL No. 17-427	Granville (14CRS51118)	No Prejudicial Error
STATE v. SOLOMON No. 17-651	Durham (16CRS55759)	No Error in Part; Vacated and Remanded in Part
TIBBS v. FORD No. 17-936	Mecklenburg (14CVD17086)	Appeal dismissed.

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