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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 18, 2020

MAILING ADDRESS: The Judicial Department
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APPEAL AND ERROR

Interlocutory appeal—N.C. False Claims Act—sovereign immunity raised—substantial right—In a case brought by the State against a charter school and its CEO (defendants) for violation of the N.C. False Claims Act, defendants' interlocutory appeal from orders denying its motions to dismiss affected a substantial right where defendants raised issues of sovereign immunity. However, the appeal was limited to the denial of motions to dismiss under Rule 12(b)(6) and did not include review of the denial of a motion to dismiss under Rule 12(b)(1). **State of N.C. ex rel. Cooper v. Kinston Charter Acad., 531.**

Interlocutory appeal—petition for writ of certiorari—additional issues—The Court of Appeals declined to issue a writ of certiorari to review additional issues regarding sufficiency of pleadings in an interlocutory appeal involving liability of a

charter school and its officer under the N.C. False Claims Act. **State of N.C. ex rel. Cooper v. Kinston Charter Acad., 531.**

Interlocutory appeal—prayer for judgment continued—motion for final judgment—Where defendant, a West Virginia resident, became ineligible for a concealed carry permit in West Virginia because a North Carolina trial court had previously entered a prayer for judgment continued (PJC) after finding defendant guilty of assault on a female, defendant could not appeal the denial of his motion for a final judgment on the assault charge. Defendant's appeal was interlocutory and, therefore, required dismissal because he failed to file a petition for a writ of certiorari. Moreover, because defendant had consented to the PJC by paying court costs (as a condition of the PJC), he had already waived his right of appeal in the case. **State v. Doss, 547.**

Preservation of issues—timeliness of objection—at time evidence is introduced—interruption by voir dire hearing—Defendant's objection was timely where he objected to certain testimony and was overruled in the presence of the jury (when the witness stated that she could answer the State's questions only if "made to do so"), the trial court then excused the jury and conducted a voir dire hearing on the issue and announced that defendant's objection would "continue to be overruled," and after voir dire the witness gave the challenged testimony without further objection by defendant. The issue was preserved for appellate review. **State v. Phillips, 623.**

Untimely submission of appellate brief—two days late—non-jurisdictional violation—no dismissal—Plaintiff's failure to request an extension of the time to file an appellate brief until two days after the deadline was a non-jurisdictional violation of the appellate rules (Rule 13(a)) and did not justify the extreme sanction of dismissal where the non-compliance did not impair appellate review or frustrate the adversarial process. **Stevens v. Heller, 654.**

ASSOCIATIONS

Condominium—breach of fiduciary duty—claim by non-shareholders—lack of standing—In a case involving potential mismanagement of condominium assessments, a tenant in one of the condominium units and its owners (plaintiffs) lacked standing to sue the association because they were not shareholders and were owed no fiduciary duty. The trial court properly granted a directed verdict for defendants (including the condo association and its sole officer) on plaintiffs' claims for breach of fiduciary duty and constructive fraud. **Ironman Med. Props., LLC v. Chodri, 502.**

Condominium—breach of fiduciary duty—suit by shareholder—standing—In a case involving potential mismanagement of condominium assessments, the owners of individual units of a condominium association had standing to bring claims for breach of fiduciary duty against the condominium association and its sole officer, despite the common rule that a shareholder cannot sue for injuries to a corporation, because the association owed a statutorily-imposed fiduciary duty to the unit owners pursuant to N.C.G.S. § 47C-3-103(a). **Ironman Med. Props., LLC v. Chodri, 502.**

ATTORNEY FEES

Condominium assessments—N.C.G.S. § 47C-3-116—mandatory award—denial reversed—In a case involving alleged financial mismanagement of a condominium

ATTORNEY FEES—Continued

association, the trial court erred by denying a motion for costs and attorney fees filed by defendant condo association, because N.C.G.S. § 47C-3-116(e) and (g) required the award of attorney fees if the action involved enforcing assessments levied on unit owners. On remand, the trial court was directed to determine whether the condo association was the prevailing party and whether the action related to the collection of assessments and if so, to award reasonable attorney fees. **Ironman Med. Props., LLC v. Chodri, 502.**

ATTORNEYS

Motion to withdraw—after case settled—ongoing obligations—conditions of withdrawal—lack of basis—In a post-divorce action concerning the breach of a property settlement agreement, the trial court erred by denying an attorney's motion to withdraw after the parties settled their claims by consent order. Although there were no indications that withdrawal would prejudice the client, delay ongoing proceedings, or disrupt the orderly administration of justice, the trial court not only denied the motion but also impermissibly set forth conditions which needed to be met before the request to withdraw could be reconsidered—based on the opposing party's argument that the unrepresented person would be difficult to reach since he frequently moved between various out-of-state locations—all of which were premised on future noncompliance with the consent order but none of which were required to carry out the obligations contained in the consent order. On remand, the trial court was directed to allow the motion, but it could still consider whether to hold further proceedings or to enter additional orders to address noncompliance concerns. **Wicker v. Wicker, 664.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to advise—immigration consequences of guilty plea—prejudice—N.C.G.S. § 15A-1022(a)—Where defendant, an immigrant, pleaded guilty to possession of a controlled substance and possession with intent to sell heroin, which presumptively subjected him to deportation under a federal statute, his lawyer's advice that he "may" be deported if he pleaded guilty constituted ineffective assistance of counsel. Nevertheless, the case was remanded to determine if defendant was prejudiced, because it was unclear whether the trial court concluded he was already deportable on other grounds (or that the court had all the facts before it to make that conclusion). Additionally, the Court of Appeals emphasized that, although defendant asserted U.S. citizenship at trial, N.C.G.S. § 15A-1022(a) still required the trial court to warn defendant of any deportation risk before accepting his guilty plea. **State v. Marzouq, 616.**

Right to counsel—forfeiture—standby counsel—request to replace or activate as primary counsel—In a prosecution for murder and other charges arising from a robbery, where the trial court denied a pro se defendant's requests to either activate standby counsel as his primary attorney or replace standby counsel, the court deprived defendant of his right to counsel by erroneously finding he had forfeited that right. The record did not show defendant trying to obstruct or delay the trial, and defendant repeatedly expressed a desire to waive his right to proceed pro se rather than waive his right to counsel. Moreover, the trial court had previously assured defendant that he could request to activate standby counsel as his primary attorney but did not warn him that such requests—when made close to trial—could result in him forfeiting his right to counsel. **State v. Harvin, 572.**

CONSTITUTIONAL LAW—Continued

State budget process—federal block grants—subject to legislative appropriation—In a case of first impression, the Court of Appeals rejected the governor's as-applied constitutional challenge to the legislature's appropriation of federal block grants, because block grants come within the "State treasury" as used in Art. V, Section 7 of the N.C. Constitution and neither state law nor the language of the block grants themselves precluded the block grants from being subject to the legislature's appropriations power. **Cooper v. Berger, 468.**

CONTEMPT

Criminal—willfulness—recording device in the courtroom—The trial court did not err by finding defendant in criminal contempt of court where defendant willfully disregarded prior warnings and the posted courtroom policy by using a recording device inside the courtroom. Among other things, defendant's willfulness was evident in a social media post stating that he was going to livestream the court proceedings and was "prepared to go to jail for this." **In re Eldridge, 491.**

Probationary sentence—reasonably related to rehabilitation—essay about respect for court system—The trial court's sentence for defendant's criminal contempt of court (for willfully violating the prohibition against the use of recording devices inside the courtroom) accorded with the law where the trial court suspended defendant's thirty-day sentence for twelve months upon several conditions, including that defendant write an essay on the subject of respect for the court system, receive approval from the trial judge, and post it on all his social media accounts without any negative comments—and not be permitted to attend any session of court in the judicial district until he had completed the other conditions. **In re Eldridge, 491.**

CRIMINAL LAW

Procedure—extension of session of court—The Court of Appeals rejected defendant's argument that the trial court violated the rule against judgments entered out of session by failing to extend the session of court in which his trial began. Pursuant to N.C.G.S. § 15-167, which allows a trial judge to extend a session of court if a felony trial is in progress on the last Friday of that session, the trial court properly announced a weekend recess in open court, and there was no objection from either party. The trial judge's reference to her subsequent commission in declining to make findings in support of the extension of session was not a refusal to extend the session. **State v. Evans, 552.**

DAMAGES AND REMEDIES

Punitive damages—no evidence of actual fraud—directed verdict—In a case involving potential mismanagement of condominium assessments, the trial court properly granted a directed verdict for defendants (including the condo association and its officer) on plaintiffs' claim for punitive damages where plaintiffs (a unit owner and its tenant) failed to present any evidence of actual fraud. **Ironman Med. Props., LLC v. Chodri, 502.**

EVIDENCE

Expert testimony—DNA evidence—prejudice analysis—In a statutory rape prosecution, expert testimony concerning DNA comparison admitted in violation of Evidence Rule 702(a) was more than mere corroboration of the State's other

evidence because it discredited evidence that corroborated defendant's theory of the case—that another person transferred defendant's DNA to the prosecuting witness. There was a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. **State v. Phillips, 623.**

Expert testimony—sufficient facts or data—product of reliable principles and methods—DNA evidence—inconclusive sample—In a statutory rape prosecution, the trial court violated Evidence Rule 702(a) by admitting the testimony of an expert witness, who performed the DNA analysis in the case, regarding the minor contributor's alleles on the victim's external genitalia swab. The testimony comparing an inconclusive unknown sample with a known sample was based on insufficient facts or data because the witness herself testified that the minor contributor's DNA profile was not of sufficient quality and quantity for comparison purposes. Further, the testimony could not reasonably be considered the product of reliable principles and methods because the witness repeatedly stated that the comparison the State asked her to perform would be against the policy of any lab in the country. **State v. Phillips, 623.**

Sexual abuse of a minor—no physical evidence—improper vouching—plain error analysis—The admission of testimony from a child protective services investigator vouching for the truthfulness of a minor's allegations of sexual abuse by defendant (that her office had "substantiated" defendant as the perpetrator and believed the victim's allegations to be true) amounted to plain error where there was no physical or other contemporaneous incriminating evidence and the victim's credibility was the central issue to be decided by the jury. **State v. Warden, 646.**

FIDUCIARY RELATIONSHIP

Condo association—breach of duty by officer—financial mismanagement—In a case involving potential mismanagement of condominium assessments, the trial court improperly entered a directed verdict for the condominium association on a claim for breach of fiduciary duty brought by one unit owner where the unit owner presented sufficient evidence to go to the jury on that claim, including that the association's officer failed to maintain a separate bank account, billed the owner for charges unrelated to the common areas of the condominium, and refused the owner full access to the association's financial records, and that the owner suffered monetary damages as a result. **Ironman Med. Props., LLC v. Chodri, 502.**

FRAUD

Constructive—intent to personally benefit—directed verdict—improper—In a case involving alleged misappropriation of condominium assessments and dues, the trial court erred by entering a directed verdict for defendant (officer of a condominium association) on plaintiff unit owner's claim for constructive fraud where evidence did not definitively resolve whether the officer intended to personally benefit from financial mismanagement or was merely negligent. **Ironman Med. Props., LLC v. Chodri, 502.**

HOMICIDE

Attempted first-degree murder—conspiracy to commit—cognizable offense —Considering an issue of first impression, the Court of Appeals held that conspiracy to commit attempted first-degree murder is a cognizable offense, and

the offense does not require the State to prove that the defendant intended to fail to commit the attempted crime itself. **State v. Lyons, 603**.

Attempted first-degree murder—sufficiency of the evidence—gun shot at law enforcement officer in vehicle—There was sufficient evidence to convict defendant of attempted first-degree murder where a law enforcement officer testified that defendant pointed a gun at her face from the window of his vehicle and that she heard a gunshot after she ducked behind the dashboard of her vehicle. **State v. Lyons, 603.**

IMMUNITY

Public official—N.C. False Claims Act—CEO of charter school—insufficient evidence—In a case brought by the State against a charter school and its CEO for violation of the N.C. False Claims Act, the trial court properly denied the CEO's motion to dismiss under Rule 12(b)(6) where there was insufficient information in the record at the pleadings stage to determine whether public official immunity protected the CEO from suit. **State of N.C. ex rel. Cooper v. Kinston Charter Acad., 531.**

Sovereign—N.C. False Claims Act—charter school—extension of state—In a case brought by the State against a charter school for violation of the N.C. False Claims Act (NCFCA), sovereign immunity protected the charter school from suit because it was a public school, and therefore an extension of the state, and there was no indication that the legislature intended to waive immunity for public schools for purposes of liability under the Act. Even assuming charter schools were not categorically entitled to immunity under the NCFCA, the charter school was not a "person" subject to liability under the Act where it operated as an arm of the state in furtherance of the state constitution's mandate to provide education. **State of N.C. ex rel. Cooper v. Kinston Charter Acad., 531.**

JUDGES

Recusal motions—judge as witness and trier of fact—contempt of court hearing—The trial judge did not err by refusing to recuse himself from defendant's criminal contempt of court hearing concerning defendant's usage of a recording device inside the trial judge's courtroom during a prior criminal matter. A reasonable person would not doubt the trial judge's objectivity or impartiality, considering the judge's thoughtful response to the recusal motion and the lack of any facts suggesting bias or impartiality. **In re Eldridge, 491.**

JURISDICTION

Trial court—authority to enter written order—after notice of appeal given—criminal case—In a prosecution for driving while impaired, the trial court had jurisdiction to enter a written order granting defendant's motion to suppress after the State had already given oral notice of appeal, because the order—rather than affecting the merits of the case—merely chronicled the findings and conclusions that the trial court had already announced from the bench. **State v. Fields, 561.**

JURY

Question from the jury—request for clarification by trial court—delivered by bailiff—prejudice analysis—Even assuming that the trial court erred by responding to a question from the jury by having the bailiff read to the jury the court's written request for clarification, defendant failed to demonstrate prejudice. The trial court's instructions to the bailiff were clear and unambiguous, there was no objection from defendant, and the message did not relate to defendant's guilt or innocence. **State v. Evans, 552.**

MEDICAL MALPRACTICE

Rule 9(j)—expert's failure to review all medical records—disputed—summary judgment—improper—In a medical malpractice action against a dentist and his dental practice (defendants), the trial court erred by granting summary judgment in favor of defendants after finding it was "undisputed" that plaintiff's expert failed to review all medical records before plaintiff filed her complaint, pursuant to Civil Procedure Rule 9(j). Because of the expert's equivocal deposition testimony (she stated that she "would have" reviewed the dentist's clinical notes, but she could not say under oath whether she had), the parties disputed whether the expert reviewed all medical records pursuant to Rule 9(j), and therefore a genuine issue of material fact remained. **Mangan v. Hunter, 516.**

MOTOR VEHICLES

Driving while impaired—probable cause to arrest—based on other officer's request—In a prosecution for driving while impaired, where a second officer arrested defendant at the first officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress on grounds that the second officer lacked probable cause—both independently and through the first officer—to arrest defendant. The court's unchallenged findings of fact showed that the first officer failed to follow the green pickup truck after identifying it and neither officer saw defendant drive, park, or get out of the truck (or any other vehicle). **State v. Fields, 561.**

Driving while impaired—probable cause to arrest—findings of fact—sufficiency of evidence—In a prosecution for driving while impaired, where one officer arrested defendant at another officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress where the contested findings of fact were supported by competent evidence and where the trial court properly determined the weight and credibility of any contradictory evidence. The findings noted a lack of evidence connecting the pickup truck to defendant (whom neither officer saw driving any vehicle) and thus supported the conclusion that the officers lacked probable cause to arrest defendant. **State v. Fields, 561.**

REAL PROPERTY

Failure to conduct reasonable diligence—no inspections—notice of potential problems—Plaintiff-buyers' failure to conduct any inspection during the due diligence period or prior to closing on real property—even after they received a written report from defendant-sellers in the form of invoices from an HVAC contractor,

signaling potential problems with the HVAC system—was a failure to conduct reasonable diligence under the circumstances, so defendants were entitled to summary judgment on plaintiffs' claims regarding the defective HVAC system. **Stevens v. Heller, 654.**

Seller a licensed real estate broker—duty of disclosure—same as ordinary seller—The Court of Appeals rejected the assertion that a licensed real estate broker selling her own property owed plaintiffs a heightened duty of disclosure compared to any ordinary seller of real property. **Stevens v. Heller, 654.**

SENTENCING

Appeal—request to invoke Appellate Rule 2—sentences within presumptive range and overlapping with aggravated range—The Court of Appeals declined to invoke Appellate Rule 2 to consider defendant's arguments concerning his criminal sentences where the sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range. **State v. Lyons, 603.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

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

ROY A. COOPER, III, individually and in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff
v.
PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, in his official capacity as CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION; and YOLANDA K. STITH, in her official capacity as VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION, Defendants

No. COA18-978

Filed 3 December 2019

Constitutional Law—state budget process—federal block grants—subject to legislative appropriation

In a case of first impression, the Court of Appeals rejected the governor's as-applied constitutional challenge to the legislature's appropriation of federal block grants, because block grants come within the "State treasury" as used in Art. V, Section 7 of the N.C. Constitution and neither state law nor the language of the block grants themselves precluded the block grants from being subject to the legislature's appropriations power.

Appeal by Plaintiff from an order and judgment entered 9 April 2018 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 October 2019.

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P., by Daniel F. E. Smith, Jim W. Phillips, Jr., and Eric M. David, for Plaintiff-Appellant.

NELSON MULLINS RILEY & SCARBOROUGH LLP, by D. Martin Warf and Noah H. Huffstetler, III, for Defendants-Appellees Philip E. Berger and Timothy K. Moore.

No briefs filed by Charlton L. Allen and Yolanda K. Stith.

INMAN, Judge.

Plaintiff-Appellant Roy A. Cooper, III, the Governor of North Carolina, appeals from an order and judgment dismissing his claim challenging the General Assembly's appropriation of federal block grant funds awarded to the State in a manner inconsistent with the Governor's

recommended budget. The Governor contends the federal funds are not within the General Assembly's constitutional authority to control, and that the General Assembly has interfered with the Governor's constitutional duty to faithfully execute the law.

After careful review, and with the benefit of ample and able briefing and argument from the parties, we hold that the block grant funds are, despite their source in the federal government, subject to appropriation by the General Assembly. We affirm the trial court.

FACTUAL AND PROCEDURAL HISTORY

The record below shows the following:

In 2017, the Governor filed suit against Defendants-Appellees Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives (the "Legislative Defendants"), challenging the constitutionality of two session laws and six statutes.[1] While those claims were pending, the Governor and the General Assembly continued in the execution of their duties, which included the preparation of the State budget for the 2017-2019 biennium. The Governor submitted a recommended budget proposing, among other things, specific allocations of various federal block grant funds awarded to North Carolina. Those federal block grants included the Community Development Block Grant ("CDBG"), the Maternal and Child Health Block Grant ("MCHBG"), and the Substance Abuse Prevention and Treatment Block Grant ("SABG," collectively with the CDBG and MCHBG as the "Block Grants").

The General Assembly disagreed with the Governor's proposed allocations of the Block Grants and passed the State budget as Session Law 2017-57 on 28 June 2017, which altered the allocations as follows:

[SPACE INTENTIONALLY LEFT BLANK]

1. Charlton Allen and Yolanda K. Stith were also named as defendants; however, because they have not entered an appearance in this appeal and the order and judgment at issue here does not involve any claims against them, we omit them from further discussion in this opinion.

Community Development Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Scattered Site Housing	$10,000,000	$0	($10,000,000)
Neighborhood Revitalization	$0	$10,000,000	$10,000,000
Economic Development	$13,737,500	$10,737,500	($3,000,000)
Infrastructure	$18,725,000	$21,725,000	$3,000,000

Substance Abuse Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Substance Abuse Services – Treatment for Children/ Adults	$29,322,717	$27,722,717	($1,600,000)
Competitive Block Grant	$0	$1,600,000	$1,600,000

Maternal and Child Health Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Women and Children's Health Services	$14,070,680	$11,802,435	($2,268,245)
Every Week Counts[2]	$0	$2,200,000	$2,200,000
Perinatal Strategic Plan Support Position	$0	$68,245	$68,245

2. Every Week Counts is "a demonstration project in two counties . . . of North Carolina to study (i) the extent to which a home-based prenatal care model can reduce the rate of preterm birth among multiparous women and (ii) whether multiparous women without a prior preterm birth, but with multiple risk factors for preterm birth in the current pregnancy, may benefit from 17 Alpha-Hydroxyprogesterone Caproate (17P) therapy." 2017 N.C. Sess. Laws 57 § 11E.12.(a).

See 2017 N.C. Sess. Laws 57 §§ 11A.14.(a), 11L.1.(a), 11L.1.(y)-(z), 11L.1.(aa)-(ee), 15.1.(a), 15.1.(d) (collectively, the "Block Grant Appropriations").

In response to passage of the State budget, the Governor amended his complaint to add a claim challenging the constitutionality of the Block Grant Appropriations. This new claim asserted that the "Block Grant Appropriations are unconstitutional because they prevent the Governor from performing his core function under [Article III, Section 5(4) of] the North Carolina Constitution to 'take care that the laws be faithfully executed[,]" and, "[t]o the extent the Block Grant Appropriations are part of the State budget, they also violate Article III, Section 5(3) of the North Carolina Constitution because they encroach on the Governor's duty to administer the budget."[3]

The Legislative Defendants filed a combined motion to dismiss and answer to the Governor's amended complaint. The Governor then filed a motion for partial summary judgment and permanent injunction declaring the Block Grant Appropriations unconstitutional "as applied in this case[.]" Two days later, the Legislative Defendants filed a motion for judgment on the pleadings as to that same claim. After briefing and argument, Judge Henry W. Hight, Jr., entered a combined order and judgment on 9 April 2018 resolving all motions in favor of the Legislative Defendants.

The trial court concluded that the federal block grant funds "are designated for the State of North Carolina and will be paid into the State Treasury." It also concluded that "Article V, Section 7 of the Constitution unambiguously states that no money can be drawn from the State Treasury without an appropriation[,]" and rejected the Governor's argument that the federal block grants constitute "custodial fund[s]" exempt from the constitutional and statutory budgetary and appropriations processes as without precedent under state law. The trial court ultimately concluded that: (1) the Governor failed to allege and forecast evidence "that the challenged portions of Session Law 2017-57 violate his duty to take care that the laws be faithfully executed or otherwise encroach on his duty to administer the budget;" and (2) that, therefore, the challenged provisions of Session Law 2017-57 are not unconstitutional.

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3. The Governor's amended complaint also included a claim challenging additional portions of Session Law 2017-57 related to the appropriation of settlement funds set aside for North Carolina as part of a federal lawsuit against Volkswagen. Although review of that claim was originally part of this appeal, we granted a motion, filed by the Governor, to dismiss that portion of the appeal. Our review is therefore limited to the constitutionality of the Block Grant Appropriations.

Judge Hight certified the order and judgment for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The Governor appeals.

ANALYSIS

I. Appellate Jurisdiction

In general, no right of immediate appeal from an interlocutory order exists. *Paradigm Consultants, Ltd. v. Builders Mutual Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (citations omitted). Because the order and judgment at issue in this case was final as to the Governor's challenge to the Block Grant Appropriations and certified by the trial court for immediate appeal pursuant to Rule 54(b), we possess jurisdiction to hear the Governor's appeal. *See, e.g., Estate of Tipton By & Through Tipton v. Delta Sigma Phi Fraternity, Inc.*, ___ N.C. App. ___, ___, 826 S.E.2d 226, 231-32 (2019) (holding a grant of partial summary judgment on less than all claims was subject to immediate appeal when the order contained a Rule 54(b) certification).

II. Standard of Review

A trial court's entry of judgment on the pleadings—or of summary judgment—is subject to *de novo* review on appeal. *See N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (acknowledging *de novo* review applies to entry of judgment on the pleadings); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("Our standard of review of an appeal from summary judgment is de novo[.]" (citation omitted)). "Judgment on the pleadings is properly entered only if 'all the material allegations of fact are admitted[,] . . . only questions of law remain,' and no question of fact is left for jury determination." *N.C. Concrete Finishers*, 202 N.C. App. at 336, 688 S.E.2d at 535 (quoting *Ragsdale v. Kennedy*,

286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)) (alteration in original). Summary judgment "is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and internal quotation marks omitted).

Our Supreme Court has recently explained the standard of review for constitutional questions:

> We review constitutional questions de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt. In other words, the constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

State ex rel. McCrory v. Berger, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citations and quotations omitted).

III. Historical and Legislative Context

The Governor's appeal presents an as-applied constitutional challenge to the Block Grant Appropriations identified in his complaint, but it turns on a broader constitutional issue of first impression: whether the North Carolina Constitution permits the General Assembly to appropriate federal funds designated to the State through federal block grants. This Court has not previously been presented with this issue. Our Supreme Court was presented with—and declined to answer—this exact query in *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 779, 295 S.E.2d 589, 594-95 (1982). There, the Supreme Court demurred because "[t]he briefs and materials submitted to us contain very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress." *Id.*

We are not so bereft of congressional context here, however, and, as pointed out by both parties, other states' supreme courts have squarely resolved the issue by considering their respective constitutions and looking to the texts, nature, purposes, and contours of the block grants at issue and the federal grants-in-aid regime generally. *Compare Colorado General Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (surveying the federal block grant landscape and examining the terms and conditions

of eight specific federal block grants, including the Block Grants at issue here, before holding that each was not subject to appropriation by the state's legislature under Colorado's constitution), *with Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978) (holding federal block grant funds were subject to appropriation by Pennsylvania's legislature under the state's constitution in part because Congress's authorizing legislation did not suggest the contrary).

A. Federal Grants-In-Aid

For the first half of the twentieth century, the federal government operated a relatively small grants-in-aid system as compared to current standards. *See Shapp*, 480 Pa. at 466, 391 A.2d at 603 (noting that federal aid to states grew from $2.9 billion in 1954 to $60 billion in 1976); Robert Jay Dilger & Michael H. Cecire, Cong. Research Serv., R40638, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* 39 (2019) (hereinafter "*Federal Grants*") (observing that President Donald Trump's budget request for fiscal year 2020 "estimates that total outlays for grants to state and local governments will increase from $696.5 billion in FY2018 to an anticipated $749.5 billion in FY2019 and $750.7 billion in FY2020").[4] President Lyndon Johnson's "Great Society" platform enacted during the 1960s expanded federal funding for states; the number of federal grants-in-aid tripled between 1960 and 1968, and "[m]ost . . . were designed purposively by Congress to encourage state and local governments to move into new policy areas, or to expand efforts in areas identified by Congress as national priorities." *Federal Grants* at 21-22. The grants were generally structured to provide "an increased emphasis on narrowly focused project, categorical grants to ensure that state and local governments were addressing national needs." *Id.* at 22. These categorical grants are the most restrictive form of federal grants-in-aid:

4. The Congressional Research Service's "primary function is to respond to congressional research requests[,]" *Bowsher v. Synar*, 478 U.S. 714, 758, 92 L. Ed. 2d 583, 616, n.25 (1986) (Stevens, J., concurring), and the Service is tasked with carrying out its statutory duties "without partisan bias[.]" 2 U.S.C. § 166(d) (2018). Other courts frequently cite to the Service's reports to provide historical or other context when addressing legal issues. *See, e.g.*, *United States v. Valdovinos*, 760 F.3d 322, 331 (4th Cir. 2014) (citing to Congressional Research Service reports for "some necessary and useful background" on incarceration); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103, 181 L. Ed. 2d 586, 596 (2012) (citing a Congressional Research Service report for the proposition that the use of arbitration clauses in consumer contracts rose during the early 1990s). Both parties in this case cite to a Congressional Research Service report in their appellate briefs to provide general background information on federal block grants.

> [P]roject categorical grants typically impose the most restraint on recipients . . . . Federal administrators have a high degree of control over who receives project categorical grants (recipients must apply to the appropriate federal agency for funding and compete against other potential recipients who also meet the program's specified eligibility criteria); recipients have relative little discretion concerning aided activities (funds must be used for narrowly specified purposes); and there is a relatively high degree of federal administrative conditions attached to the grant, typically involving the imposition of federal standards for planning, project selection, fiscal management, administrative organization, and performance.

Robert Jay Dilger & Eugene Boyd, Cong. Research Serv., R40486, *Block Grants: Perspectives and Controversies* 2 (2014) (hereinafter "*Block Grants*").

Despite Congress's preference for categorical grants and the federal control they offered during the 1960s, that decade also saw the creation of the first two federal block grants. *Federal Grants* at 22. Block grants differ from categorical grants in several key ways:

> Block grants are at the midpoint in the continuum of recipient discretion. Federal administrators have a low degree of discretion over who receives block grants (after setting aside funding for administration and other specified activities, the remaining funds are typically allocated automatically to recipients by a formula or formulas specified in legislation); recipients have some discretion concerning aided activities (typically, funds can be used for a specified range of activities within a single functional area); and there is a moderate degree of federal administrative conditions attached to the grant, typically involving more than periodic reporting criteria and the application of standard government accounting procedures, but with fewer conditions attached to the grant than project categorical grants.

Block Grants at 3.

As the expansion of the federal grants-in-aid system continued through the 1960s—largely through continued creation of restrictive categorical grants—there "came 'a rising chorus of complaints from state and local government officials' concerning the inflexibility of fiscal and administrative requirements attached to the grants." *Federal Grants*

at 23 (quoting Advisory Comm'n on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52, 29 (1978), *available at* https://library.unt.edu/gpo/acir/Reports/policy/a-52.pdf);[5] *see also Lamm*, 738 P.2d at 1158-59 (noting that the Commission "suggested that federal assistance to the states be restructured to allow revenue sharing and block grants in addition to categorical grants."). State governments found willing allies in the presidential administrations of the 1970s, when Presidents Richard Nixon and Gerald Ford advocated for more block grants and revenue sharing programs because "block grants and general revenue sharing provided state and local governments additional flexibility in project selection and promoted program efficiency by reducing administrative costs." *Federal Grants* at 23. By 1976, the Commission "determined that state legislative control over federal funds does not contravene federal policy and is, in fact, the desirable mode of administration." *Shapp*, 480 Pa. at 470, 391 A.2d at 605.

President Ronald Reagan continued the push started by his Republican predecessors to "increase the emphasis on block grants to provide state and local government officials greater flexibility in determining how the program's funds are spent," and, in 1981, Congress significantly altered the federal grants-in-aid system by consolidating 77 categorical grants and two block grants into nine new block grants as part of the Omnibus Budget Reconciliation Act of 1981 ("OBRA"). *Federal Grants* at 28-29.[6] In enacting OBRA, "Congress did not include . . . the comptroller general's recommendation that would have required state legislative appropriation of the OBRA block grants[,]" and instead was simply "silent regarding the authority of state legislatures to appropriate federal block grant funds[.]" *Lamm*, 738 P.2d at 1160.

Despite OBRA's shift from categorical grants towards block grants, Congress passed only one of the 26 additional block grants President Reagan proposed over the remainder of his two terms, *Federal Grants* at 30, and "[t]he emphasis on categorical grants . . . continued" through

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5. The Advisory Commission on Intergovernmental Relations ("the Commission") was created by Congress as a "permanent bipartisan commission" whose purposes included "giv[ing] critical attention to the conditions and controls involved in the administration of Federal grant programs" and "recommend[ing], within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government." Act of Sept. 24, 1959, Pub. L. No. 86-380 §§ 1-2, 73 Stat. 703, 703-04. The Commission was terminated by an act of Congress in 1995. Independent Agencies Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 480, 480 (1995).

6. The Block Grants at issue in this case were among the nine new block grants created in 1981.

the 1990s. *Id.* at 33. Block grants have nonetheless become more common in the past two decades. *Compare id.* (counting four block grants in existence as of 1980), *with Block Grants* at 5 (counting 23 federal block grants as of 2014). As noted *supra*, the federal grants-in-aid system now totals in excess of $740 billion; in North Carolina, federal grants-in-aid comprised 28.4 percent of the State's spending in fiscal year 2017. *Federal Aid to State and Local Governments*, Center on Budget and Policy Priorities (Apr. 19, 2018), https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments.

B. The Block Grants

Each of the Block Grants at issue in this appeal fits within the general definition and structure of block grants as outlined *supra*.

The Community Development Block Grant awards federal funds to state government applicants who submit a consolidated plan for each program year, including an action plan detailing how CDBG funds will be allocated. 24 C.F.R. §§ 91.10, 91.300, 91.320, & 570.485(a) (2019). The consolidated plan must identify "[t]he lead agency or entity responsible for overseeing the development of the plan." 24 C.F.R. § 91.300(b)(1) (2019). In North Carolina, that agency is the Department of Commerce ("N.C. DOC"). *See* N.C. Dep't of Commerce et al., *North Carolina 2016-2020 Consolidated Plan and 2016 Annual Action Plan* 3 (2016), *available at* https://files.nc.gov/nccommerce/documents/Rural-Development-Division/CDBC/Con-PlansCDBG/20162020-ConPlan.pdf (designating N.C. DOC as the "CDBG Administrator"). CDBG funds must be spent to benefit low- and moderate-income persons, to prevent or eliminate slums or blight, or to meet urgent needs threatening community health or welfare. 42 U.S.C. § 5304(b)(3) (2018). Congress has enumerated 26 community development activities that can be funded by this block grant. 42 U.S.C. § 5305(a) (2018). At least 70 percent of grant expenditures must benefit low- or moderate-income persons. 24 C.F.R. § 570.484 (2019). Congress prohibits States from using the funds for certain expenditures. *See, e.g.*, 42 U.S.C. § 5305(h) (2018) (prohibiting the use of CDBG funds to assist in relocations of certain industrial facilities).[7]

7. A more detailed summary of the Community Development Block Grant and its requirements is available from the U.S. Department of Housing and Urban Development ("HUD"), which administers the CDBG at the federal level. *See* U.S. Dep't of Hous. and Urban Dev., Office of Block Grant Assistance, *Basically CDBG for States* (July 2014), *available at* https://www.hudexchange.info/resource/269/basically-cdbg-for-states/. HUD's guidance acknowledges that states are responsible for "[s]etting priorities and deciding what activities to fund[,]" and, "[u]nder the state CDBG program, states are provided maximum feasible deference." *Id.* at 1-2.

The Maternal Child Health Block Grant operates similarly. State government applicants request funds each year. 42 U.S.C. § 705 (2018). By statute, "[t]he State health agency of each State shall be responsible for the administration (or supervision of the administration) of programs carried out with [MCHBG] allotments." 42 U.S.C. § 709(b) (2018). The North Carolina Department of Health and Human Services ("N.C. DHHS") administers these programs in North Carolina. The federal government awards the funds "for the purpose of enabling each State . . . to provide and to assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services." 42 U.S.C. § 701(a)(1)(A) (2018). Each state receiving funds must allocate at least 30 percent toward preventive and primary care for children, at least 30 percent toward services for children with special needs, and no more than ten percent toward administration of the grant; the remaining funds may be spent however the state decides, consistent with the governing statutes and regulations. 42 U.S.C. §§ 701(a)(1)(A), 704(a), 704(d) & 705(a)(3) (2018). MCHBG funds may not be spent in particular ways, such as to purchase land. 42 U.S.C. § 704(b) (2018).[8]

Congress also requires states to apply annually for the Substance Abuse Block Grants. 42 U.S.C. § 300X-32(b)(1)(C); 45 C.F.R. § 96.122(g)(2) (2019). Applicants must "identif[y] the single State agency responsible for the administration of the program[,]" 42 U.S.C. 300x-32(b)(1)(A)(i) (2018), which, for North Carolina, is currently N.C. DHHS. Recipients expend SABG funds within the framework of their plans according to their discretion, with a minimum of 20 percent spent on substance abuse prevention. 42 U.S.C. §§ 300x-21(b) & 300x-22(a)(1) (2018).[9] As a

8. The U.S. Department of Health and Human Services ("U.S. DHHS") administers both the Maternal Child Health Block Grant and the Substance Abuse Block Grant. A detailed breakdown of the application, spending, and reporting requirements is available from the agency. U.S. Dep't of Health and Human Servs., Health Res. and Servs. Admin., Maternal and Child Health Bureau, Div. of State and Cmty. Health, OMB No. 0915-0172 *Title V Maternal and Child Health Services Block Grant to States Program: Guidance and Forms for the Title V Application/Annual Report* (expires Dec. 31, 2020), *available at* https://grants6.tvisdata.hrsa.gov/uploadedfiles/Documents/blockgrantguidance.pdf.

9. A fact sheet authored by U.S. DHHS discloses that outside of the 20 percent allocated toward primary prevention, five percent of Substance Abuse Block Grant funds are set aside for federal data collection purposes, an additional five percent must be spent by certain states on HIV treatment, and "[t]he remainder . . . can be expended by the States . . . for substance abuse prevention, early intervention, treatment and recovery support services at grantees' discretion." U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Services Admin., *Fact Sheet: Substance Abuse Prevention and Treatment Block Grant* 2 (2013), *available at* https://www.samhsa.gov/sites/default/files/sabg_fact_sheet_rev.pdf.

prerequisite to receiving these funds, each state must enact and enforce laws that prohibit the sale or distribution of tobacco products to minors. 42 U.S.C. § 300x-26(a)(1) (2018). No more than five percent of the grant may be used to administer the block grant, 45 C.F.R. § 96.135(b)(1) (2019), and states are prohibited from using SABG funds on six specific activities. 45 C.F.R. § 96.135(a) (2019).

In sum, while the Block Grants all impose certain restrictions and criteria for the application, acceptance, and expenditure of their respective grant funds, each affords significant discretion to the recipient states on how that money is ultimately spent. *See* Eugene Boyd, Cong. Research Serv., R43520, *Community Development Block Grants and Related Programs: A Primer* 1 (2014) ("Although . . . states are given great discretion and flexibility in the selection of activities to be funded, the [CDBG] program's governing statute requires that all activities meet one of three national objectives."); Victoria L. Elliott, Cong. Research Serv., R44929, *Maternal and Child Health Services Block Grant: Background and Funding* 13 (2017) ("Beyond . . . broad requirements, states determine the actual services provided under the [MCHBG] block grant."); Erin Bagalman, Cong. Research Serv., R44510, *Substance Abuse and Mental Health Services Administration (SAMHSA): Agency Overview 2* (2016) ("States have flexibility in the use of SABG funds within the framework of the state plan and federal requirements.").

According to affidavits in the record, the State of North Carolina receives and expends federal grant funds through a process that is roughly uniform across each of the Block Grants. Funds are held by the federal government up until N.C. DOC or N.C. DHHS submits a discrete request tied to a given expenditure; in response, the federal government remits the requested funds into an account in the name of the North Carolina Department of State Treasurer (the "Treasurer"). The funds are assigned a budget code tied to the State agency on receipt by the Treasurer, and the agency submits a requisition to the Office of the State Controller to transfer the coded funds to a disbursing account tied to the agency—also held and maintained by the Treasurer. Those funds are then disbursed through a paper warrant or electronic transfer, at which time they enter the hands of a sub-grantee, a third party, another division within the agency, or are used to satisfy an administrative expense of the agency itself.

C. State Expenditures Under The North Carolina Constitution

The North Carolina Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations

made by law." N.C. Const. art. V, § 7(1). The General Assembly's primacy over State expenditures embodied in this language dates to the genesis of the State. *See* John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 154 (2d ed. 2013) (noting that "[t]he power of the purse is the exclusive prerogative of the General Assembly[,]" and "Subsection 1 dates from the 1776 constitution"). Legislative—rather than executive—authority over the State's expenditure of funds was intrinsic to the State's founding, as "Colonial Americans were acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives." *Id.* The drafters of the State's first constitution expressly made the Governor's authority over public funds subordinate to the General Assembly's authority, while employing language that recognized the appropriations power as a means of oversight. *See* N.C. Const. of 1776, § XIX ("That the Governor, for the Time being, shall have Power to draw for, and apply, *such Sums of Money as shall be voted by the General Assembly* for the Contingencies of Government, *and be accountable to them for the same.*" (emphasis added)).

The language now found in Article V, Subsection 7(1) was first adopted in 1868. N.C. Const. of 1868 art. XIV § 3. It remained unchanged until 1971, when the provision was reorganized and restated in Article V without further alteration. N.C. Const. of 1971 art. V § 7(1). Although the verbiage of the provision has evolved, its paramount importance has not: "It is the power of the purse, to which the power of the sword is a mere sequence." *Wilmington & W.R. Co. v. Alsbrook*, 110 N.C. 137, 145, 14 S.E. 652 (1892); *see also White v. Hill*, 125 N.C. 194, 200-01, 34 S.E. 432, 433-34 (1899) (Clark, J., dissenting) (reviewing Article XIV, Section 3 of the 1868 Constitution and observing that "[t]he legislative power is supreme over the public purse. . . . The power of the purse is essentially the supreme power, and by it alone in England and in this country the power of the sword has been subordinated to the civil power."). Nor has the power been diverted from the legislature's exclusive control: "Article XIV, section 3, [now Article V, section 7], of the North Carolina Constitution . . . states in language no man can misunderstand that the legislative power is supreme over the public purse." *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967).

Both the General Assembly and the Governor exercise certain constitutional duties in crafting the State's budget. Our Constitution provides that "[t]he Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and

proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor." N.C. Const. art. III § 5(3). The General Assembly has, since at least 1981, appropriated block grant funds through the budget process. *See*, *e.g.*, 1981 N.C. Sess. Laws ch. 1282 § 6 (appropriating $193,701,970 of federal block grant funds, including the Community Development Block Grant, Maternal Child Health Block Grant, and Substance Abuse Block Grant for the 1982-83 fiscal year).

IV. The Block Grant Appropriations Are Constitutional

The Governor asserts that the Block Grant funds are not within "the State treasury" as used in Article V, Section 7, and therefore are not subject to appropriation by the General Assembly. To support that claim, the Governor posits that: (1) under North Carolina law, the only funds in "the State treasury" for constitutional purposes are those raised by the State through taxation, fines, or penalties; (2) Congress did not intend the General Assembly to have spending power over the Block Grant funds; and (3) the funds are therefore "custodial funds" held by the State to accomplish federal goals, and the Governor—not the General Assembly—has exclusive authority to direct the funds outside the constitutional appropriation and budgetary processes to further those aims. We address each point in turn.

A. The Block Grant Funds Are Within The State Treasury

Our Supreme Court defined the term "State treasury" in *Gardner v. Board of Trustees of N.C. Local Governmental Employees' Retirement System*, 226 N.C. 465, 38 S.E.2d 314 (1946), and both parties seize on this decision to support or rebut any conclusion that the Block Grant funds are outside the ambit of Article V, Section 7. In *Gardner*, a Charlotte police officer was a member of the Law Enforcement Officers' Benefit and Retirement Fund, which was established by statute, financed by a two dollar fee assessed against convicted criminal defendants, and held in a special fund with the State Treasurer. 225 N.C. at 466-67, 38 S.E.2d at 315-16. The officer sought membership in a second state retirement fund, the Local Governmental Employees' Retirement System; however, that system's enabling statute provided that "[p]ersons who are . . . members of any existing retirement system and who are . . . entitled to benefits . . . at the expense of funds drawn from the treasury of the State of North Carolina . . . shall not be members." *Id.* at 466, 38 S.E.2d at 315. The Local system denied the officer membership, and he filed suit, ultimately arguing before the Supreme Court that the prohibition did not apply because benefits under the Law Enforcement fund were not paid

out of the treasury's general funds derived from general taxation. *Id.* at 466-67, 38 S.E.2d at 315-16.

The Supreme Court held that the Law Enforcement fund's benefits were drawn from the State treasury. *Id.* at 467-68, 38 S.E.2d at 316. The fact that the monies were raised outside of the general taxation powers, set aside for a special purpose, and kept in a separate account was not "controlling, since it is the duty of the State Treasurer 'to receive all monies which shall from time to time be paid into the treasury of this state.' " *Id.* at 468, 38 S.E.2d at 316 (quoting N.C. Gen. Stat. § 147-68 (1945)). The Supreme Court continued:

> And once in the treasury, "No money shall be drawn from the treasury but in consequence of appropriations made by law." Moneys paid into the hands of the State Treasurer by virtue of a State Law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority. A treasurer is one in charge of a treasury, and a treasury is a place where public funds are deposited, kept and disbursed.

Id. (quoting N.C. Const. of 1868, art. XIV § 3) (citing Webster's Dictionary).[10] Thus, the State treasury is a depository of "public funds," and "[m]oneys paid into the hands of the State Treasurer by virtue of State Law become public funds[.]" *Id.*

We are not persuaded that *Gardner* compels us to interpret or treat the Block Grant funds as being outside "the State treasury" as used in Article V, Subsection 7(1). The Supreme Court's definition of "public funds" in *Gardner* did not, by its plain language, exclude sources of money other than State-levied taxes, fines, or penalties, and, when read in context, *expanded* the sources of monies that constitute "public funds" in the "State treasury." Also, the federal Block Grant funds at issue here do, strictly speaking, enter "into the hands of the State Treasurer by virtue of a State Law." *Id.* Neither party disputes that the Block Grant funds are received and deposited in an account maintained by the Treasurer, a practice consistent with our general statutes:

> All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which

10. It is unclear from the opinion which edition of Webster's Dictionary the Supreme Court cited; however, Merriam-Webster currently provides a substantively identical definition for "treasury." *Treasury*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/treasury (last visited Nov. 11, 2019).

> collects revenue for the State *in any form whatsoever*, and every institution, agency, officer, employee, or representative of the State or any agency, department, division or commission thereof, except officers and the clerks of the Supreme Court and Court of Appeals, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer.

N.C. Gen. Stat. § 147-77 (2019) (emphasis added).

Finally, *Gardner* did not involve federal funds. There is no indication that the Supreme Court in 1948 considered federal block grant funds in its analysis, particularly given the facts before it. As the Supreme Court of Pennsylvania observed in rejecting a substantially identical argument by its governor based on a Pennsylvania decision from 1941:

> The Court in 1941 could not anticipate that another source of income would become available for wide-spread administration of programs on the State level, and that within three decades, federal funds would constitute a large portion of the budgets of most states in the union.
>
> . . . .
>
> In an age when state funds were provided almost entirely through state taxation, the [court in 1941] had no reason to foresee the vast impact that federal funding would eventually have on state fiscal matters. To interpret its choice of words as excluding such federal funds from state monies available for appropriation is as illogical as to exclude regulation of air traffic from the Congress' constitutional Commerce Clause powers because [it was] not mentioned or contemplated by the framers.

Shapp, 480 Pa. at 466-67, 391 A.2d at 603. *Gardner* is likewise distinguishable.

In short, *Gardner* is not controlling to our decision here, and, to the extent that it is pertinent, its expansive reading of "State treasury" and "public funds" such that non-tax dollars deposited in a special fund for a specific purpose are nonetheless subject to appropriation suggests that the Block Grant funds are within the "State treasury" for purposes of Article V, Subsection 7(1).

The Governor also cites our Supreme Court's decision in *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898), describing the State Treasurer as "the officer in whose hands the legislative department has placed the funds it has raised and appropriated." 122 N.C. at 256, 29 S.E. at 366. *Garner*, however, dealt only with the question of whether the judiciary, by writ of mandamus, could compel the State Treasurer to pay a judgment entered against the State without legislative appropriation. *Id.* The case did not involve federal funds or a dispute about whether the Treasurer had constitutional authority over or possession of funds. *Id.*

Garner is therefore distinguishable from the facts before us for the same reasons as *Gardner*, and the language relied upon by the Governor is non-binding *dicta*. *See, e.g.*, *Tr. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).

B. Legislative Appropriation Is Not Prohibited by Federal Law

We also disagree with the Governor's contention that the Block Grants' enabling statutes and governing federal regulations demonstrate Congress's intent to give North Carolina's executive branch unfettered discretion over the allocation of the Block Grant funds to the exclusion of the appropriation power of the General Assembly. Though the Governor cites several decisions from other jurisdictions holding, under their respective state constitutions, that federal grant-in-aid funds are not subject to appropriation by their state legislatures, those decisions are not premised on the legal conclusion that Congress intended state legislatures to have no say over the allocation and expenditure of block grant funds. *See State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 985-86 (N.M. 1974) (holding New Mexico's legislature could not appropriate federal funds designated to the state's public institutions of higher learning because the state's constitution vested authority over those funds with a separate Board of Regents); *Opinion of the Justices to the Senate*, 375 Mass. 851 (1978) (following long-established state precedents and caselaw to opine that federal funds carrying federal statutory conditions are held in trust outside the commonwealth's treasury as established in its constitution and are therefore not subject to appropriation); *In re Okla. ex rel. DOT*, 646 P.2d 605, 609-10 (Okla. 1982) (holding federal grants-in-aid are not subject to appropriation under state law without addressing Congressional intent as to state legislative appropriation).

The only out-of-state decision cited by the Governor that addresses whether Congress intended to prohibit state legislatures from

appropriating federal block grant funds is contrary to and undercuts his argument. The Colorado Supreme Court's decision in *Lamm* reviewed the federal grants-in-aid system and several specific block grants, including the CDBG, MCHBG, and SABG, and concluded that "Congress has left the issue of state legislative appropriation of federal block grants for each state to determine." *Lamm*, 738 P.2d at 1169.

Other state courts examining Congress's intent for allocation of federal block grant funds have reached the same conclusion. *See, e.g.*, *Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("Appellants have cited nothing which dictates that the federal laws pursuant to which these programs are funded requires that the Pennsylvania legislature is to be by-passed."); *Anderson v. Regan*, 53 N.Y.2d 356, 368 n.12 (1981) (observing, in a decision holding that federal grants-in-aid are subject to state legislative appropriation, that "the mere application of the appropriation requirement to Federal funds received by the State is not inherently at odds with any of the existing Federal mandates"). We agree with the conclusion reached by the *Lamm* court and others cited, particularly in light of the apparent intent of the block grant structure. *See supra* Part III.A.[11]

Counsel for the Governor conceded at oral argument that all of the purposes for which the General Assembly appropriated the Block Grants fall within the terms of the federal statutes and regulations governing them, and did not identify any federal law expressly prohibiting state legislative appropriation.

We are also unpersuaded by the Governor's argument that the Block Grants' enabling statutes and regulations award the grants directly to the Governor or to a specific state agency. Each of the pertinent statutes directs the grants to be awarded to the "State," 42 U.S.C. §§ 300x-21, 702(c), & 5303 (2018), and the definition of "State" in each statute does

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11. Several legal scholars agree with this analysis of the federal block grant scheme. *See, e.g.*, Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1260-61 (1999) ("[T]hese [block grant] laws are usually silent about the role of state legislatures. But such silence should not be read to exclude state legislatures' role in appropriating federal revenue. . . . [N]othing in the legislative history suggests a conscious congressional decision to exclude legislative involvement. . . . [T]here seems little reason to exclude all legislative appropriation of federal grants as a matter of federal law."); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretations in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1752 n.97 (2003) (observing that the U.S. General Accounting Office—now the U.S. Government Accountability Office—recommended Congress increase state legislative involvement in federal grants-in-aid in 1980, and that "Congress seems to have followed this recommendation").

not compel the conclusion that the Executive Branch is the necessary and lone beneficiary or arbiter of the funds rather than the administrator on behalf of the State as a whole. *See* 42 U.S.C. § 5302(a)(2) (2018) (defining "State" under the CDBG as "any State of the United States, *or* any instrumentality *thereof* approved by the Governor" (emphasis added)); 42 U.S.C. § 701(c)(5) (2018) (defining "State" for purposes of the MCHBG as "each of the 50 States and the District of Columbia"); 42 U.S.C. § 300x-64(b)(2) (2018) (defining "State" as used in the statute creating the SABG as "each of the several States").[12] The fact that specific State agencies are tasked with administering each Block Grant does not render those agencies the sole beneficiaries or allocators to the exclusion of the rest of the State. *Cf. Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("The funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so only *on behalf of* the Commonwealth." (emphasis in original)).[13]

The Governor also points out that other federal block grant statutes expressly authorize state legislative appropriation, and contends that the absence of such authorization in the CDBG, MCHBG, and SABG statutes reflects an intent to prohibit the General Assembly from appropriating those funds. *See*, *e.g.*, 29 U.S.C. § 3251(a) (2018) (providing that funds awarded to states under the Workforce Innovation and Opportunity Grants program "shall be subject to appropriation by the State legislature, consistent with the terms and conditions required under this subchapter"). We construe that language to permit legislatures in some states—such as Colorado and Massachusetts—to appropriate those block grant funds where they would otherwise be barred from doing so under state law. The absence of this language from the Block Grants at

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12. Even if the grants were awarded directly to the Governor or an Executive Branch agency, that would not necessarily indicate a choice by Congress to preclude the General Assembly from appropriating the funds consistent with North Carolina law. *See* Hills, *supra* note 11, at 1260-61 (noting that even where federal grants are "bestow[ed] . . . on state executive agencies or governors[,]" legislative history does not support excluding state legislatures from appropriating the funds); Gardner, *supra* note 11, at 1752-53 (acknowledging that while Congress may elect to give federal funds "directly to specific state executive agencies[,]" such an action does not prohibit state legislative appropriation).

13. We note that just as nothing in the North Carolina Constitution appears to enable the General Assembly to "receive" funds outside the State treasury and to the exclusion of the other branches, *In re Separation of Powers*, 305 N.C. at 778, 295 S.E.2d at 596, nothing in the Constitution appears to give the Executive Branch that authority either.

issue here does not alter our conclusion that Congress left the issue of state legislative appropriation power to the individual states.[14]

C. The Block Grants Are Not Otherwise "Custodial Funds" Under State Law

The Governor also contends that the Block Grants are "custodial funds" held in trust and not subject to appropriation, but—aside from *Gardner* and *Garner* addressed *supra*—cites no North Carolina authority suggesting the existence of a *constitutional* concept of "custodial funds" that are in the hands of the state treasurer yet entirely beyond the reach of the General Assembly.[15] The Governor does, however, point out that the State Budget Act, N.C. Gen. Stat. §§ 143C-1-1 *et seq.* (2019), defines "State funds" as "[a]ny moneys including federal funds deposited in the State treasury except moneys deposited in a[n] . . . agency fund[,]" N.C. Gen. Stat. § 143C-1-1(d)(25), and defines "agency funds" as "[a]ccounts for resources held by the reporting government in a purely *custodial* capacity." N.C. Gen. Stat. § 143C-1-3(a)(8) (emphasis added). The Legislative Defendants concede that agency funds are not appropriated under the ordinary budget process called for by the Budget Act. The Governor argues that the Budget Act's exclusion of agency funds constitutes the General Assembly's "recognition" that there are funds held by the State that are not subject to legislative appropriation.

We are not convinced. The fact that the legislature may elect to treat some funds as custodial in nature as a *statutory* matter does not mean the funds are "custodial funds" and not subject to appropriation as a *constitutional* matter. *Cf. Gardner*, 226 N.C. at 467-68, 38 S.E.2d at 316

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14. The Governor's argument that the act of legislative appropriation itself violates congressional intent raises the syllogism that the Block Grant Appropriations are preempted under the Supremacy Clause of the United States Constitution: if federal law governing the Block Grants prohibits the General Assembly from appropriating the funds, then any state budget act appropriating them is preempted by that federal law. Given that we have discerned no Congressional intent to prohibit state legislative appropriation and there appears to be no actual conflict with the Block Grants' enabling statutes—either as to the act of appropriation or the purposes for which they were appropriated—no preemption has occurred. *See, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 369, 562 S.E.2d 377, 388 (2002) (noting that North Carolina law is preempted under the Supremacy Clause where Congress expressly or impliedly intends to preempt state law or where federal law actually conflicts with state law).

15. As explained *supra*, the out-of-state decisions the Governor cites in support of the "custodial fund" concept were decided against the backdrop of their respective state constitutions and related jurisprudence. *See, e.g.*, *Lamm*, 738 P.2d at 1169-72 (relying on a body of state caselaw dating as far back as 1922 for the concept of "custodial funds" under the Colorado constitution).

(holding that non-tax monies held by the state treasurer in a special fund for a limited purpose pursuant to statute were nonetheless within the State treasury and subject to legislative appropriation); *Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("That funds are designated custodial funds does not mean that legislative action approving the use of the funds is not needed." (citations omitted)).

Nor does it appear that the Block Grant funds are "agency funds" within the meaning of the Budget Act.[16] The General Assembly has been appropriating block grants—including these Block Grants—without challenge through the budgetary appropriations process since 1981. And, the Governor's brief acknowledges that his preferred allocations of the Block Grant funds were accounted for in his proposed annual budget, which was submitted to the General Assembly pursuant to the State Budget Act.

Further, the State Budget Act provides that "[e]xcept where provided otherwise by federal law, funds received from the federal government become State funds when deposited in the State treasury and shall be classified and accounted for in the Governor's budget recommendations no differently from other sources[,]" N.C. Gen. Stat. § 143C-3-5(d), and the Governor is specifically required to "submit [federal] Block Grant plans to the General Assembly *as part of* the Recommended State Budget submitted pursuant to [Section] 143C-3-5." N.C. Gen. Stat. § 143C-7-2(a) (emphasis added). While some federal funds may therefore be considered custodial agency funds for purposes of the State Budget Act depending on the circumstances—such as where required by federal law—the State Budget Act treats federal block grants as state funds subject to appropriation through the statutory budgetary process. We do not see, and the Governor has not otherwise identified, any federal prohibition against treating the Block Grant funds as state funds subject to legislative appropriation.

The logistics by which the State of North Carolina accepts, receives, and expends the Block Grant funds do not alter our analysis. Although the Governor asserts generally that the Block Grant Appropriations interfere with the draw-down process employed to receive and spend Block Grant funds, no evidence in the record suggests that to be the

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16. Per the evidence in the record, "agency funds" are generally understood, by way of example, to include monies akin to county vehicle property taxes that the State, through the Division of Motor Vehicles, collects during the vehicle registration renewal process on the counties' behalf and later remits back to the counties for their own appropriation and use.

case. Rather, and by way of example, it appears that instead of drawing and expending Community Development Block Grant monies for a project related to "scattered site housing," as proposed by the Governor, the North Carolina Department of Commerce must simply draw down and expend CDBG monies for a project aimed at "neighborhood revitalization," as appropriated by the General Assembly. This election of which broad policy aims to fund within the larger national objective of community development is, fundamentally, a legislative one:

> The legislative branch of government is without question the policy-making agency of our government[.] . . . [T]he General Assembly is well equipped to weigh all the factors surrounding a particular problem, balanc[e] the competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time[.]

Rhyne v. K-Mart Corp., 358 N.C. 160, 169-70, 594 S.E.2d 1, 8-9 (2004) (citations and internal quotation marks omitted) (third alteration in original). Nothing shows that the founders of this State, in drafting our Constitution, intended for the Executive Branch to wield such authority over a category of funds that now constitutes more than a quarter of all State expenditures, and that it could do so free from legislative control, appropriation, and substantial oversight. This same concern was raised by New York's court of last resort:

> Although the framers of the [New York] Constitution obviously could not have anticipated the massive role that Federal funds were to play in the composition of future treasuries, the concerns they expressed at the time that the appropriation rule was adopted remain of equal concern today.
>
> . . . .
>
> Even more important, however, is the need to ensure a measure of accountability in government. As the framers of the Constitution astutely observed, oversight by the people's representatives of the cost of government is an essential component of any democratic system. Under the present system, some one third of the State's income is spent by the executive branch outside of the normal legislative channels. The absence of accountability in this sector of government is, manifestly, an unacceptable state of affairs in light of the framers' intention that *all* of the expenditures of government be subjected to legislative scrutiny.

> Finally, we note that application of the strictures imposed by section 7 of article VII to Federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches of government. . . . When the appropriation rule is bypassed[,] . . . the Legislature is effectively deprived of its right to participate in the spending decisions of the State, and the balance of power is tipped irretrievably in favor of the executive branch.

Anderson, 53 N.Y.2d at 364-66 (emphasis in original).

In sum, neither the North Carolina Constitution and statutes nor decisions from other states interpreting their own constitutions suggest the existence of a category of "custodial funds" held by the State but outside the appropriations power vested in the General Assembly under Article V, Subsection 7(1) of the North Carolina Constitution. The Governor does not identify any North Carolina constitutional provision or caselaw creating one. This Court cannot fashion such a category out of whole cloth. *See Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012) ("This Court is an error-correcting court, not a law-making court.").

CONCLUSION

The North Carolina Constitution plainly provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V § 7(1). The federal laws governing the Block Grants identify the State as the beneficiary of the funds, and they do not prohibit their appropriation by our General Assembly—the branch that wields exclusive constitutional authority over the State's purse. Though some states, applying their own respective constitutions and statutes, may proscribe state legislative appropriation of federal block grant funds, our Constitution and law does not permit us to be counted amongst them, and the Governor has neither rebutted the presumption that acts of the General Assembly are constitutional nor identified a "plain and clear" constitutional violation. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252. As a result, we hold that the Block Grant Appropriations are constitutional as-applied and affirm the ruling of the trial court.

AFFIRMED.

Judges STROUD and TYSON concur.

IN THE MATTER OF DAVIN ELDRIDGE, Contemnor

No. COA19-370

Filed 3 December 2019

1. Judges—recusal motions—judge as witness and trier of fact —contempt of court hearing

The trial judge did not err by refusing to recuse himself from defendant's criminal contempt of court hearing concerning defendant's usage of a recording device inside the trial judge's courtroom during a prior criminal matter. A reasonable person would not doubt the trial judge's objectivity or impartiality, considering the judge's thoughtful response to the recusal motion and the lack of any facts suggesting bias or impartiality.

2. Contempt—criminal—willfulness—recording device in the courtroom

The trial court did not err by finding defendant in criminal contempt of court where defendant willfully disregarded prior warnings and the posted courtroom policy by using a recording device inside the courtroom. Among other things, defendant's willfulness was evident in a social media post stating that he was going to livestream the court proceedings and was "prepared to go to jail for this."

3. Contempt—probationary sentence—reasonably related to rehabilitation—essay about respect for court system

The trial court's sentence for defendant's criminal contempt of court (for willfully violating the prohibition against the use of recording devices inside the courtroom) accorded with the law where the trial court suspended defendant's thirty-day sentence for twelve months upon several conditions, including that defendant write an essay on the subject of respect for the court system, receive approval from the trial judge, and post it on all his social media accounts without any negative comments—and not be permitted to attend any session of court in the judicial district until he had completed the other conditions.

Judge BROOK concurring in part and dissenting in part.

Appeal by defendant from order entered 11 January 2019 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

BRYANT, Judge.

Where the trial court's actions would not cause a reasonable person to doubt his objectivity or impartiality, we affirm the trial court's ruling denying defendant's motion for recusal. Where defendant's actions gave rise to criminal contempt, we affirm the trial court's ruling finding him in criminal contempt. Where the trial court did not abuse its discretion by imposing specific conditions which were reasonably related to defendant's probationary sentence, we affirm the trial court's ruling.

On 29 November 2018, defendant Davin Eldridge, a frequent publisher for a Facebook page called "Trappalachia," entered the Macon County Courthouse. The officer working the metal detector saw defendant had a small tape recorder and "advised [defendant that] he [could] not record inside the courtroom. Defendant acknowledged the officer's instruction and entered a courtroom. As he did so, defendant bypassed signs posted on the entranceways stating:

> BY ORDER OF THE SENIOR RESIDENT SUPERIOR COURT JUDGE: DO NOT use or open cell phones, cameras, or any other recording devices inside the courtrooms. Violations of this order will be contempt of court, subjecting you to jail and/or a fine. Your phone may be subject to seizure and search.

While in the courtroom, defendant was observed sitting on the second row with a cell phone, holding it "shoulder-chest level" towards the front of the courtroom. The officer went over to defendant and instructed him to put his phone away. Defendant replied, "I'm not doing anything." The Honorable William H. Coward, Superior Court Judge of Macon County, was presiding over a criminal matter at that time. Judge Coward was informed that a live posting of the hearing in session was streaming from a Facebook page. Based on that information, Judge Coward interrupted the hearing to issue a reminder that recordings of courtroom proceedings were prohibited by law. At the conclusion of the hearing, Judge Coward viewed the Facebook postings by defendant, which included footage of the inside of the courtroom and the prosecutor presenting

his closing argument. The trial court ordered defendant to return to the courtroom later that day. Defendant failed to return as ordered.

On 3 December 2018, Judge Coward issued a show cause order for defendant to appear and show why he should not be held in criminal contempt. The show cause order made it clear the notice of hearing was based on defendant's usage of a recording device inside the courtroom. The hearing was scheduled for 11 January 2019. Meanwhile, the North Carolina State Bureau of Investigation (SBI) made a preservation request to Facebook to preserve all information relevant to the specific date and time period of the incident. A search warrant was issued and signed by Judge Coward. Upon execution of the warrant, the agents seized defendant's Facebook account records and several messaging threads.

On 11 January 2019, immediately prior to the criminal contempt hearing, the defendant made an oral motion under N.C.G.S. § 5A-15 for Judge Coward to recuse himself, which was denied. A contempt hearing was held, and the trial court found defendant to be guilty of criminal contempt. Defendant was sentenced to jail for thirty days. The active sentence was suspended, and defendant was placed on probation for one year with certain conditions. Defendant gave oral notice of appeal in open court.

On appeal, defendant argues the trial court erred by: (I) denying his motion for recusal at the hearing for contempt, (II) finding him in criminal contempt of court, and (III) issuing a probationary sentence that was unsupported by law.

I

[1] First, defendant argues Judge Coward erred by refusing to recuse himself from defendant's hearing. We disagree.

Disqualification and recusal of a presiding judge in plenary proceedings for contempt is governed by Canon 3 of the North Carolina Code of Judicial Conduct and, in criminal cases, section 5A-15 of the North Carolina General Statutes.

The Code of Judicial Conduct provides, in pertinent part, that a judge should recuse upon motion of any party or by the judge's own initiative if "impartiality may reasonably be questioned" including, *inter alia*, where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." Code of Jud.Conduct, Canon 3C(1)(a) (2015).

Section 5A-15 of the North Carolina General Statues provides that "[t]he judge is the trier of facts at the show cause hearing." N.C.G.S. § 5A-15(d) (2017). "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." *Id.* § 5A-15(a).

> While [a written] motion required by N.C. Gen. Stat. § 15A-1223 must be made in a criminal proceeding where either the state or the defendant alleges bias, close familial relationship, or absence of impartiality on the part of the presiding judge, the legislature specifically codified an exception to this requirement for criminal contempt proceedings [under N.C.G.S. § 5A-15] where the acts constituting the contempt so involve the judge issuing the show cause order that his objectivity could be reasonably questioned.

In re Marshall, 191 N.C. App. 53, 60, 662 S.E.2d 5, 10 (2008). Therefore, section 5A-15(a) "imposes a duty on the judge to acknowledge that his involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*." *Id.* at 60–61, 662 S.E.2d at 10.

In the instant case, at the beginning of the show cause hearing, defendant orally moved to recuse Judge Coward from the contempt proceedings—arguing there was an "appearance of impropriety" because Judge Coward was "in a situation where [he was] a witness as well as a trier of fact." In response, Judge Coward reasoned as follows:

> As to this motion, the Court respects [defense counsel's] argument as zealous counsel and in questioning my objectivity, but I'm going to deny the motion because I feel that I am objective and can be objective and could not be called as a witness.
>
> I feel that, as [defense counsel] pointed out, we could have had a hearing with or without [defendant's] presence on November 29th and given him, as you said, [defense counsel], limited due process.
>
> However, out of an abundance of caution and to insure that [defendant] receives all the constitutional protections to which he's entitled, I continued the matter to

> today to allow him time to hire counsel and to prepare for this hearing.
>
> I'm prepared to go forward with it at this time.

After carefully reviewing the record and defendant's arguments for Judge Coward's recusal, we disagree with defendant's assertion that Judge Coward's actions or personal knowledge would cause a reasonable person to doubt his objectivity or impartiality. The colloquy between Judge Coward and defense counsel reflects that he considered his position as the trier of fact and determined that he was able to preside over the hearing in an objective, impartial manner. Thus, absent facts to suggest bias or impartiality toward defendant, we affirm Judge Coward's decision to deny defendant's motion for recusal.

II

[2] Next, defendant argues the trial court erred by finding him in criminal contempt. Specifically, defendant argues his actions did not establish that he was in willful violation of the statute for criminal contempt. We disagree.

"If a trial court's finding is supported by competent evidence in the record, it is binding upon an appellate court, regardless of whether there is evidence in the record to the contrary." *State v. Key*, 182 N.C. App. 624, 627, 643 S.E.2d 444, 447 (2007).

"Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (internal citation omitted).

Section 5A-11 of the North Carolina General Statues delineates a number of acts which constitute criminal contempt, including the following:

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
>
> (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
>
> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C.G.S. § 5A-11(a)(1)–(3) (2017).

Here, defendant challenges the trial court's findings of fact by arguing that his "actions did not disrupt the plea hearing in the ongoing criminal case nor were they calculated to do so." However, there is ample evidence presented at the hearing which showed that defendant knowingly carried a device and entered the courtroom with the intention of live streaming the courtroom proceedings, after being given express warnings, in violation of the court's rules.

Witness testimony from an officer established that prior to entering the courtroom on 29 November, defendant was observed walking through the metal detectors with a small tape recorder. He was issued a verbal warning by the officer not to operate recording devices inside the courtroom. The officer also testified that the day before, defendant "was [seen] sitting in the courtroom with a laptop." Another officer testified that defendant had his "cell phone in his hand and facing the courtroom," holding it at "shoulder-chest level" while court was in session. He was told by that officer inside the courtroom to put his phone away.

Defendant's assertion on appeal that "[t]he more logical inference is that [he] accidently turned his phone on and captured the video" is refuted by the evidence in the record. The messages obtained from defendant's Facebook account reveal that defendant intended to livestream courtroom proceedings, notwithstanding prior warnings and the courtroom policy on recording devices. One relevant post was as follows: "Be prepared today for Trapp's FB Live event in court. . . . I'm prepared to go to jail for this by filming;" "If you can't get in touch [with me] today[,] it's because I was put in jail."

It is evident that defendant had a clear understanding of the courtroom policy, yet he willfully disregarded prior warnings and the posted policy by recording inside the courtroom. His actions supported the trial court's finding of criminal contempt, therefore, defendant's argument is overruled.

III

[3] Lastly, defendant argues the trial court did not sentence him in accordance with the law.

"It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse." *State v. Goode*, 16 N.C. App. 188, 189, 191 S.E.2d 241, 241–42 (1972).

"[A]s is the case with all offenses of a criminal nature, the punishment that courts can impose therefor, either by fine or imprisonment, is circumscribed by law." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). Section 5A-12, indicates the trial court can censure, impose a sentence up to thirty days imprisonment, and/or a fine not to exceed $500.00. N.C.G.S. § 5A-12(a). However, "[t]he practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time[.]" *State v. Everitt*, 164 N.C. 399, 402, 79 S.E. 274, 275 (1913).

> "[T]he [trial] courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The [trial] courts will be presumed to have exercised such discretion in a proper case."

Id. at 404, 79 S.E. at 276 (citation omitted).

Section 15A-1343 of the North Carolina General Statues ("Conditions of probation") allows the trial court to "impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C.G.S. § 15A-1343(a). "The [trial] court has substantial discretion in devising conditions under this section." *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). Additionally, subsection (b1) states that the trial court may require a defendant to comply with special conditions during probation including, *inter alia*, "any other conditions determined by the [trial] court to be reasonably related to [their] rehabilitation." N.C.G.S. § 15A-1343(b1)(10).

Here, the trial court sentenced defendant to be confined in the Macon County Detention Center for thirty days. Defendant's sentence was suspended for twelve months, upon six specific conditions for him to meet during his probationary sentence: 1) serve an active sentence of 96 hours; 2) pay the costs of the action; 3) pay a fine of $500.00; 4) draft a 2,000-3,000 word essay on the following subject: "Respect for the Court System is Essential to the Fair Administration of Justice," forward the essay to Judge Coward for approval, and following approval, post the essay on all social media or internet accounts that defendant owns or controls or acquires hereafter during his period of probation and attributed to defendant, without negative comment or other negative criticism by defendant or others, during said period of probation; 5) not violate any order of Court or otherwise engage in further contemptuous behavior; and, 6) not attend "any court session in Judicial District

30A unless and until his essay has been approved and posted as required herein and he has fully complied with all other provisions of this order."

Despite defendant's argument that his sentence was "contrary to law," he cites to no authority in support of that argument. We also note that defendant does not argue that the trial court abused its discretion so as to require that his sentence be set aside. Nevertheless, we acknowledge the trial court's "substantial discretion" in deciding whether special conditions reasonably fit within defendant's sentence. *See State v. Johnston*, 123 N.C. App. 292, 305, 473 S.E.2d 25, 33 (1996) (upholding a special condition prohibiting the defendant, convicted for disseminating obscene materials, from working in any retail establishment that sold sexually explicit material).

Given defendant's questionable and intentional conduct, his frequent visits to the courtroom, and his direct willingness to disobey courtroom policies, we discern no abuse of discretion in the trial court's decision to impose conditions on defendant's probationary sentence. Such conditions are reasonably related to the necessity of preventing further disruptions of the court by defendant's conduct, and the need to provide accountability without unduly infringing on his rights. Thus, because there is sufficient evidence that the trial court properly exercised its authority, we overrule defendant's argument. The trial court's order is

AFFIRMED.

Judge TYSON concurs.

Judge BROOK concurs in part, dissents in part, with separate opinion.

BROOK, Judge, concurring in part and dissenting in part.

I fully join the portions of the majority opinion holding that the trial court did not abuse its discretion in denying Defendant's motion for recusal and that competent evidence supported the trial court's finding that Defendant was in criminal contempt of the court's orders against using recording devices in the courtroom. However, I respectfully dissent from the portion of the majority opinion finding no error in the sentence imposed by the trial court. The probation condition imposed by the trial court requiring Defendant to write and publish an essay about respect for the courtroom on his social media and internet accounts *and*

to delete any negative comments made by third-parties on this essay bears no reasonable relationship to Defendant's rehabilitation or to his crime and raises serious First Amendment concerns.

Generally speaking, a sentencing judge "may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2017). "In addition to the regular conditions of probation[,] . . . the court may, as a condition of probation, require that during the probation the defendant comply with one or more . . . special conditions[.]" *Id.* § 15A-1343(b1). A sentencing judge enjoys "substantial discretion" to devise and impose special conditions of probation, *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985), but these conditions must still be "reasonably related to [the defendant's] rehabilitation," N.C. Gen. Stat. § 15A-1343(b1)(10). As this Court has observed,

> [t]he extent to which a particular condition of probation is authorized by N.C. Gen. Stat. § 15A-1343(b1)(10) hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation.

State v. Allah, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013). Finally, "any condition which violates defendant's constitutional rights is *per se* unreasonable and beyond the power of the trial court to impose." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001).

Our review of an invalid special condition of probation is preserved by statute. Under N.C. Gen. Stat. § 15A-1342(g), "[t]he failure of a defendant to object . . . at the time such a condition is imposed does not constitute [] waiver of the right to object at a later time[.]" N.C. Gen. Stat. § 15A-1342(g) (2017). Although the Supreme Court has interpreted the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) to "refer to the revocation hearing," rather than extending to challenges "for the first time at the appellate level," *State v. Cooper*, 304 N.C. 180, 183-84, 282 S.E.2d 436, 439 (1981),[1] our Court has held that where the defendant

1. The Supreme Court's observation in *Cooper* about the meaning of the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) was made in the context of an appeal from a probation revocation where the challenge to the condition was not raised at the revocation hearing but was instead being raised for the first time on appeal from the revocation hearing. *Cooper*, 304 N.C. at 183, 282 S.E.2d at 439 ("[D]efendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which

challenges the validity of a special condition of probation on direct appeal from the ensuing judgment, prior to any revocation hearing, N.C. Gen. Stat. § 15A-1342(g) preserves the challenge, *Allah*, 231 N.C. App. at 96, 750 S.E.2d at 910.

While I agree with the majority that the sentencing judge's decision to require Defendant, who violated multiple court orders by recording and livestreaming courtroom proceedings on social media, to write an essay about respect for the courtroom and publish this essay on his social media and internet accounts bears a reasonable relationship to Defendant's criminal contempt of court, and to his rehabilitation for this crime, I do not agree that requiring Defendant to monitor comments made on this essay by third-parties and delete any comments the court might consider critical bears a reasonable relationship to Defendant's crime or to *his* rehabilitation, as N.C. Gen. Stat. § 15A-1343 requires. "[T]rial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1)," however, "N.C. Gen. Stat. § 15A-1343(b1)(10) 'operates as a check on the discretion available to trial judges' during that process." *Id.* at 98, 750 S.E.2d at 911 (quoting *Lambert*, 146 N.C. App. at 367, 553 S.E.2d at 77). Although the decision of a sentencing judge to impose a special condition of probation is reviewed for an abuse of discretion, *id.*, "statutory errors regarding sentencing issues . . . are questions of law, and as such, are reviewed *de novo*." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (internal marks and citation omitted). As noted previously, whether the reasonable relationship requirement under N.C. Gen. Stat. § 15A-1343(b1)(10) is met depends on "whether the [] condition bears a reasonable relationship to the offense[] committed . . . [or] assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

The condition imposed by the sentencing judge requiring Defendant to monitor comments made on the essay and delete any the court might consider critical is not reasonably related to Defendant's willful violation of the court's orders against using recording devices in the courtroom, nor does it bear a reasonable relationship to his rehabilitation from his past willful disobedience of court orders. It holds Defendant responsible for what is essentially the behavior of others; and while there is some truth to the adage that we are only as good as the company

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his probation is revoked."). *Cooper* thus simply stands for the proposition that collateral attack of a special condition of probation on appeal from a violation of probation where the special condition is not challenged at the revocation hearing is not statutorily preserved by N.C. Gen. Stat. § 15A-1342(g).

we keep, the relevant community in this context is incredibly diffuse, extending through cyberspace. The lack of reasonable relationship between Defendant's crime and his rehabilitation to the requirement that he monitor comments made on the essay and delete any critical comments violates the statutory requirement contained in N.C. Gen. Stat. § 15A-1343(b1)(10). My vote therefore is to vacate this condition of his probation.

Our Court has a "settled policy" of avoiding constitutional questions "when a case can be disposed of on appeal without reaching the constitutional issue[.]" *Lambert*, 146 N.C. App. at 368, 553 S.E.2d at 77. Because I vote to vacate the condition of probation requiring Defendant to delete negative comments on the essay, I do not delve deeply into what I consider deeply troubling constitutional problems with this condition of probation. Although we generally do not review constitutional questions that have not first been raised in the trial court, *see State v. Goldsmith*, 187 N.C. App. 162, 167, 652 S.E.2d 336, 340 (2007), suffice it to say that the sentencing judge has not only compelled Defendant to speak within the meaning of the First Amendment, he has compelled Defendant to then continue speaking by censoring the viewpoints of others expressed in response to speech compelled by the court. This compelled speech silencing third-party viewpoints expressed in response to compelled speech raises serious First Amendment concerns.

Thus, while I join the portions of the majority opinion holding that there was no abuse of discretion by the trial court in denying the motion to recuse and that competent evidence supported the court's finding of criminal contempt, I vote to vacate the condition of Defendant's probation requiring him to delete negative comments made by others on social media and the internet. I otherwise find no error in the sentence imposed by the trial court.

IRONMAN MEDICAL PROPERTIES, LLC and HODGES FAMILY PRACTICE, INC., Plaintiffs
v.
TANVIR CHODRI, M.D. a/k/a Tanvir Chaudhary, PREMIER MEDICAL CENTER CONDOMINIUM ASSOCIATION, INC., RANDOLPH PULMONARY & SLEEP CLINIC, PLLC and WHITE OAK MEDICAL PROPERTIES, LLC, Defendants
v.
BETH HODGES, M.D. and FRANCISCO HODGES, M.D., Third-Party Defendants.

No. COA18-108

Filed 3 December 2019

1. Associations—condominium—breach of fiduciary duty—suit by shareholder—standing

In a case involving potential mismanagement of condominium assessments, the owners of individual units of a condominium association had standing to bring claims for breach of fiduciary duty against the condominium association and its sole officer, despite the common rule that a shareholder cannot sue for injuries to a corporation, because the association owed a statutorily-imposed fiduciary duty to the unit owners pursuant to N.C.G.S. § 47C-3-103(a).

2. Associations—condominium—breach of fiduciary duty—claim by non-shareholders—lack of standing

In a case involving potential mismanagement of condominium assessments, a tenant in one of the condominium units and its owners (plaintiffs) lacked standing to sue the association because they were not shareholders and were owed no fiduciary duty. The trial court properly granted a directed verdict for defendants (including the condo association and its sole officer) on plaintiffs' claims for breach of fiduciary duty and constructive fraud.

3. Fiduciary Relationship—condo association—breach of duty by officer—financial mismanagement

In a case involving potential mismanagement of condominium assessments, the trial court improperly entered a directed verdict for the condominium association on a claim for breach of fiduciary duty brought by one unit owner where the unit owner presented sufficient evidence to go to the jury on that claim, including that the association's officer failed to maintain a separate bank account, billed the owner for charges unrelated to the common areas of the condominium, and refused the owner full access to the association's financial records, and that the owner suffered monetary damages as a result.

4. Fraud—constructive—intent to personally benefit—directed verdict—improper

In a case involving alleged misappropriation of condominium assessments and dues, the trial court erred by entering a directed verdict for defendant (officer of a condominium association) on plaintiff unit owner's claim for constructive fraud where evidence did not definitively resolve whether the officer intended to personally benefit from financial mismanagement or was merely negligent.

5. Damages and Remedies—punitive damages—no evidence of actual fraud—directed verdict

In a case involving potential mismanagement of condominium assessments, the trial court properly granted a directed verdict for defendants (including the condo association and its officer) on plaintiffs' claim for punitive damages where plaintiffs (a unit owner and its tenant) failed to present any evidence of actual fraud.

6. Attorney Fees—condominium assessments—N.C.G.S. § 47C-3-116 —mandatory award—denial reversed

In a case involving alleged financial mismanagement of a condominium association, the trial court erred by denying a motion for costs and attorney fees filed by defendant condo association, because N.C.G.S. § 47C-3-116(e) and (g) required the award of attorney fees if the action involved enforcing assessments levied on unit owners. On remand, the trial court was directed to determine whether the condo association was the prevailing party and whether the action related to the collection of assessments and if so, to award reasonable attorney fees.

Appeal by plaintiffs and third-party defendants from judgment entered 20 December 2016 and cross-appeal by defendants from order entered 2 December 2016, both entered by Judge Eric C. Morgan in Randolph County Superior Court. Heard in the Court of Appeals 6 September 2018.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus and G. Gray Wilson; Allman Spry Davis Leggett & Crumpler, P.A., by D. Marsh Prause and Jodi D. Hildebran; and Yates, McLamb & Weyher, LLP, by Rodney E. Pettey and Brian M. Williams, for plaintiffs and third-party defendants.

Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, for defendant Premier Medical Center Condominium Association, Inc.

TYSON, Judge.

I. Procedural Background

Ironman Medical Properties, LLC ("Ironman") and Hodges Family Practices, Inc. ("HFP") (collectively, "Plaintiffs"), as well as Drs. Beth and Francisco Hodges (the "Hodges") as third-party defendants, appeal from a 2 December 2016 order granting a motion for a directed verdict made by Dr. Tanvir Chodri ("Dr. Chodri"), Premier Medical Center Condominium Association, Inc. ("Premier") and White Oak Medical Properties, LLC ("White Oak") (collectively, "Defendants"). These parties also appeal the 20 December 2016 judgment entered following a jury's verdict. Premier cross-appeals from a separate order denying its motion for attorney's fees and its motion to tax costs to Plaintiffs entered on 2 December 2016.

We find no error in the jury's verdict and the judgment entered thereon. We affirm the trial court's entry of directed verdict dismissing all claims asserted by the tenant, HFP, the Hodges and dismissing Ironman's punitive damage claims. We reverse and remand for trial on Ironman's claim for breach of fiduciary duty against Premier and Dr. Chodri and for the trial court to address Defendant Premier's motion for costs and attorney's fees.

II. Factual Background

Ironman and HFP are separate and distinct legal entities chartered as a North Carolina Limited Liability Company and corporation, respectively. The Hodges, as individuals, hold ownership interests in both these entities.

White Oak developed Premier Medical Center as a ten-unit condominium complex located ("Condominium") in Asheboro, North Carolina. Ironman is the record owner of one condominium unit in the Premier Medical Center. In June 2010, Ironman leased its unit to HFP.

White Oak is a North Carolina Limited Liability Company, which owns and maintains the other nine units located in Premier Medical Center. Premier is a chartered North Carolina not-for-profit condominium association corporation. Dr. Chodri serves as the sole officer of Premier and is a co-owner of White Oak. Neither White Oak, Premier, nor Dr. Chodri is a party to Ironman's lease to HFP nor have any other connection to the Hodges on these issues, except through Ironman.

The voting interests in Premier were divided twenty-six percent (26%) to Ironman and seventy-four percent (74%) to White Oak. The

common areas were allocated as twenty-one percent (21%) to Ironman and seventy-nine percent (79%) to White Oak.

White Oak was developed and initially owned by Dr. Chodri, his wife and a development partner. They managed Premier for approximately one year before their partner declared bankruptcy. Dr. Chodri had no prior experience managing investment properties or condominium associations.

Dr. Chodri practiced medicine and relied upon his medical practice office manager, Julie Trollinger ("Trollinger") to handle the financial affairs of White Oak and the Premier condominium complex. The parties agree that the office manager was "inexperienced, unsophisticated, and not particularly knowledgeable about such matters" involving managing condominium property.

Ironman quit paying its condominium dues in June 2012, despite repeated demands from Premier. On 4 December 2012, Ironman's unit's tenant, HFP, requested a breakdown of expenses for 2011 and 2012. The parties dispute whether Premier failed to timely provide the summaries of a budget and whether the budget summaries it provided were correct.

Plaintiffs alleged, despite HFP's multiple verbal and written requests, they were not furnished with income, expense, balance, or bank statements for the Condominium until after the lawsuit was filed in 2015.

Ironman also sent to Premier a written request for statements after Premier had responded to HFP's prior request by sending Ironman allegedly all financial documentation Premier had at the time. Plaintiffs were unsatisfied with these responses from Premier, claiming they were limited and entirely devoid of the requested financial information they were entitled to receive.

Plaintiffs' inquiry into Premier's finances revealed that the Condominium's assets had not been managed in accordance with the Declaration's bylaws. Under the bylaws, Premier had the authority and power to, *inter alia*, levy and to collect assessments. Assessments for the benefit of all the unit owners should have been levied in the same ratio as the percentage ownership interests.

The Declaration also provided that Premier was to treat all monies collected on its behalf as the separate property of Premier. All unit owner's assessments were to be paid monthly. The failure to enforce any right, provision, or covenant within the Declaration did not constitute a waiver of the right to seek enforcement in the future, within the applicable statute of limitations.

Premier's assets were allegedly commingled with those of White Oak and all Premier unit owners were allegedly charged an invalidly-calculated assessment fee. Improper assessments and account management allegedly allowed White Oak to underpay condominium dues to Premier by over $200,000.00 since 2010.

No annual meetings of Premier's shareholders to elect officers and directors to the Association were conducted, as is required by the bylaws. Premier sought no federal or state tax ID number until 2015, maintained no separate corporate records, and never conducted audits of its finances.

Prior to the filing of this lawsuit, Premier, as an entity, had never generated profit and loss statements or balance sheets and had never sent required notices of annual reserve balances to its unit owners. Starting in 2010 when Ironman bought its unit, dues it paid were deposited into White Oak's bank account, rather than into a separate Premier account. White Oak never paid its required unit dues to Premier.

Rather, Trollinger would collect rent from tenants of White Oak's units and deposit them into a White Oak account. She also paid Premier's operating expenses from that account. After Ironman quit paying its required dues in 2012, Dr. Chodri would move funds from his other accounts to cover Premier's expenses, if the White Oak account was close to being overdrawn.

Premier's assessments to the unit owners were invalidly calculated based upon the occupied square footage, rather than the total project square footage, as is required by the Declaration. Consequently, no separate or earmarked payments were made by White Oak to Premier for its vacant units. The improper account management allegedly caused approximately $207,345.00 in underpayment by White Oak to Premier.

HFP, as Ironman's tenant, had initially overpaid Ironman's assessments. Premier's accountant testified at the time of trial, after accounting for the withheld funds, HFP had underpaid Ironman, and consequently Ironman's unpaid obligations to Premier were $37,582.00.

Dr. Chodri also paid Premier's taxes out of the White Oak account and used funds in that account to pay down White Oak's mortgages and other non-condominium expenses. Dr. Chodri admitted receiving a benefit from improper uses of these funds.

Before HFP leased Ironman's unit, Ironman had been provided with a detailed report of Premier's expenses for 2009. The document

contained White Oak's letterhead, rather than Premier's. It also showed the inclusion of property taxes, which were not an association expense.

After reviewing this expense report, Dr. Beth Hodges responded: "Is he serious? $9000 for lawn and snow removal? What lawn? And let's not even discuss the janitorial fees. Either he is getting seriously ripped off or he is padding the bills." Nevertheless, despite these observations, HFP went forward with the lease with Ironman.

Dr. Chodri never told Plaintiffs of the improper account structures or assessment calculations. Once Defendants began attempting to sort through their accounting, Trollinger testified that she had not told the Hodges or HFP that a new bank account was being opened in Premier's name, because it was "none of their business." Further, Dr. Chodri testified that Premier had never informed Ironman or White Oak that no reserve funds were being maintained, because he thought sufficient funds were present to maintain the project. If Premier had kept reserve funds, and Ironman and White Oak had paid its required assessments and reserves, Ironman would be entitled to twenty-one percent of the reserve funds, and White Oak would be due seventy-nine percent.

Dr. Chodri testified he was unaware that White Oak was not paying its dues, that Premier's funds were being deposited into White Oak's accounts, and he had not realized the separate Premier bank account had not been set up. Dr. Chodri stated he had failed to contribute his monthly objective of $500.00 towards the reserve fund, as Premier was struggling to meet other expenses. Premier's lender was told $500.00 per month was being set aside from the reserve fund.

On 18 March 2015, Ironman filed suit against Dr. Chodri, Premier, and White Oak. The original complaint alleged claims for breach of the condominium association declaration and bylaws, breach of fiduciary duty, and constructive fraud, and sought punitive damages. Defendants filed an answer with counterclaims on 30 July 2015. Ironman's reply to Defendants' counterclaims was filed on 1 October 2015. Defendants subsequently filed an amended answer. Ironman amended its complaint, with leave of court, to add HFP as a third-party plaintiff on 9 November 2015.

Plaintiffs' complaint alleged, *inter alia*, a breach of fiduciary duty that rose to the level of constructive fraud and breach of the Declaration of Condominium ("Declaration") and sought punitive damages. Defendants counter-claimed for breach of the Declaration and sought recovery of unpaid association dues Ironman had been withholding from the association since June of 2012.

The jury trial began on 9 August 2016. At the close of Plaintiffs' evidence, the court granted Defendants' motion for a directed verdict on all claims except Ironman's breach of contract claim on the Declaration. At the close of all evidence, Plaintiffs submitted a written request for special jury instructions on their affirmative defense, which was denied by the trial court. Plaintiffs failed to object to the instructions at the time the jury was charged and have waived any challenge. *See* N.C. R. App. P. 10(a)(2).

The jury returned a verdict, which found both parties in breach of the Declaration, and awarded $1.00 in favor of Plaintiffs on their breach of contract claim and $51,472.00 in favor of Defendants on their breach of contract claim based on Ironman's unilateral suspension of payment of its dues in 2012. Plaintiffs and the Hodges timely appealed. Premier cross-appealed the trial court's denial of its motion for attorneys' fees and costs.

III. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

IV. Analysis

A. Standing

[1] Defendants initially challenge the Plaintiffs' standing to bring their claims for breach of fiduciary duty and constructive fraud. Defendants argue shareholders have no right to bring a direct claim to enforce causes of action accruing to the corporation. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000). "An action alleging a wrong done by [a condominium] association must be brought against the association and not against the unit owner." N.C. Gen. Stat. § 47C-3-111(b) (2017).

> The general prohibition against individual shareholder suits is understandable, for the duties, the breaches of which constitute the ground of action, are duties to the corporation, considered as a legal entity, and not duties to any particular shareholder. Thus, any damages recovered from derivative suits flow back to the corporation, not to the individual shareholders bringing the action. Furthermore, the procedural requirements for derivative suits protect shareholders and the corporation itself by avoiding a multiplicity of lawsuits, by *limiting who should properly speak for the corporation, and by*

> *preventing self-selected advocates pursuing individual gain rather than the interests of the corporation or the shareholders as a group, from bringing costly and potentially meritless strike suits. Given these principles, a shareholder generally has no standing to bring individual actions against a corporation. Standing, which is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, generally refers to a party's right to have the merits of its dispute decided by a judicial tribunal.*
>
> Nevertheless, a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong.

Raymond James Capital Partners, L.P. v. Hayes, 248 N.C. App. 574, 578, 789 S.E.2d 695, 700 (2016) (internal citations, alterations and quotation marks omitted) (emphasis supplied).

Ironman asserts standing to sue the association as a shareholder because:

> There are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997) (citations omitted).

"The North Carolina Supreme Court has recognized as illustrative of a special duty, 'when a party violate[s] its fiduciary duty to the shareholder.' " *Corwin v. British Am. Tobacco PLC*, 251 N.C. App. 45, 66, 796 S.E.2d 324, 338 (2016), *rev'd on other grounds sub nom. Corwin as Tr. for Beatrice Corwin Living Irrevocable Tr. v. British Am. Tobacco PLC*, __ N.C. __, 821 S.E.2d 729 (2018) (quoting *Barger*, 346 N.C. at 659, 488 S.E.2d at 220).

The officers and board members of a condominium association owe a statutorily-imposed fiduciary duty to both the association and the unit holders. N.C. Gen. Stat. § 47C-3-103(a) (2017). "Subsection (a) makes members of the executive board appointed by the declarant liable as

fiduciaries of the unit owners with respect to their actions or omissions as members of the board." *Id.*, Cmt. 1. "A 'fiduciary relation' is one that 'may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635, 794 S.E.2d 346, 351 (2016) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*)." *Id.*

"A plaintiff must present evidence that they suffered an injury peculiar or personal to themselves. An injury is peculiar or personal to the shareholder if a legal basis exists to support plaintiff's allegations of an individual loss, separate and distinct from any damage suffered by the corporation." *Corwin*, 251 N.C. App. at 66, 796 S.E.2d at 339 (citation and internal quotation marks omitted).

Our appellate courts have "equated the status of corporate shareholders and corporate directors to that existing between limited partners and general partners" when standing of a party has been challenged in this way. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 334, 525 S.E.2d 441, 443 (2000).

"Even when one person contributes a disproportionate amount of the investment and thus bears a correspondingly greater loss, such an occurrence hardly makes for an individual injury." *Green v. Freeman*, 367 N.C. 136, 144, 749 S.E.2d 262, 269 (2013) (emphasis added) (citation and internal quotation marks omitted). "[T]he question is not whether the plaintiff is in a less favorable position than the general partner, but whether the plaintiff is in a less favorable position when compared to all other limited partners." *Jackson v. Marshall*, 140 N.C. App. 504, 509, 537 S.E.2d 232, 235 (2000) (referencing *Energy Investors Fund*, 351 N.C. at 336, 525 S.E.2d at 444).

This Court in *Norman* looked to the discussion and analysis in both *Barger* and *Energy Investors* to explain when a special duty arises or a distinct injury exists. "*Norman*'s extensive discussion of the closely held nature of the company and the powerlessness of the minority shareholders offers tools for a careful examination of the particular facts of a case to determine if a special duty or distinct injury exists within the meaning of *Barger* and *Energy Investors*." *Gaskin v. J.S. Procter Co., LLC*, 196 N.C. App. 447, 453, 675 S.E.2d 115, 119 (2009) (referencing *Norman*, 140 N.C. at 405, 537 S.E.2d at 259).

In *Gaskin* and *Norman*, this Court considered the following factors to determine whether to permit a direct action against a closely held corporation: (1) the number of shareholders; (2) whether the plaintiff was a minority shareholder; (3) the degree of control the plaintiff maintains in the partnership; (4) whether individual defendants used majority stock ownership and control to divert corporate funds to themselves; and, (5) the impact of a direct lawsuit on third-party creditors. *Id.* at 454, 675 S.E.2d at 119; *Norman*, 140 N.C. at 404, 537 S.E.2d at 258.

As Premier's sole officer and executive board member, Dr. Chodri's position carries and imposes a statutory fiduciary duty that is owed to all unit owners, including Ironman and White Oak. *See* N.C. Gen. Stat. § 47C-3-103. Comment 1 to Section 47C-3-103 provides: "This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant." Ironman and White Oak have standing under the statute to assert claims for breach of fiduciary duty. *Id.* Whether Ironman or White Oak suffered individual or recoverable damages is a separate issue.

B. Directed Verdict

Plaintiffs argue that the trial court erred by granting a directed verdict that dismissed Plaintiffs' claims for breach of fiduciary duty and constructive fraud, and punitive damages. Defendant argues the trial court's directed verdict was proper because Plaintiffs failed to provide sufficient evidence to justify the claim that Dr. Chodri's alleged breach of his statutorily-imposed fiduciary duty rose to the level of constructive fraud, to survive a defense of expiration of the three year statute of limitations and to warrant application of the corresponding ten-year statute of limitations.

1. Standard of Review

The trial court's order and judgment appealed from is presumed to be correct, and the burden of showing error rests with the appellant. *London v. London*, 271 N.C. 568, 570-71, 157 S.E.2d 90, 92 (1967). "The standard of review of [a] directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

"To survive a motion for directed verdict . . ., the non-movant must present more than a scintilla of evidence to support its claim." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 861, 788 S.E.2d 154, 157 (2016) (citations and internal quotation marks omitted). "Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*." *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004).

[2] Neither HFP, as tenant, nor the Hodges, as individuals, possess standing to bring either claims because neither of them are unit owners or were owed any statutorily-created or other fiduciary duty by Premier or its officer(s), nor had privity of contract with Premier. As such, neither party can show "an injury separate and distinct from that suffered by other shareholders." *Barger*, 346 N.C. at 658, 488 S.E.2d at 219. The trial court correctly granted a directed verdict on all of HFP's and the Hodges' claims for breach of fiduciary duty and constructive fraud, as neither are shareholders of Premier.

2. *Breach of Fiduciary Duty*

[3] Ironman's claim for breach of fiduciary duty alleges that Dr. Chodri, in his representative capacity as Premier's executive board president, owed a statutorily-imposed fiduciary duty to Ironman, as a unit owner. Ironman contends that Dr. Chodri breached this statutorily-imposed fiduciary duty when he, *inter alia*, failed to maintain a separate bank account, billed Ironman for unrelated common element charges, and refused to provide full access to the books and records. Further, Ironman argues that as a result of Dr. Chodri's breach, Ironman suffered and will continue to suffer monetary damages due to Dr. Chodri's use of their payments to pay his taxes, make payments on White Oak's mortgage, and directly pay himself approximately $138,000.00. Viewed in the light most favorable to it, Ironman has provided sufficient evidence to be submitted to the jury, unless otherwise barred.

Ordinarily, breaches of fiduciary duty are governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1). *Marzec v. Nye*, 203 N.C. App. 88, 93, 690 S.E.2d 537, 541 (2010). However, "[a] ten-year statute of limitations applies to breach of fiduciary duty claims only when they rise to the level of constructive fraud." *Orr v. Calvert*, 212 N.C. App. 254, 260, 713 S.E.2d 39, 44 (emphasis supplied), *overruled on other grounds*, 365 N.C. 320, 720 S.E.2d 387 (2011). Because Ironman filed suit more than three years after Dr. Chodri's alleged wrongdoing, its' claim for breach of statutory fiduciary duty is barred, unless the breach rose to the level of constructive fraud.

3. Constructive Fraud

[4] A constructive fraud claim requires a plaintiff to allege and show (1) that the defendant "owes the plaintiff a fiduciary duty;" (2) that the defendant "breached" that duty; and, (3) that the defendant "sought to benefit himself in the transaction." *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) (citation omitted). "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud[,]" and accordingly does not need to meet the Rule 9(b) pleading requirement. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 482, 593 S.E.2d 595, 599 (2004) (citation omitted).

The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty. *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004). This element requires a plaintiff to allege and prove that the defendant took "advantage of his position of trust to the hurt of plaintiff" and sought "his own advantage in the transaction." *Barger*, 346 N.C. at 666, 488 S.E.2d at 224 (citation omitted).

Since sufficient evidence of a statutory fiduciary relationship exists, the remaining issues to support a constructive fraud claim are whether Ironman introduced sufficient evidence showing: (1) Dr. Chodri benefitted as a result of the mismanaged funds; and, (2) if Dr. Chodri benefitted, that he intentionally took advantage of the fiduciary relationship to benefit himself.

A plaintiff must allege that the benefit sought was "more than a continued relationship with the plaintiff" or "payment of a fee to a defendant for work" it actually performed. *Sterner v. Penn*, 159 N.C. App. 626, 631-32, 583 S.E.2d 670, 674 (2003) (citation omitted). The evidence presented included Dr. Chodri allegedly misappropriating association dues in addition to assessments.

Ironman contends Dr. Chodri benefitted from his financial misconduct by making payments for taxes, mortgage, and to pay himself from the White Oak account which contained Premier's funds. Presuming, without deciding, this is sufficient evidence to show that Dr. Chodri benefitted from the alleged mismanagement, the issue remains of whether Ironman introduced sufficient evidence that Dr. Chodri mismanaged the funds with the intent to benefit himself.

Entering summary judgment or a directed verdict on claims for breach of a fiduciary duty and constructive fraud, "is rarely proper when a state of mind such as intent or knowledge is at issue." *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986). Here, it is unclear whether Dr. Chodri intended to benefit from the improper account management or was merely negligent or omitted his duties. However, presuming that Dr. Chodri personally benefitted, the burden shifts to Dr. Chodri to prove that he dealt in an "open, fair and honest manner." *Compton v. Kirby*, 157 N.C. App. 1, 16, 577 S.E.2d 905, 915 (2003). *See also Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007) (holding "[w]hen . . . the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred"). As such, we are unable to conclude as a matter of law that the trial court's entry of a directed verdict on Ironman's claims on these issues was proper.

4. *Punitive Damages*

[5] To recover punitive damages a claimant must prove, by "clear and convincing evidence," that "the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) fraud, (2) malice, or (3) willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a)-(b) (2017). As used in Chapter 1D, "fraud" means actual fraud. *See* N.C. Gen. Stat. § 1D-5(4) (2017) (" 'Fraud' does not include constructive fraud unless an element of intent is present."). Because Plaintiffs presented no evidence of actual fraud, the trial court's entry of a directed verdict on all Plaintiffs' claims for punitive damages is affirmed.

C. Attorney Fees

[6] Defendants assert the trial court erred by denying their motion for attorneys' fees. Defendants argue an award of costs and attorneys' fees under N.C. Gen. Stat. § 47C-3-116(e) and N.C. Gen. Stat. § 47C-3-116(g) are mandatory.

1. *Standard of Review*

N.C. Gen. Stat. § 47C-3-116 provides for mandatory attorney fees. This Court "review[s] a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008).

2. *Analysis*

As permitted by the Condominium Act and its Declaration, Premier assesses all owners condominium fees for the payment of common area expenses. Enforcement of collecting those fees is subject to N.C. Gen. Stat. § 47C-3-116. Section 116, entitled "Lien for sums due the association; enforcement," provides procedures and remedies that an association may take to collect sums due it from a unit owner. N.C. Gen. Stat. § 47C-3-116 (2017). Additionally, Section 116 includes three separate attorneys' fees provisions. *See* N.C. Gen. Stat. § 47C-3-116(e), (f)(12), (g). Here, Defendants argue that an award of attorneys' fees to Premier is mandatory under subsections (e) and (g).

Subsection 116(g) provides that any judgment in any "civil action relating to the collection of assessments shall" include an award of costs and reasonable attorneys' fees "for the prevailing party." N.C. Gen. Stat. § 47C-3-116(g). This statute's use of the word "shall" provides no element of discretion of whether reasonable fees will be awarded. *See Willow Bend*, 192 N.C. App. at 418, 665 S.E.2d at 578 (holding that attorney fees under the analogous N.C. Gen. Stat. § 47F-3-116(e) were mandatory where the statute provided that "[a] judgment, decree, or order in any action brought under this section *shall* include costs and reasonable attorneys' fees for the prevailing party").

Upon remand, the trial court must determine if Premier was: (1) the prevailing party; and, (2) in a civil action relating to the collection of condominium assessments. If so, the trial court must award Premier its "reasonable" attorney fees. The trial court's denial of Premier's motion for costs and attorney fees is reversed and remanded.

V. Conclusion

For the reasons stated above, we find no error in the judgment entered upon the jury's verdicts concerning the parties' respective breach of the Declaration. We affirm the trial court's entry of directed verdict for Defendants and against HFP and the Hodges individually on all their claims. We also affirm the trial court's entry of directed verdict against all Plaintiffs on their claims for punitive damages.

We reverse and remand that portion of the trial court's order which entered a directed verdict against Plaintiff Ironman on its claim for breach of fiduciary duty and constructive fraud against Defendants Premier and Dr. Chodri as its sole officer. We also reverse and remand the order denying Premier's claims for costs and attorney fees against

Ironman for breach of the Declaration and remand for a hearing in accordance with the statutes. *It is so ordered.*

NO ERROR IN PART, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and BERGER concur.

CHARITY MANGAN, Plaintiff
v.
JAMES S. HUNTER, DDS, JAMES S. HUNTER, DDS, P.A., JENNIFER WELLS, DDS, AND JENNIFER L. WELLS, DDS, P.A. d/b/a FIRST IMPRESSIONS FAMILY DENTISTRY, Defendants

No. COA19-30

Filed 3 December 2019

Medical Malpractice—Rule 9(j)—expert's failure to review all medical records—disputed—summary judgment—improper

In a medical malpractice action against a dentist and his dental practice (defendants), the trial court erred by granting summary judgment in favor of defendants after finding it was "undisputed" that plaintiff's expert failed to review all medical records before plaintiff filed her complaint, pursuant to Civil Procedure Rule 9(j). Because of the expert's equivocal deposition testimony (she stated that she "would have" reviewed the dentist's clinical notes, but she could not say under oath whether she had), the parties disputed whether the expert reviewed all medical records pursuant to Rule 9(j), and therefore a genuine issue of material fact remained.

Appeal by Plaintiff from Order entered 23 July 2018 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2019.

Lanier Law Group, P.A., by Donald S. Higley, II, and Lancaster and St. Louis, PLLC, by Hilary A. St. Louis, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Luke Sbarra, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Charity Mangan (Plaintiff) appeals from an Order entered 23 July 2018 granting summary judgment in favor of Defendants James S. Hunter, DDS (Dr. Hunter) and James S. Hunter, DDS, P.A. (collectively, Defendants) in this medical malpractice action. The Record before us on appeal tends to establish the following:

Plaintiff began visiting Dr. Hunter for dental treatment in 1986 and continued to be a regular patient until Dr. Hunter's retirement in 2013. During the twenty-seven years that Plaintiff saw Dr. Hunter for dental care, Plaintiff developed temporomandibular joint disorder, migraines, and fibromyalgia. She also developed bruxism (teeth grinding). Plaintiff's last appointment with Dr. Hunter was on 17 April 2013. At that time, Dr. Hunter reported no dental caries.[1] Dr. Hunter did recommend a crown along with continued use of Plaintiff's dental guard.

Seven months later, in November 2013, Plaintiff visited a new dentist, Dr. Sherrill Jordan, for routine dental care. Dr. Jordan reported tooth erosion on nearly all of Plaintiff's teeth and twelve cavities. Plaintiff received a second opinion from Dr. Wells, whose opinion was very similar to Dr. Jordan's. Plaintiff received treatment for thirteen cavities in December 2013 by Dr. Wells. In February 2014, Plaintiff visited another new dentist, Dr. Jason Baker, and received additional dental treatments in March 2014. Dr. Baker referred Plaintiff to Dr. Napenas in May 2014, and Dr. Napenas subsequently diagnosed her with atypical odontalgia. Dr. Napenas informed Plaintiff that "treatment [for atypical odontalgia] would include a life-long management for the pain with similar medications as what she was already taking for fibromyalgia." He prescribed Plaintiff an antidepressant for nerve pain and stress management. Plaintiff also alleged her primary care physician prescribed her blood pressure medication as a result of the stress of the situation. At the time of the filing of the Complaint, Plaintiff was still seeing Drs. Baker and Napenas for treatment.

In March 2015, Sharon Szeszycki, DDS (Dr. Szeszycki) was contacted by Plaintiff's counsel about the present action. Dr. Szeszycki, a dentist in the Chicago area, has been working as an expert witness in the area of dental malpractice since 2007. Around 10 March 2015, counsel for Plaintiff mailed a letter to Dr. Szeszycki that indicated it included

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1. The transcript and Record use the terms dental caries and cavities interchangeably. *See Dental caries*, The American Heritage College Dictionary (3d ed. 1993) (defining dental caries as "[t]he formation of cavities in the teeth by the action of bacteria").

a USB drive with Plaintiff's records. On 20 March 2015, Dr. Szeszycki reported, in her Affidavit Letter to Plaintiff's counsel, "[a] reasonable and meritorious cause for action exists with respect to James Hunter DDS[.]" Dr. Szeszycki's Affidavit Letter stated, in forming her opinion, she reviewed: "Mangan timeline of events[,] Dr. Baker letter[,] Demand letter to Luke Sbarra March 2015[,] Baker treatment plan[,] Perio charting[, and] Mangan teeth pics." She continued to find "Dr. Hunter failed to document any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progression of this disease process."

On 18 February 2016, Plaintiff filed her Complaint alleging medical malpractice against Defendants in Cabarrus County Superior Court. In accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure, Plaintiff's Complaint alleged:

> [A]ll medical records pertaining to Defendants' negligence . . . have been reviewed by a person or persons reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is/are willing to testify that the medical care did not comply with the applicable standard of care.

Defendants accepted service on 13 April 2016 and submitted their Answer to Plaintiff's Complaint on 13 June 2016. The parties began discovery. On 27 April 2018, Plaintiff voluntarily dismissed her claims against Jennifer Wells, DDS and Jennifer Wells, DDS, P.A. d/b/a First Impressions Family Dentistry without prejudice.

On 29 August 2016, Dr. Szeszycki responded to Defendants' Rule 9(j) interrogatories. The relevant responses are as follows:

> 4. Specifically identify all documents you reviewed to form your opinion about the medical care rendered by any Defendants.
>
> **RESPONSE [Dr. Szeszycki]**
>
> **I reviewed the following materials:**
>
> **Mangan timeline of events**
>
> **Dr. Baker letter**
>
> **Demand letter to Luke Sbarra March 2015**
>
> **Baker treatment plan**

Perio charting

Mangan teeth pics

5. State with specificity the date you received the medical records regarding Plaintiff, the date you actually reviewed the medical care rendered, when and to whom you expressed your opinions regarding the medical care Defendants provided to Plaintiff, and whether you provided anyone a written, verbal, or other report regarding your conclusions.

RESPONSE

I received the materials on or about March 15, 2015 and began my review on that date. I continued my review on March 17, 2015 and then prepared a written Affidavit on March 20, 2015 expressing my opinions. (R p. 48).

On 2 April 2018, Plaintiff designated Dr. Szeszycki as an expert witness. Plaintiff submitted "Dr. Szeszycki is expected to testify that Defendants breached the standard of care in their care and treatment of [Plaintiff]" and that "Dr. Szeszycki bases her opinions on her education and training as well as her review of [Plaintiff's] medical records."

Defendants deposed Dr. Szeszycki on 10 May 2018. Dr. Szeszycki's deposition revealed the following exchanges:

[Counsel for Defendants:] [W]hat information do you have that you relied on that you do not have with you printed out . . . ?

[Dr. Szeszycki:] Okay. There is a Baker treatment plan, Baker updated treatment plan. There was a demand letter to you. There's Dr. Baker X-ray, Dr. Baker letter. There's a file that says Gawthrop-Wells-Mangan. Another one that's Hunter-Mangan, which I think is what I have with me because that's his clinical notes, Dr. Hunter's clinical notes, and then there is a Hunter, DDS, James condensed version, which is his dep. Jordan DDS. Mangan timeline of events. . . .

. . . .

[Counsel for Defendants:] This is, I believe, your responses to the 9(j) discovery responses. Do you recall making these responses?

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And in number 4, do you recall the question specifically identify all documents you reviewed to form your opinion about the medical care rendered by the Defendants?

. . . .

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And your response was I reviewed the following materials, and you have a list of the materials that you listed – that you reviewed?

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] That is the material you reviewed, correct?

[Dr. Szeszycki:] At the time, yes.

. . . .

[Counsel for Defendants:] And those were the only documents provided to you when you did your review in March of 2015, correct?

[Dr. Szeszycki:] Yes.

. . . .

[Counsel for Defendants:] And prior to the filing of the lawsuit, the documents that you reviewed would have been those listed on interrogatory number 4 . . . correct?

[Dr. Szeszycki:] Correct.

[Counsel for Defendants:] And no other documents, correct?

[Dr. Szeszycki:] Correct.

. . . .

[Counsel for Defendants:] And those documents mentioned in [Interrogatory] answer number 4, that's the complete universe of information you considered in March of 2015, correct?

[Dr. Szeszycki:] I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that.

> [Counsel for Defendants:] Did you?
>
> [Dr. Szeszycki:] I'd have to look -- let's see here.
>
> [Counsel for Defendants:] It's not on the list?
>
> [Dr. Szeszycki:] It's not on the list. I know. That's a surprise to me.
>
> [Counsel for Defendants:] So because it's not on the list, can you say under oath today that you looked at his notes?
>
> [Dr. Szeszycki:] I -- because it is not on the list, I cannot say that I looked at his notes, correct. . . . I would find it unusual for me to have given an opinion without looking at the notes. . . .

When asked specifically about Defendants' alleged malpractice, Dr. Szeszycki testified that "[her] feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking . . . [a]nd also what is contained in his note taking."

On examination by Plaintiff's counsel, Dr. Szeszycki stated: "I would never base my opinion on someone's report, for instance, the timeline of events that was written by the patient. I would always have looked at the records." Defendants' counsel then inquired: "Can you testify under oath in this case that you reviewed Dr. Hunter's records pertaining to the care Miss Mangan received at Dr. Hunter's office?" At that time, Dr. Szeszycki responded: "I'm going to testify under oath that I would have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit."

At the conclusion of the deposition, Defendants revisited the question of whether Dr. Szeszycki reviewed Plaintiff's medical records.

> [Counsel for Defendants:] [Y]ou've stated two different things. You've stated under oath in your 9(j) responses that you did not have Dr. Hunter's records. . . . Now, you're stating that you have no reason to doubt you received them and that you normally would do it. So I'm asking you can you now under oath change what you previously said under oath, which is that you did not have those records. I want you to be able to tell me why under oath you can say today that you reviewed Dr. Hunter's records in March of 2015.
>
> [Dr. Szeszycki:] I'm going to make a statement here. You asked me under oath could I see, given what I wrote down

> in the affidavit, is information that's written there, did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no, but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion.
>
> . . . .
>
> [Counsel for Defendants:] . . . I'm asking right now as you sit here and testify under oath, the best you can say is consistent with what you've previously said under oath is that you cannot say under oath that you reviewed Dr. Hunter's medical records prior to the time that the lawsuit was filed, correct?
>
> [Dr. Szeszycki]. I cannot say under oath and based on my affidavit letter that I saw Dr. Hunter's clinical notes. I can say -- I can say that when I -- in completing the file, I asked for more information . . . and when I received Dr. Hunter's notes, I went, oh, yes, I've seen these, and, yet, they're not listed here. I will agree with you. They are not listed here on my affidavit letter.

On 30 May 2018, Defendants filed a Motion for Summary Judgment pursuant to Rules 9(j) and 56 of the North Carolina Rules of Civil Procedure. Defendants' Motion for Summary Judgment alleged:

> The Rule 9(j) discovery responses of Dr. Sharon Szeszycki . . . and the deposition transcript of Dr. Sharon Szeszycki . . . disclose her failure to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action. Consequently, in light of this Rule 9(j) failure, no genuine issue of material fact exists and Defendants are entitled to judgment as a matter of law.

In response, on 5 July 2018, Plaintiff's counsel filed an Affidavit of Attorney for Plaintiff, averring "Dr. [Szeszycki] acknowledged receipt of his records and reviewed them." Dr. Szeszycki also filed an affidavit on 5 July 2018, averring: "Since the deposition and refreshing my memory as to my notes and research, I can say that I am certain I reviewed Defendant Hunter's dental records prior to rendering my opinion in this matter and prior to the filing of this lawsuit."

On 12 July 2018, the trial court entered "Order Granting Defendant James S. Hunter, DDS and James S. Hunter, DDS, P.A. Summary

Judgment" (Order). The Order was served on Plaintiff after entry on 23 July 2018. In the Order, the trial court made what it termed "undisputed findings of fact and conclusions of law." The trial court, however, also found "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records pertaining to Defendants' alleged negligence that were available . . . ." Plaintiff timely appealed this Order on 15 August 2018.

Issue

The issue in this appeal is whether the trial court erred by granting summary judgment in favor of Defendants on the basis of its finding Plaintiff's expert did not review Plaintiff's medical records as required by Rule 9(j).

Analysis

I. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact." *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 173 (2018). "We review *de novo* a trial court's dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance." *Preston v. Movahed*, ___ N.C. App. ___, ___, 825 S.E.2d 657, 661, *disc. rev. allowed* ___ N.C. ___, 830 S.E.2d 818 (2019).

II. Summary Judgment and Rule 9(j)

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent." *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) (alterations, citations, and quotation marks omitted).

Summary judgment is a procedural way in which parties can ensure compliance with Rule 9(j) in medical malpractice actions. *See Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477, *disc. review denied*, 363 N.C. 651, 684 S.E.2d 290 (2009) ("The Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j). *E.g.*, N.C. Gen. Stat. § 1A-1, Rules 12, 41, and 56 (2005). Rule 9(j) itself, however, does not provide such a method."). Rule 9(j), in relevant part, requires:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017). In sum, Rule 9(j) requires the person a plaintiff seeks to have qualified as an expert review "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" prior to the filing of the complaint. *See id.*

Rule 9(j) was added to the North Carolina Rules of Civil Procedure in 1995. *See Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018). "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 818 (2012) (emphasis in original omitted) (citation omitted). "[T]he rule averts frivolous actions by precluding any filing in the first place

by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." *Vaughan*, 371 N.C. at 435, 817 S.E.2d at 375. Thus, compliance with Rule 9(j) is determined at the time the complaint is filed. *Moore*, 366 N.C. at 31, 726 S.E.2d at 817 (citation omitted). However, "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts[.]" *Id.* (citation omitted).

A. The Trial Court's Order

Turning to the case *sub judice*, Defendants' Motion for Summary Judgment alleged Dr. Szeszycki "fail[ed] to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action." After considering the parties' arguments, the trial court granted summary judgment in favor of Defendants. In its Order, the trial court purported to make "undisputed findings of fact and conclusions of law in connection with [the] Judgment[.]" Plaintiff contends that the trial court erred in Findings of Fact 8, 13, and 14, ultimately arguing that Dr. Szeszycki did, in fact, review Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

Summary judgment is proper where there "is no genuine issue as to any material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c). Here, necessarily, the issue of whether Dr. Szeszycki reviewed the medical records in question prior to the filing of Plaintiff's Complaint is a material fact; the answer to that question determines whether Plaintiff's lawsuit may proceed on the merits. Upon our de novo review of the Record, we conclude the trial court's Findings of Fact are not, as it claims, "undisputed" and therefore that summary judgment was improper.

The trial court's Order cites our Supreme Court's decision in *Moore v. Proper* in support of its decision to make findings of fact at the summary judgment phase.[2] *Moore* was decided by our Supreme Court in 2012 and affirmed a divided Court of Appeals decision to reverse the

2. The trial court's Order, in footnote one, stated:

> The Court makes findings of fact and conclusions of law consistent with Moore v. Proper, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012) (stating, "when a trial court determines a Rule 9(j) certification is not supported by the facts, the Court must make written findings of facts to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and in turn, whether those conclusions support the trial court's ultimate determination.").

trial court's grant of summary judgment in favor of the defendants. 366 N.C. 25, 25, 26, 28, 726 S.E.2d 812, 815 (2012). The trial court granted the defendants' motion for summary judgment on the basis that the plaintiff's expert was not reasonably expected to qualify under North Carolina Rule of Evidence 702. *Id.* at 28, 726 S.E.2d at 815.

The Supreme Court's decision in *Moore* cautions lower courts against conflating the requirements of Rule 9(j) with those of Rule 702 of the North Carolina Rules of Evidence. *Id.* at 31, 726 S.E.2d at 817 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)) ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702."). The Court emphasized that "the trial court is not generally permitted to make factual findings at the summary judgment stage[ ]" and cautioned lower courts "a finding [of fact] that reliance on a fact or inference is not reasonable will occur only in the *rare* case in which no reasonable person would so rely." *Id.* at 32, 726 S.E.2d at 818 (emphasis added) (citation omitted).

This Court has recognized that although findings of fact are not proper at summary judgment, "[i]t is not uncommon for trial judges to recite uncontested facts upon which they base their summary judgment order, however when this is done any findings should clearly be denominated as uncontested facts and not as a resolution of contested facts." *Raymond*, ___ N.C. App. at ___, 811 S.E.2d at 174 (citation and quotation marks omitted). This reasoning aligns with our Supreme Court's holding in *Moore* instructing trial courts to grant summary judgment only under the rare circumstance when there could be no other finding but that "no reasonable person would so rely" on the forecasted or disputed evidence as to whether a party reasonably expected a proffered expert to qualify under Rule 702. *Moore*, 366 N.C. at 32, 726 S.E.2d at 818.

Here, we conclude the trial court erroneously applied *Moore*'s instruction by making "undisputed findings of fact" at summary judgment in light of the evidence in the case *sub judice*. The Record reflects, in multiple instances, that the issue before the trial court is one of disputed and material fact rendering summary judgment wholly improper and, further, does not fall into the rare case described in *Moore*. *See id.* Instead, the trial court's Findings serve to resolve contested facts, inconsistent with this Court's prior opinion in *Raymond*. *See* ___ N.C. App. at ___, 811 S.E.2d at 174.

First, in Finding 8, the trial court includes select citations to portions of Dr. Szeszycki's deposition testimony supporting summary judgment

in favor of Defendants as "undisputed facts." However, Finding 8 omits important portions of Dr. Szeszycki's deposition that flag the factual question of whether she reviewed Plaintiff's medical records before the filing of the Complaint. During examination by Defendants' counsel, Dr. Szeszycki testified her answer to Interrogatory 4 included all the materials that she reviewed. She reiterated her "Affidavit Letter" similarly included the correct list of materials she reviewed. However, when asked later in the deposition if her response to Interrogatory 4 is "the complete universe of information [she] considered in March of 2015[,]" she responded: "I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that." She continued: "I would find it unusual for me to have given an opinion without looking at the notes." The issue was revisited at the conclusion of the deposition. Dr. Szeszycki emphasized she "would never base [her] opinion on someone's report, for instance, the timeline of events that was written by the patient. [She] would always have looked at the records." Moreover, Dr. Szeszycki stated: "I'm going to testify under oath that I would have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit." Dr. Szeszycki conceded: "You asked me under oath could I see, given what I wrote down in the affidavit, . . . did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no[.]" However, she continued, "but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion."

Defendants contend that it is clear from Dr. Szeszycki's deposition that she did not review Plaintiff's medical records as required by Rule 9(j); we disagree. During a line of questioning, Defendants' counsel inquired: "And your feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking, correct?", to which Dr. Szeszycki responded, "[a]nd also what is contained in his note taking." At another point, Defendants' counsel asked Dr. Szeszycki: "there's no clinical evidence that you are aware of indicating that decay existed as of April 2013, correct?" Dr. Szeszycki answered, "Correct. According to Dr. Hunter's notes, there is no indication." In both instances, it appears from our review of the deposition that Dr. Szeszycki was testifying that a portion of the opinions she formed were based on the contents of Dr. Hunter's notes.

In short, the gist of Dr. Szeszycki's deposition testimony is apparent. Even though the list of materials she provided did not state that it included Plaintiff's medical records, Dr. Szeszycki believed she reviewed the records prior to rendering her opinion on the matter. Whether her

belief is accurate or not, however, is a genuine issue of material fact to be resolved.

Second, in Finding 13, the trial court purported to find "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records . . ." Finding 13 indicates the trial court engaged in weighing "[t]he totality of the evidence" before it. Similarly, in Finding 14, the trial court stated "the Affidavits do not satisfy the Court[.]" These Findings, weighing the evidence, are inconsistent with our summary judgment standard. Thus, we conclude it was error for the trial court to make "undisputed findings of fact" at summary judgment in this case because the trial court's Findings actually resolved a genuine issue of material fact as to whether Dr. Szeszycki reviewed Plaintiff's medical records prior to the filing of Plaintiff's Complaint.

Our own review of the Record reveals additional facts further supporting our conclusion there are factual questions present that are not "undisputed," as the trial court found. In her initial Affidavit Letter to Plaintiff's counsel, Dr. Szeszycki found "Dr. Hunter failed to *document* any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progress of this disease process [,]" signaling Dr. Szeszycki may have reviewed records or clinical notes not listed in the "Materials Reviewed" section. Although counsel for Plaintiff concedes that Dr. Szeszycki's response to Interrogatory 4 omits Plaintiff's medical records, counsel has repeatedly averred it was purely a typographical omission. Moreover, Dr. Szeszycki's response to Interrogatory 5 raises a factual question of whether or not she reviewed the medical records. Specifically, Interrogatory 5 asked for the date Dr. Szeszycki "received the medical records" and "the date [she] actually reviewed the medical care rendered[.]" Thus, when asked when she received and reviewed the records, Dr. Szeszycki answered that she received and reviewed "the materials" on 15 March 2015. As such, we conclude the trial court erred in granting summary judgment in favor of Defendants.

B. The Crocker *Framework*

Although Rule 9(j) compliance is a conclusion of law reviewed de novo, *Preston*, ___ N.C. App. at ___, 825 S.E.2d at 661, we are unable to review the trial court's conclusion Plaintiff failed to comply with Rule 9(j) when a genuine issue of material fact persists. We further recognize, in preliminary matters such as 9(j) compliance, it is not practical for the jury to be the ultimate fact finder. As such, when factual questions like the one before us arise, we are guided by our Supreme Court's decision

in *Crocker v. Roethling*, which this Court followed in *Barringer*. *See Crocker v. Roethling*, 363 N.C. 140, 140, 675 S.E.2d 625, 625 (2009); *Barringer*, 197 N.C. App. at 250-51, 677 S.E.2d at 474.

In *Crocker*, our Supreme Court reversed and remanded this Court's affirmation of the trial court's grant of summary judgment in a medical malpractice action. 363 N.C. at 142, 675 S.E.2d at 628. The majority held "that in a medical malpractice case: [ ] gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant[.]" *Id.* at 149, 675 S.E.2d at 632. Justice (later Chief Justice) Martin, in his concurrence, elaborated on the way in which trial courts could properly exercise their discretion. He ultimately concluded the trial court should consider conducting voir dire on proffered experts in cases where "the admissibility decision may be outcome-determinative[.]" *Id.* at 152, 675 S.E.2d at 634 (Martin, J., concurring). He emphasized "the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication."[3] *Id.* We agree.

"[T]he voir dire procedure provides a more reliable assessment mechanism than discovery depositions or conclusory affidavits, protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate." *Id.* at 153, 675 S.E.2d at 634-35. By conducting voir dire in close cases, the trial court is provided with "an informed basis to guide the exercise of its discretion" *Id.* at 152, 675 S.E.2d at 634.

Indeed, in *Barringer*, this Court reversed and remanded the trial court's grant of summary judgment in favor of the defendant on the question of whether the plaintiff's expert was "sufficiently familiar with the applicable standard of care." 197 N.C. App. at 247, 261, 677 S.E.2d at 472, 474. In *Barringer*, it was unclear from the proffered expert's affidavit and subsequent deposition testimony whether he applied a national or local standard of care in forming his opinion. *Id.* at 250, 677 S.E.2d at 474. This Court, in looking at the expert's initial affidavit and subsequent deposition testimony, concluded it "present[ed] a close question" and was "undeveloped." *Id.* at 247, 250, 677 S.E.2d at 472, 474 (citing *Crocker*,

3. Justice Martin's concurrence in *Crocker* is the controlling opinion. *See id.* at 154 n. 1, 675 S.E.2d at 635 n. 1 (Newby, J., dissenting); *see also Barringer*, 197 N.C. App. at 251 n. 4, 677 S.E.2d at 474 n. 4 ("Justice Martin's concurring opinion, having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a voir dire examination of the proffered expert witness." (citations and quotation marks omitted)).

363 N.C. at 147, 675 S.E.2d at 631). Therefore, this Court remanded the case to the trial court "with instructions to conduct a voir dire examination of [the expert] in order to 'determine the admissibility of the proposed expert testimony.' " *Id.* at 251, 677 S.E.2d at 474 (citing *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634 (Martin, J., concurring)). Defendants cite *Barringer* in support of their argument for summary judgment. However, this Court concluded there "the [expert's] affidavit is plainly inconsistent with [the expert in question's] prior sworn testimony and does not create a genuine issue of fact . . . ." *Id.* at 257-58, 677 S.E.2d at 478. We conclude, in the case *sub judice*, there is a genuine issue of material fact, notwithstanding the existence of an allegedly inconsistent subsequent affidavit.

Here, the trial court granted Defendants' Motion for Summary Judgment, finding it was "undisputed" Plaintiff's expert "failed to review all medical records pertaining to Defendants' alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiffs' [sic] filing of her civil action." As we have noted, however, that fact is disputed by the parties and, further, the resolution of that fact is outcome determinative. Dr. Szeszycki's deposition testimony does not unequivocally establish she did or did not review Plaintiff's medical records as Defendants contend. Therefore, we conclude, as this Court did in *Barringer*, it is a "close call" whether the Record and evidence to date shows Dr. Szeszycki did or did not review Plaintiff's medical records prior to the filing of the Complaint, rendering summary judgment improper. Thus, we hold, consistent with *Crocker* and *Barringer*, the trial court should conduct a voir dire of Plaintiff's expert to "provide[ ] a more reliable assessment mechanism than discovery depositions or conclusory affidavits[.]" *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634-35.

Conclusion

Based on the foregoing reasons, we vacate the trial court's 23 July 2018 Order and remand this matter to the trial court to hold a voir dire examination of Dr. Szeszycki to resolve the issue of whether Dr. Szeszycki reviewed Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

VACATED and REMANDED.

Judges INMAN and BROOK concur.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, ATTORNEY GENERAL, PLAINTIFF
v.
KINSTON CHARTER ACADEMY, A NORTH CAROLINA NON-PROFIT CORPORATION; OZIE L. HALL, JR., INDIVIDUALLY AND AS CHIEF EXECUTIVE OFFICER OF KINSTON CHARTER ACADEMY; AND DEMYRA MCDONALD HALL, INDIVIDUALLY AND AS BOARD CHAIR OF KINSTON CHARTER ACADEMY, DEFENDANTS

No. COA18-688

Filed 3 December 2019

1. **Appeal and Error—interlocutory appeal—N.C. False Claims Act—sovereign immunity raised—substantial right**

   In a case brought by the State against a charter school and its CEO (defendants) for violation of the N.C. False Claims Act, defendants' interlocutory appeal from orders denying its motions to dismiss affected a substantial right where defendants raised issues of sovereign immunity. However, the appeal was limited to the denial of motions to dismiss under Rule 12(b)(6) and did not include review of the denial of a motion to dismiss under Rule 12(b)(1).

2. **Immunity—sovereign—N.C. False Claims Act—charter school—extension of state**

   In a case brought by the State against a charter school for violation of the N.C. False Claims Act (NCFCA), sovereign immunity protected the charter school from suit because it was a public school, and therefore an extension of the state, and there was no indication that the legislature intended to waive immunity for public schools for purposes of liability under the Act. Even assuming charter schools were not categorically entitled to immunity under the NCFCA, the charter school was not a "person" subject to liability under the Act where it operated as an arm of the state in furtherance of the state constitution's mandate to provide education.

3. **Immunity—public official—N.C. False Claims Act—CEO of charter school—insufficient evidence**

   In a case brought by the State against a charter school and its CEO for violation of the N.C. False Claims Act, the trial court properly denied the CEO's motion to dismiss under Rule 12(b)(6) where there was insufficient information in the record at the pleadings stage to determine whether public official immunity protected the CEO from suit.

4. Appeal and Error—interlocutory appeal—petition for writ of certiorari—additional issues

The Court of Appeals declined to issue a writ of certiorari to review additional issues regarding sufficiency of pleadings in an interlocutory appeal involving liability of a charter school and its officer under the N.C. False Claims Act.

Appeal by defendants Kinston Charter Academy and Ozie L. Hall, Jr. from orders entered 21 March 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Ozie L. Hall, Jr., pro se, defendant-appellant.

Ragsdale Liggett PLLC, by Mary M. Webb, Edward E. Coleman, III, and Amie C. Sivon, for defendant-appellant Kinston Charter Academy.

BERGER, Judge.

Plaintiff filed an action against Defendants Kinston Charter Academy ("Kinston Charter") and Ozie L. Hall ("Hall") for, among other things, violations of North Carolina's False Claims Act. On March 21, 2018, the trial court denied motions to dismiss filed by Kinston Charter and Hall (collectively, "Appellants"). Appellants now appeal the interlocutory orders denying their respective motions to dismiss. In addition, Appellants have filed petitions for writs of certiorari seeking review of the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. For the reasons discussed below, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and deny Appellants' petitions for certiorari review.

Factual and Procedural Background

Kinston Charter is a non-profit corporation located in Kinston, North Carolina. From January 2004 to September 2013, Kinston Charter operated a public school pursuant to a charter from the North Carolina State Board of Education as provided for by Section 115C-238.29 of the North Carolina General Statutes.[1] Hall served as Kinston Charter's CEO from

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1. At the relevant time herein, North Carolina charter schools were governed by Section 115C-238.29. Effective September 23, 2015, charter school governance was recodified at Section 115C-218.

2007 until 2013. Demyra McDonald-Hall served as the chairwoman of Kinston Charter's board of directors for roughly the same period of time.

In North Carolina, charter schools receive operating funds from the State on a per pupil basis. In the spring of each year, a charter school is required to provide an estimate to the Department of Public Instruction ("DPI") of its anticipated average daily membership ("ADM") for the upcoming school year. This estimate is determined by the school's current ADM plus or minus any estimated losses or increases in the student population for the upcoming year ("Estimated ADM"). During the time period relevant to this case, charter schools were permitted to submit estimated growth in student enrollment of up to twenty percent in their Estimated ADM without prior approval from the State; an increase of more than twenty percent in any given year required approval from the State Board of Education.[2] N.C. Gen. Stat. § 115C-238.29D(f)(1) (2013).

After the school year begins, charter schools must provide an average total enrollment from the first and twentieth days of the school year ("Actual ADM"). If the Estimated ADM does not align with the Actual ADM, the charter school's funding allotment is adjusted to recapture the excess funds paid to the charter school at the beginning of the school year based on its Estimated ADM.

On April 26, 2013, Hall reported to DPI an estimated enrollment for Kinston Charter of 366 students for the 2013-2014 school year. This estimate was within the statutory twenty percent growth range and did not require prior approval from the State Board of Education. However, when Kinston Charter opened for the 2013-2014 school year, the school only had 189 students in attendance—177 students less than the estimate provided by Hall, despite efforts by the school to advertise and attract additional students.

On September 4, 2013, Kinston Charter surrendered its charter to the State Board of Education. Due to the timing of the surrender, excess operating funds provided to Kinston Charter as a result of the difference between the school's Estimated ADM and Actual ADM were not recaptured by the State.

On April 26, 2016, the State of North Carolina, by and through then-Attorney General Roy Cooper, initiated this action against Kinston Charter, Hall, and McDonald-Hall. The complaint alleged violations of

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2. As of 2017, a charter school not identified as "low-performing" may now provide an Estimated ADM of up to thirty percent higher than its current ADM without seeking prior approval from the State Board of Education. N.C. Gen. Stat. § 115C-218.7(b) (2017).

the North Carolina False Claims Act ("NCFCA"), Chapter 55A of the North Carolina General Statutes ("Chapter 55A"), and the Unfair and Deceptive Trade Practices Act ("UDTPA"). Pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts, the case was designated "exceptional."

On July 3, 2017, the trial court heard arguments on Hall and McDonald-Hall's motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On August 9, 2017, the trial court granted dismissal of the Chapter 55A and UDTPA claims against Hall in his individual capacity and denied dismissal of the NCFCA claim. The court granted dismissal of all claims against McDonald-Hall in her individual capacity.

On March 19, 2018, the trial court heard Kinston Charter's motion to dismiss pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6). The trial court also heard arguments on Hall and McDonald-Hall's 12(b)(6) motions to dismiss all charges against them in their official capacities. Additionally, the trial court heard arguments on Hall's 12(b)(1) motion to dismiss the NCFCA claim against him in his individual capacity.

On March 21, 2018, the court granted dismissal of the Chapter 55A and UDTPA claims against Kinston Charter and denied dismissal of the NCFCA claim. The court granted dismissal of all claims against Hall and McDonald-Hall in their official capacities. Additionally, the trial court denied Hall's 12(b)(1) motion to dismiss the NCFCA claim against him in his individual capacity.

Appellants now seek interlocutory review, arguing that the trial court erred in denying their motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). In addition, Appellants have filed petitions for writs of certiorari seeking interlocutory review regarding the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. For the reasons set forth herein, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and deny Appellants' petitions for certiorari.

Scope of Review

[1] As an initial matter, we must address the scope of this Court's jurisdiction over Appellants' interlocutory appeals.

> An order is either interlocutory or the final determination of the rights of the parties . . . . An appeal is interlocutory when noticed from an order entered during the pendency

> of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Beroth Oil Co. v. N.C. Dep't of Transp., 256 N.C. App. 401, 410, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted).

Ordinarily, an interlocutory order is not immediately appealable. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, a party may seek immediate appellate review when an interlocutory order affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2017). "[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

An appeal from an interlocutory order raising issues of sovereign immunity affects a substantial right sufficient to warrant immediate review. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209, 753 S.E.2d 822, 826 (2014). "However, this only applies for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)." *Id.* at 209, 753 S.E.2d at 826 (citation and quotation marks omitted). Accordingly, only Appellants' challenges to the trial court's denial of their motions to dismiss under Rule 12(b)(6) based on sovereign immunity are properly before this Court.

Standard of Review

We review a trial court's denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017). "Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fails to state a claim upon which relief can be granted." *Id.* at 46, 802 S.E.2d at 898 (*purgandum*). When ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are deemed admitted for purposes of the motion. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015). A complaint should only be dismissed where it affirmatively appears that the plaintiff is not entitled to relief under any set of facts presented in support of the claim. *Wray*, 370 N.C. at 46, 802 S.E.2d at 898.

Analysis

Appellants contend that the trial court erred by denying their motions to dismiss under Rule 12(b)(6) because they are entitled to immunity from liability, and neither falls within the contemplated meaning of the term "person" under the NCFCA. We agree that Kinston Charter is entitled to sovereign immunity, and it is not a "person" subject to liability under the Act. However, while Hall qualifies as a "person" under the NCFCA, the record is insufficient to determine, at this stage, whether Hall is entitled to immunity in his individual capacity. Therefore, we affirm in part and reverse in part.

The North Carolina False Claims Act provides that any "person" who violates the statute by making or presenting a false claim for payment to the State "shall be liable to the State for three times the amount of damages that the State sustains because of the act of that person." N.C. Gen. Stat. § 1-607(a) (2017). The NCFCA was enacted "to deter persons from knowingly causing or assisting in causing the State to pay claims that are false or fraudulent and to provide remedies in the form of treble damages and civil penalties when money is obtained from the State by reason of a false or fraudulent claim." N.C. Gen. Stat. § 1-605(b) (2017). However, the NCFCA does not define the term "person." *See* N.C. Gen. Stat. § 1-606 (2017).

The NCFCA instructs that it should be interpreted consistently with the federal False Claims Act ("FFCA").[3] N.C. Gen. Stat. § 1-616(c) (2017). Interpreting the FFCA, the Supreme Court of the United States has stated that "the False Claims Act does not subject a State (or state agency) to liability." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). In reaching this conclusion, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. According to the Court, this presumption can only be overcome by an "affirmative showing of statutory intent to the contrary." *Id.* at 781.

I. Liability for Kinston Charter under the NCFCA

[2] Kinston Charter argues that the trial court erred when it denied its motion to dismiss under Rule 12(b)(6) because it is immune from liability under the NCFCA. We agree with Kinston Charter that, as an extension of the sovereign, it is entitled to exercise the State's sovereign immunity. Moreover, the State has failed to make any showing that

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3. Notably, the FFCA also fails to define the term "person." *See* 31 U.S.C. § 3729(b) (2017).

the General Assembly intended to waive Kinston Charter's immunity so as to include public schools within the term "person" for purposes of the NCFCA. Accordingly, we reverse the trial court's denial of Kinston Charter's motion to dismiss.

In North Carolina, "[e]ducation is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' " *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992). The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. To that end, the State is required to provide "a general and uniform system of free public schools." N.C. Const. art. IX, § 2(1). Under our Constitution, the State Board of Education is tasked with supervising and administering the free public school system. N.C. Const. art. IX, § 5. Interpreting these provisions, our State Supreme Court has concluded "the State . . . is solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 856, 821 S.E.2d 755, 756 (2018).

Under Section 115C-238.29E of the North Carolina General Statutes, "[a] charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." N.C. Gen. Stat. § 115C-238.29E(a) (2013). By the plain meaning of the statute, charter schools are public schools.

In North Carolina, public schools directly exercise the power of the State. *Bridges v. City of Charlotte*, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942). As our Supreme Court has recognized,

> The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution, and under its direct delegation.

Id. at 478, 20 S.E.2d at 830.

Charter schools, as public schools in the State of North Carolina, exercise the power of the State and are an extension of the State itself. Therefore, as an extension of the sovereign, charter schools are entitled to exercise the State's sovereign immunity. This presumption of immunity may only be overcome by an affirmative showing that the General Assembly intended to waive sovereign immunity for all public schools so as to include them within the term "person" for purposes of the NCFCA.

Overcoming this presumption as it applies to our system of public schools presents an especially difficult burden. North Carolina public schools perform a core constitutional function of the highest order with the benefit of State appropriated funds. As previously noted, a person who violates the NCFCA is liable for treble damages. N.C. Gen. Stat. § 1-607(a). Moreover, where a private person brings a *qui tam* action under the NCFCA, he or she is eligible to receive up to thirty percent of the proceeds or settlement of the action to be paid out of the proceeds. N.C. Gen. Stat. § 1-610(e) (2017). Such a potential diversion of the State's educational funding from the public schools could detrimentally impact the ability of our schools to perform their constitutionally mandated mission. Thus, we will not lightly impart on the General Assembly an intent that goes beyond recapturing public school funding put to a wrongful purpose but also creates potentially massive payouts for private persons from funds originally earmarked for the benefit of our State's schoolchildren.

Here, the State has failed to make an affirmative showing that the General Assembly intended to waive sovereign immunity for Kinston Charter so as to include public schools, and by extension charter schools, within the term "person" for purposes of the NCFCA.

The State argues that this Court should follow *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 141 P.3d 225 (2006), a decision from the Supreme Court of California, which concluded charter schools are not "persons" under the California False Claims Act. Bearing in mind that we are required by Section 1-616(c) to interpret the NCFCA consistently with the FFCA, we find the State's reliance on the California Supreme Court's decision unpersuasive.

In *Wells*, the Supreme Court of California held that California charter schools are "persons" within the context of the California False Claims Act. *Id.* at 1164, 141 P.3d 225. The California Supreme Court emphatically stated that its analysis was limited to the interpretation of California law. *Id.* at 1197, 141 P.3d at 241. Importantly, California's False Claims Act provides a definition for the term "person" which includes

"any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust." *Id.* at 1187, 141 P.3d at 234. The Supreme Court of California concluded that its analysis was "not affected by . . . United States Supreme Court decisions construing the federal false claims statute" because those cases applied "federal principles of statutory construction that differ from those used in [California]" to interpret a statute "distinct from its California counterpart." *Id.* at 1197, 141 P.3d at 241.

Moreover, nothing in *Wells* indicates that the California Constitution, like the North Carolina Constitution, imposes on the State itself, rather than its local subdivisions, the responsibility to provide every child with a sound basic education. In other words, under our State Constitution, every public school in North Carolina—whether traditional or chartered—*is* the State. Thus, the California Court's use of California law to interpret a California statute is decidedly unhelpful to our analysis, especially in light of the direction by the General Assembly to interpret the NCFCA consistently with federal law. *See* N.C. Gen. Stat. § 1-616(c) (2017).

Because Kinston Charter, as a public school, was engaged in a constitutionally mandated function reserved to the State, we conclude Kinston Charter is entitled to the State's sovereign immunity. Moreover, the State has failed to carry its burden of showing that the General Assembly intended to waive Kinston Charter's immunity so as to include it within the term "person" for purposes of the Act. Accordingly, the trial court erred in denying Kinston Charter's 12(b)(6) motion, and we reverse.

Even assuming, *arguendo*, that charter schools are not categorically entitled to claim sovereign immunity from the NCFCA, Kinston Charter would still not be subject to suit under an arm-of-the-state analysis applicable to entities performing State functions.

Although charter schools are considered by North Carolina law to be public schools engaged in a core governmental function mandated by our State Constitution, they are also required by statute to "be operated by a private nonprofit corporation." N.C. Gen. Stat. § 115C-238.29E(b) (2013). As previously noted, the Supreme Court of the United States has indicated that the State and its agencies are presumptively not "persons" under the FFCA. *Vt. Agency of Nat. Res.*, 529 U.S. at 782. However, in contrast, corporations "are presumptively *covered* by the term." *Id.* at 782.

In determining whether a corporation or other entity should be considered a "person" for purposes of the FFCA, the Court has noted the "virtual coincidence of scope" between this statutory inquiry and

the constitutional inquiry for determining sovereign immunity under the Eleventh Amendment. *Id.* at 779-80. As such, federal courts employ the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is a "person" under the FFCA. *See United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014); *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-80 (4th Cir. 2012); *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121-22 (9th Cir. 2007); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004). If a corporation or other entity functions as an arm of the state, then it is not a "person" for purposes of the FFCA and cannot be subject to liability under the Act. *Ky. Higher Educ.*, 681 F.3d at 580. The critical inquiry of this analysis is to determine whether the entity is "truly subject to sufficient state control to render [it] a part of the state . . . and not a 'person.' " *Id.* at 579.

The United States Court of Appeals for the Fourth Circuit has set forth a nonexclusive, four-factor review to determine whether a corporation or other entity is a "person" under the FFCA. *Id.* at 580. Under this analysis, courts must determine:

> (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
>
> (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;
>
> (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
>
> (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

Id. at 580 (*purgandum*). Although no single factor is determinative, the Supreme Court of the United States has found the first factor to be the most significant consideration of the arm-of-the-state analysis under the FFCA. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Importantly, whether a corporation or other entity is a "person" under the FFCA is a question of balance as opposed to one of math. *Pa. Higher Educ.*, 804 F.3d at 676.

Here, under the arm-of-the-state inquiry, we must first look to whether the State would likely be held responsible for any judgments obtained against Kinston Charter. *Ky. Higher Educ.*, 681 F.3d at 580.

Charter schools are funded, at least in part, by taxpayer money flowing through the State. These schools are expressly prohibited from raising private funds by charging tuition fees. N.C. Gen. Stat. § 115C-238.29F(b) (2013). As a result, any funds paid by a charter school in satisfaction of a judgment would almost certainly require the use and depletion of State funds. However, the liability of both charter schools and the State for civil judgments obtained against a charter school is limited by statute. N.C. Gen. Stat. § 115C-218.20 (2017).

Under Section 115C-218.20(a), the board of directors of a North Carolina charter school must be required by their charter to obtain a reasonable amount of liability insurance. N.C. Gen. Stat. § 115C-218.20(a). Moreover, under the statute, "*[a]ny sovereign immunity of the charter school . . . is waived to the extent of indemnification by insurance*." N.C. Gen. Stat. § 115C-218.20(a) (emphasis added). Section 115C-218.20(b) goes on to instruct that "[n]o civil liability shall attach to the State Board of Education, the Superintendent of Public Instruction, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school." N.C. Gen. Stat. § 115C-218.20(b).

"It is a well settled principle of statutory construction that words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute which is in harmony with its purpose." *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 7 (1968). When possible, our courts must construe the separate parts or sections of a statute as a cohesive and connected whole, thereby giving effect to the intention of the General Assembly. *Jones v. Bd. of Educ.*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923).

Reading Section 115C-218.20(b) alone, the State argues that the first factor of the arm-of-the-state analysis weighs against Kinston Charter because the State is not responsible for civil judgments against the charter school. However, this argument ignores the legislative intent of Section 115C-218.20 by only giving effect to subsection (b). When Section 115C-218.20 is read in its entirety, as a cohesive and connected whole, it is apparent that the General Assembly intended to shield North Carolina charter schools, the State Board of Education, and the Superintendent of Public Instruction from civil liability absent waiver.

As originally enacted in 1996, the section of the Charter Schools Act detailing civil liability and insurance requirements for North Carolina

charter schools made no mention of charter school immunity from civil liability. *See* N.C. Gen. Stat. § 115C-238.29F(c) (Cum. Supp. 1996). Rather, the section only discussed waiver of immunity by the State Board of Education to the extent of indemnification by insurance and operation of the Torts Claims Act under specified circumstances. N.C. Gen. Stat. § 115C-238.29F(c)(2) (Cum. Supp. 1996).

In 1997, the section was amended to include the language, "Any sovereign immunity of the charter school, of the organization that operates the charter school, or its members, officers, or directors, or of the employees of the charter school or the organization that operates the charter school, is waived to the extent of indemnification by insurance." N.C. Gen. Stat. § 115C-238.29F(c)(1) (1997). The General Assembly also deleted the language discussing waiver of immunity by the State Board of Education. *See* N.C. Gen. Stat. § 115C-238.29F(c) (1997). Following the amendment, Subsection (c)(2) read in its entirety, "No civil liability shall attach to any chartering entity, to the State Board of Education, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school." N.C. Gen. Stat. § 115C-238.29F(c)(2) (1997).

Assuming that the 1997 amendment was intended by the General Assembly to contribute to the operation of the statute, rather than serve as a mere redundancy, Section 115C-238.29F(c)(1), as revised, was designed to acknowledge that North Carolina charter schools enjoy the State's sovereign immunity, but waived charter school immunity to the extent of indemnification by insurance. This construction of the section permits subsections (a) and (b) of the modern-day Section 115C-218.20 to be read as a cohesive and connected whole, thereby giving effect to the intention of the General Assembly.

Thus, while the State is correct that no liability for civil judgments obtained against a charter school attaches directly to the State Board of Education or the Superintendent of Public Instruction, it is similarly true that no liability attaches to charter schools themselves, beyond the extent of indemnification by insurance, absent waiver. N.C. Gen. Stat. § 115C-218.20; *see also* § 115C-218.105(b) (eliminating State liability for charter school contractual indebtedness); *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976) (explaining that exercise of the State's sovereign immunity is implicitly waived by entering into a valid contract).

Turning to the second factor, we must examine the degree of autonomy exercised by Kinston Charter. *Ky. Higher Educ.*, 681 F.3d at 580.

North Carolina charter schools are operated by private, non-profit corporations. N.C. Gen. Stat. § 115C-238.29E(b). Additionally, a

charter school's board of directors, and not the State, is empowered to decide those matters "related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C. Gen. Stat. § 115C-238.29E(d).

Charter schools are funded by the State Public School Fund and a per pupil share of the local current expense fund. *Sugar Creek Charter Sch., Inc. v. State*, 214 N.C. App. 1, 10-11, 712 S.E.2d 730, 736 (2011). The autonomy of charter schools in North Carolina is limited by regulatory and reporting requirements mandated by the General Assembly. A charter school is required to apply for a charter with the State Board of Education, must seek approval of material revisions to its charter with the Board, and must have its original board of directors approved by the Board. N.C. Gen. Stat. §§ 115C-238.29B(a), 115C-238.29D(e). Charter schools are prohibited from affiliating with religious institutions. N.C. Gen. Stat. § 115C-238.29F(b). Charter schools must also abide by State-mandated health and safety standards, instructional guidelines, and admission requirements. N.C. Gen. Stat. § 115C-238.29F(a), (d), (g). Additionally, charter schools are required to meet certain educational proficiency standards established by the State. N.C. Gen. Stat. § 115C-238.29F(d1). Charter schools are also subjected to regular financial auditing requirements adopted by the State Board of Education and must report audit results to the Board at least annually. N.C. Gen. Stat. § 115C-238.29F(f).

For failure to meet the conditions, standards, or procedures set forth in its charter or those additional requirements set forth in Section 115C-238.29F, the State Board of Education is empowered to "terminate, not renew, or seek applicants to assume [a school's] charter." N.C. Gen. Stat. § 115C-238.29G(a) (2013). Accordingly, a charter school's autonomy only extends as far as its compliance with its Board-approved charter and oversight by DPI.

Under the third factor, we must decide whether Kinston Charter is involved with state concerns as distinct from non-state or local concerns. *Ky. Higher Educ.*, 681 F.3d at 580. As previously noted, the Supreme Court of the United States has deemed the first factor of this analysis to be most significant within the context of the FFCA. *Port Auth. Trans-Hudson Corp.*, 513 U.S. at 48. However, as it concerns interpretation of the NCFCA, we are compelled by the educational mandate of our State Constitution to attach special significance to this factor of the analysis.

As discussed at length above, the North Carolina Constitution requires that the "right to the privilege of education" be zealously guarded

and maintained by the State. N.C. Const. art. I, § 15. The constitutional right to education culminates in the State's obligation to provide for "a general and uniform system of free public schools." N.C. Const. art. IX, § 2. As our Supreme Court has explained, our Constitution makes the State solely responsible for ensuring "the right of every child in North Carolina to receive a sound basic education." *Silver*, 371 N.C. at 856, 821 S.E.2d at 756.

Finally, we must examine the relationship between Kinston Charter and the State as established by state law. *Ky. Higher Educ.*, 681 F.3d at 580.

The General Assembly authorized the creation of charter schools to "provide opportunities for teachers, parents, pupils, and community members" to further the State's constitutionally mandated educational mission. N.C. Gen. Stat. § 115C-238.39A(a). Under Section 115C-238.29E, "[a] charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." N.C. Gen. Stat. § 115C-238.29E(a). As previously discussed, in North Carolina, public schools directly exercise the power of the State. *Bridges*, 221 N.C. at 478, 20 S.E.2d at 830. As a unit of the public school system, charter schools are "under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable." *Id.* at 478, 20 S.E.2d at 830. Moreover, when functioning within this sphere, charter schools "do not exercise derived powers . . . so general as to require appropriate limitations on their exercise; they express the immediate power of the State." *Id.* at 478, 20 S.E.2d at 830.

Thus, even if we were not persuaded, as a matter of law, that charter schools are categorically entitled to claim sovereign immunity from the NCFCA, after considering and balancing all of the applicable factors of the arm-of-the-state inquiry, and despite the presumption for inclusion of corporate entities under the Act, we conclude that charter schools are not "persons" for purposes of the NCFCA. Therefore, because the General Assembly has not waived Kinston Charter's entitlement to the State's sovereign immunity under the NCFCA, the trial court erred by denying Kinston Charter's motion to dismiss under Rule 12(b)(6).

II. Liability for Hall under the NCFCA

[3] Hall similarly argues that the trial court erred when it denied his motion to dismiss under Rule 12(b)(6) because he is immune from liability under the NCFCA in his individual capacity. Specifically, Hall contends that he should not be considered a "person" for purposes of

the Act because he is a public official and is entitled to public official immunity. At this stage of the proceedings, viewing the material allegations of the State's complaint as admitted for purposes of the motion to dismiss, we conclude that there is insufficient information in the record to determine if he is entitled to public official immunity to defeat the State's claim.

As previously noted, when ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are deemed admitted for purposes of the motion. *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 7. A complaint should only be dismissed where it affirmatively appears that the plaintiff is not entitled to relief under any set of facts presented in support of its claim. *Wray*, 370 N.C. at 46, 802 S.E.2d at 898.

In North Carolina, a public official may be entitled to assert immunity even as to claims against the official in his individual capacity. *Isenhour v. Hutto*, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999). Under the doctrine of public official immunity, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Id.* at 609, 517 S.E.2d at 127. "Negligence" simply amounts to "the lack of reasonable care." *Bashford v. N.C. Licensing Bd. for Gen. Contr'rs*, 107 N.C. App. 462, 466, 420 S.E.2d 466, 469 (1992). Our courts allow for this immunity because "it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment." *Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

However, public official immunity is not limitless. A public official is liable for actions taken while engaged in the performance of governmental duties if those actions were corrupt, malicious, or outside the scope of his duties. *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). Additionally, public official immunity does not extend to public employees. *Miller*, 224 N.C. at 787, 32 S.E.2d at 597. A public employee can be held "individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer." *Id.* at 787, 32 S.E.2d at 597. In distinguishing between a public official and public employee, "[o]ur courts have recognized several basic distinctions . . . including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

While the doctrine of public official immunity protects a public official from liability for acts of negligence, under the NCFCA, liability only attaches where a person "knowingly" commits one of the acts listed under Section 1-607(a). N.C. Gen. Stat. § 1-607(a). "Knowledge" involves an awareness or understanding of the surrounding circumstances. *Knowledge*, Black's Law Dictionary (8th ed. 2004). To act "knowingly" requires more than the culpable carelessness inherent to mere negligence. *See Bashford*, 107 N.C. App. at 466, 420 S.E.2d at 469.

Here, the State alleged in the complaint that Hall knowingly made "false or fraudulent statements in connection with receiving state funds" in violation of the NCFCA. Therefore, at this early stage of the proceedings, viewing the material allegations of the State's complaint as admitted for purposes of Hall's motion to dismiss, Hall has not yet raised sufficient evidence of his entitlement to public official immunity to defeat the State's claim.

This is not to say that a charter school official cannot enjoy immunity in his or her individual capacity, nor that a charter school official cannot assert public official immunity to defeat a claim brought under the NCFCA where the record indicates his or her actions amount only to negligence. We merely conclude that, at the pleadings stage, the record contains insufficient evidence to determine whether Hall is entitled to assert public official immunity and, if so, whether Hall's actions amounted only to negligence. Thus, the trial court did not err by denying Hall's motion to dismiss under Rule 12(b)(6).

III. Appellants' Requests for Certiorari Review

[4] Finally, Appellants seek certiorari review of the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. Having determined that Kinston Charter is immune from liability under the NCFCA and that there is insufficient evidence in the record to determine whether Hall is entitled to assert immunity, in our discretion, we decline to grant Appellants' petitions for writs of certiorari.

Rule 21 of the North Carolina Rules of Appellate Procedure authorizes this Court to issue a writ of certiorari: (1) when the right to prosecute an appeal has been lost by failure to take timely action; (2) when no right of appeal from an interlocutory order exists; or (3) to review a trial court's ruling on a motion for appropriate relief. N.C.R. App. P. 21(a)(1). However, given this Court's general policy against piecemeal appellate review, in our discretion, we decline to issue a writ of certiorari on

Appellants' remaining claims. *See Harbour Point Homeowners' Ass'n v. DJF Enters.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010).

Conclusion

For the reasons set forth herein, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and decline Appellants' petitions for writs of certiorari.

AFFIRMED IN PART AND REVERSED IN PART.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JEFFERY WADE DOSS, Defendant

No. COA19-284

Filed 3 December 2019

Appeal and Error—interlocutory appeal—prayer for judgment continued—motion for final judgment

Where defendant, a West Virginia resident, became ineligible for a concealed carry permit in West Virginia because a North Carolina trial court had previously entered a prayer for judgment continued (PJC) after finding defendant guilty of assault on a female, defendant could not appeal the denial of his motion for a final judgment on the assault charge. Defendant's appeal was interlocutory and, therefore, required dismissal because he failed to file a petition for a writ of certiorari. Moreover, because defendant had consented to the PJC by paying court costs (as a condition of the PJC), he had already waived his right of appeal in the case.

Appeal by Defendant from order entered 4 January 2019 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill, for the State.

Law Offices of J. Scott Smith, by J. Scott Smith, for Defendant-Appellant.

DILLON, Judge.

Twenty years ago, in 1999, Defendant Jeffery Wade Doss was found guilty of assault on a female in Forsyth County District Court. The trial court entered a prayer for judgment continued (PJC) on that charge. Two years ago, in 2017, Defendant, now residing in West Virginia, was informed that he was ineligible for a concealed carry permit due to the 1999 matter. A year later, in 2018, Defendant moved the Forsyth County District Court to enter a final judgment on his 1999 matter, presumably so that he could (1) appeal the matter to superior court in hopes that the State would then be forced to dismiss the charge due to the staleness of the matter and (2) he could then regain his concealed carry permit in West Virginia. However, by order entered 4 January 2019, the district court denied Defendant's motion. Defendant appeals from that order.

I. Background

In May of 1999, Defendant was charged with and found guilty of assault on a female in district court. The record contains a 2018 correspondence from the Clerk of Court in Forsyth County certifying that all of its records concerning the 1999 matter have been destroyed/purged "in accordance with the retention period established by the History Department of Cultural Resources and endorsed by our Administrative Office of the Court."

The record, though, also contains a printout of information concerning Defendant's 1999 matter contained on the Automatic Criminal/Infraction System (ACIS) maintained by our judicial branch. The ACIS printout records that (1) Defendant pleaded "not guilty" of assault on a female, (2) the trial court found him "guilty," (3) rather than imposing judgment, such as a fine or term of imprisonment, the trial court entered a PJC, and (4) the trial court ordered Defendant to pay, and Defendant in fact did pay, $86.00 in court costs.

Almost two decades later, Defendant applied in West Virginia to have his concealed carry permit renewed. However, on 21 February 2017, upon learning of the 1999 matter, West Virginia sent Defendant a letter revoking his permit because (1) his 1999 Forsyth County case resulted in a conviction for a crime involving "domestic violence,"[1] and (2)

1. The record shows that West Virginia based its belief that Defendant had been convicted of a "domestic violence" offense based on a letter received from the Forsyth

Defendant had misstated on his renewal application that he had "never been convicted of an act of violence or an act of Domestic Violence[.]"[2]

In August 2018, Defendant filed a Motion to Enter Judgment in his 1999 case in district court. Defendant's apparent reason for filing the motion was as follows: (1) he wanted a final judgment to be entered (2) so that he could appeal that judgment to the superior court for a trial *de novo* (3) whereupon his case would most likely be dismissed by the State, as it would be all but impossible for the State to retrieve any evidence of the 1999 incident and (4) with the 1999 charge dismissed, he would be most likely eligible under West Virginia law for a concealed carry permit. Defendant's Motion, however, was denied by the district court, reasoning that it did "not have statutory authority" to grant the motion.

Defendant appeals.

II. Jurisdiction

To be properly before this Court, there must be a conviction or a guilty plea amounting to a final judgment in a criminal case. *See State v. Pledger*, 257 N.C. 634, 638, 127 S.E.2d 337, 340 (1962) ("A defendant is entitled to appeal only from a final judgment."). A PJC, by definition, places the entry of a potential final judgment on hold until the court is ready to address the matter, or in some cases, the matter is postponed indefinitely. *See State v. Southern*, 71 N.C. App. 563, 566-67, 322 S.E.2d

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County Office of District Attorney that Defendant's 1999 assault on a female case "was in fact a domestic violence case [as] the victim in the case has the same last name, same home address as the [D]efendant."

We note, though, that the ACIS record conflicts with the representation made in the letter from the Forsyth County DA to West Virginia. Specifically, the ACIS record indicates that the trial court found Defendant's 1999 assault on a female did *not* involve an act of "domestic violence." On the ACIS record, the letter "N" (meaning "No") is shown in the field next to the letters "DV CV," (meaning "Domestic Violence Convicted"). The ACIS record of the 1999 matter does not indicate the name or address of the victim. There is a "Complainant" listed on the ACIS record; however, that person named is the arresting officer.

2. It could be argued that Defendant's representation on his concealed carry application, that he had not been "convicted" of a violent crime, was not a misrepresentation. That is, it could be argued that the question is ambiguous and that Defendant, in good faith, believed that the PJC meant that he never had to represent that he had been "convicted" of the charge. Indeed, while there are cases that indicate that a PJC constitutes a "conviction" in some circumstances, *see, e.g.*, *Britt v. N.C. Sheriffs' Educ.*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998), there are others holding that a PJC is not a "final conviction" in other circumstances, *see, e.g.*, *Walters v. Cooper*, 226 N.C. App. 166, 170, 739 S.E.2d 185, 188, *aff'd per curiam* 367 N.C. 117, 748 S.E.2d 144 (2013).

617, 619-20 (1984), *affirmed*, 314 N.C. 110, 331 S.E.2d 688 (1985).[3] Thus, PJCs are interlocutory orders by nature.

Defense counsel, here, argues that the interlocutory appeal may be heard because Defendant has substantial rights that have been interfered with by the inability to obtain a concealed carry permit. However, the authority he uses to support this argument is N.C. Gen. Stat. § 7A-27(b). This statute, though, only applies to interlocutory orders in *civil* cases. Interlocutory criminal appeals are reviewable by our Court in the event that the defendant files a petition for writ of *certiorari*, where we can use our discretion to hear the merits of an otherwise barred case. *See* N.C. Gen. Stat. § 15A-1444(d) (2018). However, Defendant has not filed a petition for writ of *certiorari*.

Therefore, this appeal before our Court is interlocutory, and Defendant has no right of appeal.

We note that if there was a right to appeal, it would generally lie in the superior court. N.C. Gen. Stat. § 15A-1431.

In any event, we note that Defendant could petition the superior court for a writ of *certiorari* to review the matter pursuant to N.C. R. Super. & Dist. Cts. Rule 19. *See State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832 (1993) (holding that a superior court's authority to issue a writ of *certiorari* to review matters from the district court pursuant to Rule 19 of the General Rules of Practice are analogous to our Court's right to issue such writs pursuant to Section 7A-32(c)).

For our part, we are not inclined to treat Defendant's brief as a petition for a writ of *certiorari* to aid in our jurisdiction. In his 1999 case, Defendant consented to the entry of the PJC, as he agreed to pay, and did pay, costs as a condition. That is, though the requirement to pay costs is not a condition which would convert a PJC to a final judgment, a trial court may not require a defendant to pay costs as a condition of a PJC without the defendant's consent. And where a defendant has consented

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3. We note that a PJC may convert into a final judgment where the trial court imposes conditions "amounting to a punishment," that is any condition beyond the payment of court costs or a requirement that the defendant obey the law. *See State v. Griffin*, 246 N.C. 680, 683, 100 S.E.2d 49, 51 (1957) (stating that a PJC converts to a final judgment in certain situations); *see also State v. Crook*, 115 N.C. 760, 764, 20 S.E. 513, 515 (1894) (holding that the payment of costs is not considered a punishment in criminal prosecutions); *see also State v. Brown*, 110 N.C. App. 658, 659-60, 430 S.E.2d 433, 434 (1993) (stating that a PJC does not convert to a final judgment where the trial court only imposes court costs or a condition to obey the law). In this case, the record shows that the trial court only ordered Defendant to pay costs; therefore, his 1999 PJC did not convert into a final judgment.

to the PJC, he "waives or abandons his right to appeal." *Griffin*, 246 N.C. at 682, 100 S.E.2d at 51.

It is apparent, here, that Defendant accepted a deal in 1999 to avoid criminal punishment (fine or imprisonment) by paying costs. It would seem unfair to the State to allow Defendant to renege on the deal twenty years later and be allowed to appeal to the superior court for a trial *de novo*, which would most certainly result in a dismissal of his charges altogether.[4]

III. Conclusion

We hold that this appeal is not properly before our Court and dismiss it accordingly.

DISMISSED.

Judges STROUD and YOUNG concur.

4. The General Assembly has authorized *the State* to move for appropriate relief to enter a final judgment where a PJC had been previously granted. N.C. Gen. Stat. § 15A-1416 (b)(1). However, the General Assembly has not granted a defendant this same right. It seems that the State is granted this right as an enforcement mechanism to address situations where a defendant who has received a PJC has not satisfied the conditions imposed by the court in exchange for the PJC.

[268 N.C. App. 552 (2019)]

STATE OF NORTH CAROLINA
v.
DEJAUN EVANS, Defendant

No. COA19-330

Filed 3 December 2019

1. Criminal Law—procedure—extension of session of court

The Court of Appeals rejected defendant's argument that the trial court violated the rule against judgments entered out of session by failing to extend the session of court in which his trial began. Pursuant to N.C.G.S. § 15-167, which allows a trial judge to extend a session of court if a felony trial is in progress on the last Friday of that session, the trial court properly announced a weekend recess in open court, and there was no objection from either party. The trial judge's reference to her subsequent commission in declining to make findings in support of the extension of session was not a refusal to extend the session.

2. Jury—question from the jury—request for clarification by trial court—delivered by bailiff—prejudice analysis

Even assuming that the trial court erred by responding to a question from the jury by having the bailiff read to the jury the court's written request for clarification, defendant failed to demonstrate prejudice. The trial court's instructions to the bailiff were clear and unambiguous, there was no objection from defendant, and the message did not relate to defendant's guilt or innocence.

Appeal by Defendant from judgements entered 21 August 2018 by Judge Athena F. Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Defendant-Appellant.

INMAN, Judge.

Dejaun Evans ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon,

conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred by: (1) failing to extend the session of court in which his trial began, resulting in entry of judgment out of session and without jurisdiction; and (2) responding to a question from the jury with a written request for clarification read to the jury by the bailiff, in violation of criminal procedure statutes. After careful review, we hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested on 29 April 2016 by the Charlotte-Mecklenburg Police Department in connection with a robbery after being identified in a photo lineup by the victim. Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 9 May 2016. He was initially tried on these charges in September of 2017; that trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

Defendant's second trial began on 15 August 2018 in Mecklenburg County, and included an additional charge for possession of a firearm by a felon. Special Superior Court Judge Athena Brooks presided over the trial pursuant to a commission "begin[ning] August 15, 2018 and continu[ing] Three Days or until business is completed." Judge Brooks was also assigned by separate commission to hold court in Mecklenburg County for the following week beginning 20 August 2018.[1]

On 17 Friday 2018, at the conclusion of the third day of trial, Judge Brooks called a weekend recess. Following the jury's departure from the courtroom, the prosecutor asked if "it would be appropriate at this time to make findings why we're holding this session to next week[.]" Judge Brooks replied, "I have the commission next week is—I have on the road commission." The prosecutor concluded the exchange by responding "Understood. I didn't know if that had to be on the record." The trial resumed the following Monday, 20 August 2018, in a different courtroom without any further comment on the weekend recess by the court or counsel.

The State and Defendant rested their cases later that day and court recessed for the evening. The next morning, Judge Brooks instructed

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1. We take judicial notice of these commissions, which were included in an appendix to Defendant's brief and are relied upon by both parties in their arguments before this Court. *See Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 762-63 (1954) (taking judicial notice of a superior court judge's commission).

the jury on the pertinent law, which included the following instruction on photographic lineup evidence consistent with the Eyewitness Identification Reform Act, N.C. Gen. Stat. §§ 15A-284.50 *et seq.* (2019):

> THE COURT: . . . A photo lineup conducted by a local law enforcement agency is required to meet all of the following requirements:
>
> . . . .
>
> The photograph of the suspect shall be contemporaneous and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

Once Judge Brooks completed the instructions, the jury left the courtroom to begin its deliberations in a jury room.

Later the same day, the jury sent a written note to the trial court requesting: (1) an opportunity to review a tape recording that had been entered into evidence; (2) instruction on whether the jury was required to find Defendant guilty of all charges, or if it could find Defendant not guilty as to some; (3) instruction on "[h]ow . . . 'contemporary photo' [is] defined by the court[;]" and (4) a copy of the jury instructions. The trial court read each request aloud, and engaged in the following discussion with the parties:

> THE COURT: All right. Number 3, I don't understand. It says how is contemporary photo defined by the Court. I don't know if that's my accent that came out as contemporary or if the words got confused by the jury. I simply will need more information to answer that. Any position for the state?
>
> [THE PROSECUTOR]: The state would agree.
>
> THE COURT: Anything for the defendant?
>
> [DEFENDANT'S COUNSEL]: In the Eyewitness Identification Reform Act, it says contemporary photo.
>
> . . . .
>
> THE COURT: I just want to make sure it's not my accent or my using the jury instruction. I just don't know.
>
> . . . .
>
> [THE PROSECUTOR]: . . . I would say that based on the question, it could be what [Defendant's counsel] is saying,

> it could be some other things, I would simply tell the jury that we're unclear what their question is, if they could define it further and we could readdress it.
>
> THE COURT: Just to make sure that that's what they're talking about.
>
> [DEFENDANT'S COUNSEL]: Doesn't the jury instruction say a contemporaneous photo album?
>
> . . . .
>
> THE COURT: Okay. It says contemporary.
>
> . . . .
>
> How is contemporary photo defined, I'm going to ask for a little more clarification as to that. I guess basically just ask them is it contemporary photo in regard to the lineup or something else just so I'll know where the words come from. I mean, I don't know how to get to that point other than flat out asking.
>
> [DEFENDANT'S COUNSEL]: Yeah. I think that's the only—the word contemporary, I think, in this trial has only been used at any point one time, and that was during jury instruction. No one has said contemporary other than jury instruction, and that word only appears in the eyewitness identification.
>
> THE COURT: And if it comes back to that's what it is, I'm going to tell them to use their normal understanding of the word.
>
> [DEFENDANT'S COUNSEL]: And could you ask them to rely on the evidence that was given at the trial?
>
> THE COURT: Yes, sir. I always do that.

The trial court also engaged in the following discussion concerning the request for a copy of the jury instructions:

> THE COURT: . . . As opposed to giving them all of these [instructions], because there's a lot of notes and stuff, I would ask them to say which one specifically are you requesting so that we can sanitize it out of the law that's always in the footnotes and stuff before we give it to them. I don't have a problem giving it to them, but . . . I'd rather

> give them one which conforms to the several that they're specifically asking about.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: I would ask what—if they do want specific ones, and then ask—or do they want all of them, because they may want all of them.
>
> THE COURT: If they want all of them, I'm giving it.
>
> . . . .
>
> I'm going to ask them specifically which instruction or all.

Having resolved to ask the jury to clarify these two questions, counsel and the court turned their discussion to how to convey the request for clarification to the jurors. Judge Brooks asked the bailiff to deliver the request by reading the jury a written note, at which time the prosecutor asked for a bench conference. That conference was held off the record. The recorded proceedings resumed as follows:

> THE COURT: I'm going to send this [written note[2]] back. And this will be part of the file. And you could ask these two questions in regard to three and four. Don't engage in a colloquy back and forth. Just say the judge has these questions, I need an answer to these questions.
>
> THE DEPUTY: Got you.
>
> THE COURT: And read them only as they're asked so we have them in the record what we're reading.
>
> . . . .
>
> THE DEPUTY: Right.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: Your Honor should the question be presented to them in court on the record as opposed to –
>
> THE COURT: The problem is, is if I ask them the question in court, then they may have to communicate, and we can't

2. Judge Brooks's note is included in the record, and reads: "(3) Contemporary photo as to line up request or other. (4) Which instruction or all?"

> be a part of their understanding. That's why I was going to go ahead in the jury room, because they may have to have some conversation about which instruction, et cetera, and I don't want to be a part of that.
>
> [DEFENDANT'S COUNSEL]: Can a deputy?
>
> THE COURT: He is sworn since he's with the jury. If they start having colloquy, he knows to step out.
>
> [DEFENDANT'S COUNSEL]: Well, that's my understanding.
>
> THE COURT: And I don't want him to be standing there staring at them while they're talking. If they have a conversation, he'll step out. It may be the answer is very quick, it may be they need to communicate. If you'll just radio and remind them –
>
> THE DEPUTY: Your Honor, the procedure is if you send a note back, we'll advise the judge wants you to answer these questions, they'll answer them and come back.
>
> . . . .
>
> We would never ever listen to deliberations. Once this starts, we're out. I tell them we want to get out.

The jury returned written answers to the court's inquiry, apparently on the same note they originally sent to the court, informing Judge Brooks that the jury was requesting: (1) a definition of "contemporary photo . . . [a]s to line up requirements[;]" and (2) "[i]nstructions for how a line up should be complied [sic] and the seven elements of 'Robbery with a firearm.' " With the clarifications in hand, and outside the presence of the jury, Judge Brooks suggested proposed responses to each request—neither counsel for the State nor Defendant objected. Judge Brooks called the jury back into the courtroom and provided the additional instructions.

The jury ultimately found Defendant guilty on all charges. The trial court consolidated Defendant's convictions for conspiracy and armed robbery and sentenced him to 70 to 96 months imprisonment. The trial court imposed a second, consecutive sentence of 12 to 24 months imprisonment for possession of a firearm by a felon. In addition, the trial court assessed court costs and restitution in the total amount of $1,738.99. Defendant entered written notice of appeal.

II. ANALYSIS

A. *Standard of Review*

Defendant's assertion that the trial court failed to properly extend the session in which the trial began implicates the trial court's jurisdiction, a question we review *de novo*. *State v. Lewis*, 243 N.C. App. 757, 761, 779 S.E.2d 147, 149 (2015). We apply that same standard to Defendant's argument that the trial court committed statutory error in seeking clarification from the jury through a written note delivered by the bailiff. *See State v. Mackey*, 209 NC App 116, 120, 708 S.E.2d 719, 721 (2011) ("Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." (citations omitted)).[3]

B. *Session of Court*

[1] Defendant first contends that the trial court failed to extend the session of court in which his trial began, violating the rule against judgments entered out of session. *See State v. Boone*, 310 N.C. 284, 288, 311 S.E.2d 552, 555 (1984) (holding an order entered out of session was "null and void and of no legal effect" (citation omitted)), *superseded on other grounds as recognized by State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 574 (2012). We disagree.

N.C. Gen. Stat. § 15-167 (2019) allows a trial judge to extend a session if a felony trial is in progress on the last Friday of that session. Such an extension is validly accomplished when the trial court announces a weekend recess in open court without objection from the parties. *State v. Locklear*, 174 N.C. App. 547, 551, 621 S.E.2d 254, 257 (2005).

Judge Brooks announced the weekend recess without objection by the parties and, consistent with *Locklear*, validly extended the session pursuant to N.C. Gen. Stat. § 15-167. Although she was asked and declined to make explicit findings on the record in support of that extension, her decision not to make those findings because she would already be present in Mecklenburg County under a subsequent commission does not constitute an "express[] refus[al] . . . to extend the session," as argued by Defendant. A decision not to make findings in support of a

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3. Defendant assigns error only to the method by which the trial court's clarifying request was delivered to the jury; he does not contend that the contents of the request or the decision to seek clarification were erroneous. Those issues would potentially be subject to different standards of review, depending on the nature of the arguments presented. *See, e.g., State v. Edwards*, 239 N.C. App. 391, 392-93, 768 S.E.2d 619, 620-21 (2015) (recognizing that some jury instruction challenges are subject to the abuse of discretion standard while others are reviewed *de novo*).

ruling is distinct from a decision on the ruling itself. "Unless the contrary appears, it is presumed that judicial acts and duties have been duly and regularly performed[,]" *Hamlin v. Hamlin*, 302 N.C. 478, 486, 276 S.E.2d 381, 387 (1981) (citations omitted), and we will not read the trial judge's reference to her subsequent commission in declining to make findings to support an extension of the session as an explicit refusal to extend the session.

C. Note to the Jury

[2] Defendant next contends that the trial court, in seeking clarification on a jury request through a message delivered by the bailiff, violated: (1) N.C. Gen. Stat. § 15A-1234(a) (2019), which permits a judge to "[r]espond to an inquiry of the jury made in open court" with further instruction; (2) N.C. Gen. Stat. § 15A-1234(d) (2019), which requires that "[a]ll additional instructions . . . be given in open court[;]" and (3) N.C. Gen. Stat. § 15A-1236(c) (2019), which provides that "[i]f the jurors are committed to the charge of an officer, he must . . . not . . . permit any person to speak or otherwise communicate with them on any subject connected with the trial nor . . . do so himself[.]" Mere violation of these statutes is not enough for Defendant to prevail on appeal, however, as he must also demonstrate prejudice. *See, e.g.*, *State v. Thibodeaux*, 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995) (requiring a defendant to show prejudice to prevail on appeal for violation of N.C. Gen. Stat. § 15A-1236); *State v. Robinson*, 160 N.C. App. 564, 568-69, 586 S.E.2d 534, 537 (2003) (applying the prejudicial error standard to a violation of N.C. Gen. Stat. § 15A-1234).

Assuming, *arguendo*, that Judge Brooks committed statutory error, Defendant has failed to show prejudice. Defendant seeks to analogize his appeal to cases in which the trial judge communicated to the jury only through the jury foreperson; in those instances, our appellate courts have identified prejudice in the risk that the foreperson would inaccurately recount the communication with the judge to the rest of the jury. *State v. Ashe*, 314 N.C. 28, 37-38, 331 S.E.2d 652, 657-58 (1985); *Robinson*, 160 N.C. App. at 569, 586 S.E.2d at 537. Under our caselaw, however, no prejudice results from messages relayed from the court to the jury by a bailiff where: (1) "the record 'affirmatively reveals exactly what the trial court intended to say to the . . . jurors' [through the bailiff] and there was 'no indication that anything to the contrary occurred[;]' " (2) there was "no objection from defendant[;]" and (3) "the communications '[did] not relate to defendant's guilt or innocence[,] . . . nor would defendant's presence have been useful to his defense[,]' " and thus were not " 'an instruction as to the law' outside the presence of a . . . defendant."

State v. Badgett, 361 N.C. 234, 254, 644 S.E.2d 206, 218 (2007) (quoting *State v. Gay*, 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993)). Although *Badgett* and *Gay* did not expressly analyze messages to jurors from bailiffs under the statutes at issue in this appeal, we have relied on them to determine whether reversible error arose in alleged violations of N.C. Gen. Stat. §§ 15A-1234 and -1236. *See State v. Corum*, 176 N.C. App. 150, 157-58, 625 S.E.2d 889, 894 (2006) (holding, based on *Gay*, that the defendant failed to show reversible error for violations of N.C. Gen. Stat. §§ 15A-1234 and -1236 when the trial court communicated an instruction to the jury through a bailiff); *State v. Lewis*, 214 N.C. App. 195, 714 S.E.2d 530, 2011 WL 3298882, *8-*9 (2011) (unpublished) (relying on *Gay*, *Badgett*, and *Corum* to hold that a defendant failed to demonstrate prejudicial error for violation of N.C. Gen. Stat. § 15A-1234(d) when the trial judge conveyed an instruction to the jury via a bailiff).

Here, the trial judge's instructions to the bailiff were clear and unambiguous. The bailiff confirmed that he understood the judge's directions on the record multiple times, and explained that he would only step into the jury room, convey the message, and then immediately leave prior to any colloquy. Defendant's counsel did ask whether the judge needed to call the jurors in and whether a deputy could deliver the court's request, but did not object to the procedure:

> [DEFENDANT'S COUNSEL]: Can a deputy?
>
> [THE COURT]: He is sworn since he's with the jury. If they start having a colloquy, he knows to step out.
>
> [DEFENDANT'S COUNSEL]: Well, that's my understanding.

Indeed, this exchange could be fairly read as confirming Defendant's counsel's "understanding" that the deputy could deliver the message but must avoid being present during any colloquy.

It further appears that the judge's message was neither related to Defendant's guilt or innocence nor did it amount to an instruction on the law such that prejudice arose, as it simply sought to clarify the questions asked by the jury. *Cf. Corum*, 176 N.C. App. at 158, 625 S.E.2d at 894 (holding trial court did not commit reversible error in having a bailiff deliver a written instruction to the jury that they "must rely on [their] own recollection as to what the evidence showed."). Defendant assigns prejudice to "a risk that the jury believed the information they were requesting was 'unimportant or not worthy of further consideration[,]' " quoting *Ashe*, 314 N.C. at 38-39, 331 S.E.2d at 659, and argues that "we [cannot] know how [the questions were] communicated to the jury and

how the jury might have interpreted the judge's request." However, absent evidence to the contrary, we presume that both the bailiff and the jury understood and followed the judge's straightforward instructions. *See Gay*, 334 N.C. at 482, 434 S.E.2d at 848 (presuming the bailiff accurately delivered the judge's message to the jurors where there was no evidence to the contrary); *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 134, 140, 468 S.E.2d 69, 73 (1996) ("The jury . . . is presumed to understand and comply with the instructions of the court." (citation omitted)). It appears from the record that the bailiff and the jury did exactly that; the judge received the jury's clarified requests and subsequently provided instructions, to which neither party objected, in response thereto. The jury reached its verdict without asking additional questions of the court. In short, to the extent that the trial court erred by this procedure, we hold that Defendant has failed to demonstrate prejudice warranting reversal.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate reversible error.

NO ERROR.

Judges DIETZ and YOUNG concur.

STATE OF NORTH CAROLINA
v.
BENJAMIN FIELDS

No. COA19-38

Filed 3 December 2019

1. Jurisdiction—trial court—authority to enter written order—after notice of appeal given—criminal case

In a prosecution for driving while impaired, the trial court had jurisdiction to enter a written order granting defendant's motion to suppress after the State had already given oral notice of appeal, because the order—rather than affecting the merits of the case—merely chronicled the findings and conclusions that the trial court had already announced from the bench.

2. Motor Vehicles—driving while impaired—probable cause to arrest—findings of fact—sufficiency of evidence

In a prosecution for driving while impaired, where one officer arrested defendant at another officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress where the contested findings of fact were supported by competent evidence and where the trial court properly determined the weight and credibility of any contradictory evidence. The findings noted a lack of evidence connecting the pickup truck to defendant (whom neither officer saw driving any vehicle) and thus supported the conclusion that the officers lacked probable cause to arrest defendant.

3. Motor Vehicles—driving while impaired—probable cause to arrest—based on other officer's request

In a prosecution for driving while impaired, where a second officer arrested defendant at the first officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress on grounds that the second officer lacked probable cause—both independently and through the first officer—to arrest defendant. The court's unchallenged findings of fact showed that the first officer failed to follow the green pickup truck after identifying it and neither officer saw defendant drive, park, or get out of the truck (or any other vehicle).

Appeal by the State from order entered 12 September 2018 by Judge Keith Gregory in Durham County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, and Durham County Assistant District Attorney, by Adam Williamson, for the State-Appellant.

Office of the Appellate Defender, by Assistant Appellate Defender Sterling P. Rozear, for the Defendant-Appellee.

COLLINS, Judge.

The State appeals from an order granting Defendant's motion to suppress, heard at a pretrial hearing on Defendant's charge of driving while impaired. On appeal, the State's overarching argument is that the trial court erred in allowing the motion because the State had probable cause

to arrest Defendant. We find no merit in the State's arguments and affirm the trial court's order.

I. Procedural History

On 24 February 2017, Defendant was issued a North Carolina Uniform Citation for, *inter alia*, driving while impaired. On 18 April 2018, following a bench trial in district court, Defendant was found guilty of driving while impaired. The trial court entered judgment and sentenced Defendant to 36 months' imprisonment. Defendant appealed to superior court.

On 5 June 2018, Defendant filed a motion to suppress evidence derived from his arrest, arguing there was no probable cause to support the arrest. At a hearing on 20 August 2018, the trial court orally allowed Defendant's motion. The State immediately gave oral notice of appeal in open court. The trial court entered a written order on 12 September 2018 reflecting its ruling from the bench. The State filed written notice of appeal from the 12 September 2018 order on 3 October 2018.[1]

II. Factual Background

On 24 February 2017, Officer Daryl Macaluso of the Durham Police Department responded to a disturbance call near the 800 block of Briggs Avenue. The caller reported a green pickup truck driving erratically and "attempting to hit people."

Macaluso's Testimony

Macaluso testified that as he approached the area, he was flagged down by an "extremely intoxicated" man who was telling him about the vehicle trying to run people over. Macaluso further testified, "I saw a vehicle that fit the description passing me . . . . And that vehicle was driven by the defendant. I clearly took a look at him while he was driving by." The intoxicated man did not react to the green pickup truck, nor did he "make references to the vehicle passing" them. The green pickup truck was not driving erratically or committing any traffic violations, and Macaluso did not follow the truck.

Macaluso drove his car around the block. Upon his return to the Briggs Avenue area, he was approached by "a lot more intoxicated people" who attempted to explain what had occurred. About two minutes later, as Macaluso was speaking with the group, Defendant approached

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1. We note that while the Notice of Appeal was signed and served on 3 October 2018, the clerk of court's file stamp indicates 3 September 2018.

on foot from about a half-block away. Macaluso noticed that Defendant was unsteady on his feet and slurred his speech. Defendant appeared angry and complained that he had been sold "fake crack." Macaluso asked Defendant to wait in the back of the patrol car while he investigated, and eventually called for backup in conducting an impaired driving investigation.

Munter's Testimony

Investigator Gabriel Munter responded to the call to investigate. When he arrived at the scene, he found Defendant sitting in the backseat of Macaluso's patrol car. Because Munter had not seen Defendant drive, Munter told Macaluso, "I would need you to put him behind the wheel." Munter testified, "I'm not going to pick up an impaired driving investigation unless that's been established by another officer because I wasn't there and I didn't see the driving. So if [Macaluso] can put him behind the wheel, yes, I'll pick up the investigation from that point." Munter testified that Macaluso "said that he saw [Defendant] driving. [Macaluso] said, He passed me, I believe were his words."

Munter proceeded to investigate a green pickup truck parked at the Big Apple Mini-mart. Munter found an empty liquor container in the back of the truck, but testified that it appeared to have been there a while. Munter did not check the temperature of the truck, exhaust pipe, or hood while he conducted his investigation. Munter returned to the Briggs Avenue area, where he conducted various field sobriety tests on Defendant, including a horizontal gaze nystagmus test. Defendant showed six out of six clues of impairment on the horizontal gaze nystagmus test. Munter arrested Defendant and charged him with driving while impaired.

Body Camera Video

Munter's body camera captured video of the events on that day, and Munter narrated the video while the jury watched it. At the beginning of the video, Munter walked up to Macaluso and asked questions about the original phone call tip regarding an erratic driver trying to hit people. The video then captured Macaluso telling Munter, "I didn't know that was [Defendant's] car until someone else pointed it out."

Mini-mart Video

Macaluso testified that he "continued to control the crowd" until Munter arrested Defendant and left the scene. Following Munter's departure, Macaluso went to the Big Apple Mini-mart to see if they had video of the area. Macaluso obtained video which "showed [Defendant]

coming out of the truck and [he] got the video on a flash drive." However, Macaluso testified that the flash drive containing the video was lost when Macaluso brought his patrol car in for repairs. Macaluso testified, "The flash drive is gone. There's no video." The State did not present the video at the hearing.

III. Discussion

The State argues on appeal that the trial court erred by granting Defendant's motion to suppress because (1) the trial court lacked jurisdiction to enter the written order after notice of appeal to this Court had been given, (2) the trial court's findings are not supported by the evidence, and (3) the trial court erred in finding no probable cause to arrest Defendant. We address each argument in turn.

1. Trial Court's Jurisdiction

[1] The State first argues that the trial court lacked jurisdiction to enter the written order on 12 September 2018 because the State had given oral notice of appeal immediately after the trial court announced its ruling from the bench on 20 August 2018. The State claims that once it gave notice of appeal, the trial court was without jurisdiction to enter any additional findings of fact or orders. The State's argument is meritless.

This Court reviews jurisdictional issues de novo. *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012). Generally, when appeal entries are noted, the appeal becomes effective immediately, and the trial court is without authority to enter orders affecting the merits of the case. *State v. Grundler*, 251 N.C. 177, 185, 111 S.E.2d 1, 7 (1959) (citation omitted). However, the trial court maintains jurisdiction to enter a written order after notice of appeal has been given where the order does not "*affect*[] *the merits*, but, rather, is a chronicle of the findings and conclusions" decided at a prior hearing. *State v. Walker*, 255 N.C. App. 828, 830, 806 S.E.2d 326, 329 (2017) (emphasis in original) (citation omitted).

In this case, the trial court announced from the bench that Defendant's motion was allowed. In response to the State's request for "findings of the facts[,]" the trial court announced:

> I'll reserve the right to find appropriate findings of fact. I've already indicated in open court that the State cannot make the nexus between the person that the officer saw driving, there were no traffic or Chapter 20 violations[,] to the person that came up two minutes later. I reserve the right to find further findings of fact. [Counsel for Defendant], you will prepare that order.

The State then gave notice of appeal. The written order contains 21 findings of fact, including the following:

> Throughout the duration of the hearing the State's evidence did not establish a nexus between the driver of the green pickup truck observed by Officer Macaluso, which was not observed violating any Chapter 20 offense, and the individual who later walked upon the raucous scene on Briggs Avenue.

The written order thus concludes "that the State did not meet their statutory burden that of probable cause to arrest [Defendant] on February 24, 2017 for the offense of driving while impaired." The written order does not "*affect*[] *the merits*, but, rather, is a chronicle of the findings and conclusions" decided at the motion to suppress hearing, and thus, the written order is "not a new order *affecting the merits* of the case." *Walker*, 255 N.C. App. at 830, 806 S.E.2d at 329 (emphasis in original) (citation omitted). Accordingly, the trial court had jurisdiction to enter the written order, and we reject the State's contention to the contrary. *See State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (the trial court had jurisdiction to enter a written order out of term denying defendant's motion to suppress where the order was "simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress") (quotation marks omitted); *State v. Franklin*, 224 N.C. App. 337, 345, 736 S.E.2d 218, 223 (2012) (the trial court had jurisdiction to enter its written order denying defendant's motion to suppress after defendant had given notice of appeal as the written order "merely reduced its oral ruling to writing") (internal quotation marks, brackets, and citation omitted).

2. Contested Findings of Fact

[2] The State next argues that the trial court's findings of fact 9, 19, and 21 are not supported by the evidence.

This Court's role in reviewing a trial court's order on a motion to suppress "is simply to determine whether the trial court's findings of fact are supported by the evidence and whether those findings support the court's conclusions of law." *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 725 (2008). "Our review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts . . . ." *State v. Derbyshire*, 228 N.C. App. 670, 679, 745 S.E.2d 886, 893 (2013). Unchallenged findings are deemed supported by competent evidence and are binding on appeal. *State v. Biber*, 365 N.C. 162, 167, 712 S.E.2d

874, 878 (2011). Conclusions of law are reviewed de novo. *Id.* at 168, 712 S.E.2d at 878.

Finding 9

Finding 9 states, "Officer Macaluso testified as to not seeing the green pickup truck park or any individual get in or out of the vehicle."

At the hearing, the following exchange took place:

> [Defense Counsel]: And since this individual didn't react to the car, you never pulled behind it?
>
> [Macaluso]: No.
>
> [Defense Counsel]: You never followed it down the road?
>
> [Macaluso]: I did not.
>
> [Defense Counsel]: You never mentioned in your report seeing it park?
>
> [Macaluso]: No. I pulled around Holloway Street and it was parked at a Big Apple.
>
> [Defense Counsel]: You never mentioned seeing the car park -- sorry. The pick-up truck park?
>
> [Macaluso]: I did not mention seeing it park.
>
> [Defense Counsel]: In your report you didn't put down seeing the pick-up truck park?
>
> [Macaluso]: Correct. I didn't write that on my report.
>
> [Defense Counsel]: And in your report you never mentioned seeing anyone get in or out of this truck?
>
> [Macaluso]: Correct.

This exchange supports the challenged finding of fact. The State argues this finding is not supported by the evidence because "Macaluso testified he observed a video at the mini-mart which showed Defendant getting out of his green pickup truck."[2] Macaluso did testify that after Munter left with Defendant, Macaluso "went to the Big Apple Mini-Mart to view a video" and "got the video on flash drive." However, Macaluso also testified that "[t]he video was lost" because he left the flash drive in

2. The State makes no further legal argument regarding the sufficiency of this finding.

his patrol car when he brought the car to the mechanic. The State did not introduce the video into evidence at the hearing. It is well-settled that the trial court determines the credibility of the witnesses, the weight to be given to the testimony, and "the reasonable inferences to be drawn therefrom." *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828 (2009). If different inferences may be drawn from the evidence, the trial court determines which inferences shall be drawn and which shall be rejected. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). The trial court was free to give no weight to Macaluso's testimony regarding viewing the Mini-mart video.

Moreover, Macaluso further testified that he observed the Mini-mart video only after Defendant had been arrested. Whether probable cause exists is analyzed at the moment of arrest, and "whether *at that moment* the facts and circumstances within" an officer's knowledge are sufficient to warrant arrest. *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (brackets and citation omitted). As Macaluso had not yet viewed the video showing Defendant exit the truck, any discrepancy in the evidence supporting this finding was irrelevant as the video could not have contributed to any probable cause to arrest Defendant.

Finding 19

Finding 19 states, "Defendant submitted a single sample of breath on the Preliminary Breath Test (PBT) before refusing to submit a second sample." Video recorded by Munter's body camera and Munter's narration of that video during the hearing established that Defendant submitted a sample of breath. This evidence supports the challenged finding.

The State's sole argument is that "Officer Munter testified that when he attempted to get a breath sample, Defendant barked and bit at him. (T p. 42) No evidence supports the finding that Defendant submitted a breath sample." The State misrepresents the evidence presented at the hearing and makes no legal argument concerning the sample submitted.

Finding 21

Finding 21 states, "Throughout the duration of the hearing the State's evidence did not establish a nexus between the driver of the green pickup truck observed by Officer Macaluso, which was not observed violating any Chapter 20 offense, and the individual who later walked upon the raucous scene on Briggs Avenue." Macaluso testified that he did not follow the green truck that passed him; instead, he drove his car around the block and returned to the Briggs Avenue area. About two minutes later, Defendant approached on foot from about a half-block away. Macaluso

also testified that he did not see the green pickup truck park or any individual get in or out of the truck. Moreover, Munter's body camera video captured Macaluso telling Munter, "I didn't know that was [Defendant's] car until someone else pointed it out." This evidence supports the challenged finding.

While the State argues that Macaluso's testimony established that Defendant was the driver of the green pickup truck, the trial court "determines the reasonable inferences to be drawn" from the evidence. *Knutton*, 273 N.C. at 359, 160 S.E.2d at 33 (internal citations omitted). The trial court appropriately considered the credibility of Macaluso's testimony and the weight to afford that testimony when making its findings of fact. The trial court was not compelled to "accept uncritically" the testimony of Macaluso. *State v. Salinas*, 214 N.C. App. 408, 416-17, 715 S.E.2d 262, 267-68 (2011). Thus, finding 21 is supported by evidence "even though there is evidence in the record to support a contrary finding." *State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002).

3. No Probable Cause to Arrest

[3] The State finally argues that the trial court erred in concluding that there was no probable cause to arrest Defendant.

This Court reviews conclusions of law de novo. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *Streeter*, 283 N.C. at 207, 195 S.E.2d at 505 (internal quotation marks and citation omitted). Whether probable cause exists at the time of arrest depends on "whether *at that moment* the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Id.* (emphasis added) (brackets and citation omitted).

A second officer who lacks probable cause to effectuate an arrest may justifiably arrest a defendant based on a first officer's request only when the first officer has probable cause to arrest the defendant. *State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979). "A person commits the offense of impaired driving if he drives any vehicle . . . [w]hile under the influence of an impairing substance[,] or [a]fter having consumed sufficient alcohol that he has, at any relevant time after

the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2018).

In addition to findings 9, 19, and 21, which were supported by competent evidence, the trial court made the following unchallenged findings of fact:

> 2. Officer Macaluso was responding to a call for "a vehicle driving erratic and attempting to hit people." The vehicle was described as a green pickup truck.
>
> 3. Officer Macaluso was then flagged down by an unknown individual as he approached Briggs Ave. This individual was described as very intoxicated by Officer Macaluso.
>
> 4. While speaking with the unknown intoxicated individual Officer Macaluso observed a green pickup truck going west on Holloway Street.
>
> 5. Neither the individual who flagged down Officer Macaluso, nor Officer Macaluso reacted to the green pickup truck.
>
> 6. Officer Macaluso did not observe the green pickup truck engage in any erratic driving or violate any Chapter 20 offense. The truck was never observed attempting to hit or swerve at anyone.
>
> 7. Officer Macaluso was in the driver's seat of his patrol car throughout the entirety of his conversation with the unknown intoxicated individual.
>
> 8. Officer Macaluso never pulled behind the green pickup truck or engage[d] in a traffic stop of the vehicle.
>
> . . . .
>
> 10. Officer Macaluso then circled the block to locate the vehicle and returned to 810 Briggs Avenue to speak with the same unknown individual.
>
> 11. Upon arrival at 810 Briggs Avenue Officer Macaluso encountered several drunken individuals at the location talking loudly and trying to explain their situation.
>
> 12. Officer Macaluso then testified that at a later time several individuals in the crowd became agitated as Defendant walked over to Briggs Avenue.

> 13. He also testified that the Defendant was unsteady on his feet, leaning on things as he was walking, had slurred words, appeared angry, and admitted that he bought "fake crack."
>
> 14. Officer Macaluso then placed Defendant into the back of his patrol car to investigate further.
>
> 15. At that time Officer Macaluso called for "T7" to assist in his impaired driving investigation.
>
> 16. Shortly thereafter Officer Munter of the Durham Police Department arrived and began to interview Defendant in the back of Officer Macaluso's vehicle. Officer Munter did not observe any driving.
>
> 17. Officer Munter then drove up to the green truck matching the description given to him by Officer Macaluso, ran the truck's license plate through a law enforcement database, and discovered that the truck was registered to the Defendant.
>
> 18. Officer Munter then performed the Horizontal Gaze Nystagmus test and observed six out of six clues of impairment.
>
> . . . .
>
> 20. Officer Munter formed the opinion that the Defendant was appreciably impaired and placed him under arrest for committing the offense of Driving While Impaired.

These unchallenged findings are presumed to be supported by competent evidence and are binding on appeal. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. Findings 8, 10, and 11 establish that Macaluso: did not pull behind or stop the green pickup truck; did not maintain visibility of the green pickup truck but instead circled the block and returned to Briggs Avenue; and witnessed Defendant walk up to him on foot. Finding 16 establishes in relevant part, "Officer Munter did not observe any driving." These unchallenged findings establish that Macaluso did not observe Defendant driving and support the trial court's conclusion of law that Macaluso lacked probable cause to arrest Defendant. *Id.* at 168, 712 S.E.2d at 878. In addition, Finding 21 establishes that there was no probable cause to arrest Defendant, because the State failed to establish a connection between the driver of the green pickup truck and Defendant, who later walked up to Macaluso on Briggs Avenue;

this finding supports that Macaluso did not observe Defendant drive and thus did not have probable cause to arrest Defendant for driving while impaired.

The findings also establish that Munter did not have independent probable cause to arrest Defendant for driving while impaired. As neither Macaluso nor Munter observed Defendant drive, park, or get out of the truck, Munter lacked the requisite probable cause to arrest Defendant for driving while impaired. *See Tilley*, 44 N.C. App. at 317, 260 S.E.2d at 797 (explaining that a second officer who lacks probable cause may justifiably arrest a defendant based on a first officer's request only when the first officer has probable cause to arrest the defendant).

IV. Conclusion

For the reasons stated above, we conclude that the trial court did not err by granting Defendant's motion to suppress and we affirm the trial court's order.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
CASHAUN K. HARVIN, DEFENDANT

No. COA18-1240

Filed 3 December 2019

Constitutional Law—right to counsel—forfeiture—standby counsel—request to replace or activate as primary counsel

In a prosecution for murder and other charges arising from a robbery, where the trial court denied a pro se defendant's requests to either activate standby counsel as his primary attorney or replace standby counsel, the court deprived defendant of his right to counsel by erroneously finding he had forfeited that right. The record did not show defendant trying to obstruct or delay the trial, and defendant repeatedly expressed a desire to waive his right to proceed pro se rather than waive his right to counsel. Moreover, the trial court had previously assured defendant that he could request to activate standby counsel as his primary attorney but did not warn him that

such requests—when made close to trial—could result in him forfeiting his right to counsel.

Judge DILLON dissenting.

Appeal by Defendant from judgments entered 8 May 2018 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for the Defendant.

BROOK, Judge.

Cashaun K. Harvin ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. We hold that the trial court deprived Defendant of his right to counsel. Defendant is therefore entitled to a new trial.

I. Background

In this case, "[b]ecause the issue dispositive of [the] appeal does not relate to the facts surrounding the alleged crimes, a detailed recitation of the facts is unnecessary." *State v. Dunlap*, 318 N.C. 384, 385, 348 S.E.2d 801, 802 (1986). The charges of which Defendant was found guilty arise from a robbery arranged on the pretext of a marijuana sale by Robert Scott, Jr., to Tyler Greenfield and a shooting that took place during this robbery. Mr. Scott and his then-girlfriend sustained gunshot wounds during the event. Mr. Scott died from his wounds immediately afterwards. Defendant was seventeen years old at the time of the robbery.

On 26 May 2015, Defendant was indicted for first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, and AWDWIKISI. A superseding indictment for the same charges was issued on 31 October 2016. On 20 March 2017, following the conclusion of Mr. Greenfield's trial for charges stemming from his involvement in the robbery and killing, an additional superseding

indictment was issued, adding the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.[1]

On 23 April 2018, in New Hanover County Superior Court, the Honorable Phyllis M. Gorham heard evidence and argument related to Defendant's competency to stand trial and whether Defendant had waived or forfeited his right to counsel. The following colloquy transpired:

> THE COURT: Mr. Harvin, good morning.
>
> MR. HARVIN: Good morning, Your Honor. There are some things that I would like to address before the Court today before we proceed with, you know, the trial motions and stuff. I would like to address the situation of ineffective assistance of counsel, Your Honor.
>
> THE COURT: Let me stop you right there. You don't have an attorney so there is no ineffective assistance of counsel claim that you can raise.
>
> MR. HARVIN: But having – have I not – is he not by stand [sic] counsel to provide me with assistance in things that I do not understand?
>
> THE COURT: He is standby counsel but he is not your attorney. You have waived your right to all counsel.
>
> MR. HARVIN: Yes, ma'am.
>
> THE COURT: So Mr. Mediratta[, your standby counsel,] is not your attorney, so what is your question?
>
> MR. HARVIN: So if it was the decision that he was able to replace me or take over the case, like, that's what I was told by Judge Watts [sic]. He said if I wanted to, that he could take over my case at any time if I had decided.
>
> THE COURT: If you decide that you no longer wish to represent yourself –

---

1. Mr. Greenfield was found guilty of first-degree murder based on the felony murder rule, second-degree murder, and two counts of AWDWIKISI. *State v. Greenfield*, ___ N.C. App. ___, ___, 822 S.E.2d 477, 480 (2018). On 4 December 2018, a divided panel of this Court vacated the judgments entered upon these verdicts and remanded the case for a new trial on one of the convictions for AWDWIKISI. *Id.* at ___, 822 S.E.2d at 486. The dissenting judge would have reversed and granted Mr. Greenfield a new trial on all the charges. *Id.* at ___, 822 S.E.2d at 489 (Stroud, J., dissenting). The case is currently pending before the Supreme Court. *See State v. Greenfield*, ___ N.C. ___, 828 S.E.2d 20 (2019).

MR. HARVIN: Yes, ma'am.

THE COURT: – and you wish for counsel, that the Court has assigned a standby counsel to take over and try your case, that is correct.

MR. HARVIN: Yes, ma'am.

THE COURT: But until that happens, standby counsel is not your attorney.

. . .

MR. HARVIN: Your Honor, what I'm asking for is that if I am allowed – if I'm going to continue to proceed and, you know, go to trial and stuff like that, instead of, you know, waivering [sic] my rights and pleading out, I would ask that I be provided with effective assistance of counsel even if he not – you know, he's not actually, you know, representing me but, you know, if I come to him for advice that he provide me with substantial knowledge accordingly to the law, it's been times to where I ask him something specifically and he tells me that he don't know what I'm talking about or it doesn't exist but, you know, I have it, being provided with the statutory book, I can open it up and show him and then he has said, oh, I forgot this. Well, you know, right then and there it shows me that you're incompetent to, you know, provide me with assistance because if this is something that I can find, I can go in here and find it myself and you are not able to do it or you are not willing to help me, then that means that you are not willing to provide me with assistance.

THE COURT: Okay, all right, my question is what are you asking for?

MR. HARVIN: I'm asking for basically someone to replace him as standby counsel to provide me with assistance, someone adequate.

THE COURT: Now you represent yourself.

MR. HARVIN: Yes, ma'am.

THE COURT: And the Court doesn't have to provide you with standby counsel at all.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

. . .

THE COURT: All right, let me ask you, Mr. Harvin, do you still wish to represent yourself at this trial?

MR. HARVIN: If it –

THE COURT: Let me ask you some questions.

MR. HARVIN: Yes, ma'am.

THE COURT: Are you able to hear and understand me?

MR. HARVIN: Yes, ma'am.

THE COURT: Are you now under the influence of any alcohol, narcotics, drugs, medicines, pills, or any other substance?

MR. HARVIN: No, ma'am.

THE COURT: How old are you?

MR. HARVIN: 21 at this time.

THE COURT: What is the highest grade you completed in school?

MR. HARVIN: The 10th grade, Your Honor.

THE COURT: And what grade level can you read and write?

MR. HARVIN: I would believe the 10th grade, Your Honor.

THE COURT: Do you presently suffer from any mental – suffer from any mental or physical disabilities?

MR. HARVIN: Your Honor, actually there were points to where –

THE COURT: I just need you to answer that question as of this day, this moment, yes or no.

MR. HARVIN: Yes, ma'am.

THE COURT: What do you say are those disabilities?

MR. HARVIN: I believe that I have attention deficit disorder, like I believe that has to be accommodated by, you know, medicine because I can only focus for a certain period of time, like I have a learning disability. I learn slower than others, like I'm not retarded, I'm intelligent, but it's that, you know, it takes me – it's difficult for me to, you know, grasp certain things. Like for a person to read something, it would take like just a page or two or something like that and actually grasp the concept of it, it would take them maybe 20 or 10 minutes, it would take me at least an hour, because I – like I could be focused on this and my thoughts would trail off.

THE COURT: Let me ask you a question.

When were you diagnosed with attention deficit disorder?

MR. HARVIN: I believe in like maybe about the fifth grade or something like that.

THE COURT: And you were taking medications?

MR. HARVIN: Yes, ma'am.

THE COURT: And when did you stop taking medications?

MR. HARVIN: When my mom – I can't remember exactly, but when my father had got locked up, my mom took it away because of our religious beliefs.

THE COURT: So you were still in school?

MR. HARVIN: Yes, ma'am.

THE COURT: And you say that you think you might suffer from learning disabilities. What is your learning disability?

MR. HARVIN: What is my learning disability?

THE COURT: Yes.

MR. HARVIN: At this point, it's something that I can't really tell you because I'm not a psychiatrist, Your Honor.

THE COURT: So you've never been diagnosed with a learning disability?

MR. HARVIN: Yes, ma'am.

THE COURT: When were you diagnosed?

MR. HARVIN: I believe I said the fifth grade.

THE COURT: So you had attention deficit disorder?

MR. HARVIN: Yes, ma'am.

THE COURT: And another specific learning disability?

MR. HARVIN: ADHD.

THE COURT: So just attention deficit disorder?

MR. HARVIN: Yes, ma'am.

THE COURT: All right.

MR. HARVIN: And a learning disability. I don't know if that's two different things but I know that –

THE COURT: All right, now do you understand that you have the right to be represented by an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that you may request a lawyer be appointed for you if you are unable to hire a lawyer?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer here in this court must follow?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you decide to represent yourself, the Court will not give you legal advice concerning the defenses, jury instructions or other legal issues that may be raised in the trial?

MR. HARVIN: Does that also continue to standby counsel, they can't give me advice?

THE COURT: The Court cannot – the Court cannot give you any legal advice concerning the jury instructions or the legal issues.

MR. HARVIN: Can I ask Your Honor, when you say "Court" are you pertaining to –

THE COURT: I said the Court, I am the Court.

MR. HARVIN: Okay.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that as the Judge, I am an impartial judge in this case and that I would not be offering you any legal advice, and that I must treat you just as I would treat an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that you are charged with first-degree murder punishable by life in prison without parole, attempted first-degree murder – what class is that?

[PROSECUTOR]: B2, Judge.

THE COURT: Punishable by up to life. B2 is punishable by – that is off the chart. It's more than 393 months minimum.

MR. HARVIN: Yes, ma'am.

THE COURT: Attempted robbery with a dangerous weapon, and that's – attempt is an E. There actually would be a D in this case, 204 months; assault with a deadly weapon with intent to kill inflicting serious injury, punishable by up to 231 months.

Robbery with a dangerous weapon punishable by up to 204 months; conspiracy to commit robbery with a dangerous weapon, punishable by up to 88 months.

Do you understand that's what you're charged with?

MR. HARVIN: Could you reread that again for me, please? I apologize. There are certain things that I didn't catch.

THE COURT: Well, you understand you are charged with all of those charges; first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon. Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: All right, with all of these in mind, what you're charged with, what potential punishment for each crime is, do you still now wish – do you now wish to ask me any questions?

MR. HARVIN: Yes, Your Honor. Before you make your ruling, Your Honor, I want you to also take into consideration that, you know –

THE COURT: I'm just asking you questions about your representation, about whether or not you want to continue to represent yourself.

MR. HARVIN: And what are, like, if I decide to proceed –

THE COURT: No, I just need to know, do you have any questions about what I just said to you about that?

MR. HARVIN: Can you read the last part, please?

THE COURT: I'm going the read the next question to you. Do you still wish to waive your right to the assistance of an attorney and do you voluntarily and intelligently decide to represent yourself in this case?

MR. HARVIN: No, ma'am.

THE COURT: You do not wish to represent yourself?

MR. HARVIN: No, ma'am.

THE COURT: So what are you asking the Court for today?

MR. HARVIN: Your Honor, what I was asking for initially was asking was that, like I said, I be provided with adequate by stand [sic] counsel and I was asking for more sufficient time to prepare my own defense. And what I was going to address was that I don't feel like I should relinquish my rights as counsel, I just need more time to prepare and understand the law.

THE COURT: Now, Mr. Harvin, I am treating you as an attorney.

MR. HARVIN: Yes, ma'am.

THE COURT: The question I have for you today: Are you going to continue to represent yourself in your case?

MR. HARVIN: No, ma'am.

THE COURT: What are you asking for?

MR. HARVIN: I'm asking for effective assistance of counsel.

THE COURT: You are asking to be represented by an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: And you are asking this court to once again appoint an attorney to represent you in your case?

MR. HARVIN: Yes, ma'am.

THE COURT: Mr. Harvin, you understand that if I choose to appoint an attorney to represent you –

MR. HARVIN: Yes, ma'am.

THE COURT: – that it will be over from that point? You can't come back in here and say you don't like that particular attorney.

MR. HARVIN: Yes, ma'am.

THE COURT: Because by law, you will have forfeited your right to have any attorney to represent you.

Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: And you will be back in the same position that you are now.

Do you understand that?

MR. HARVIN: Yes, ma'am. Your Honor?

THE COURT: Yes, sir.

MR. HARVIN: I just have a reasonable question.

THE COURT: I hope it's a reasonable question.

MR. HARVIN: I just – I just take it as this is ineffective assistance of counsel.

THE COURT: What is ineffective assistance of counsel?

MR. HARVIN: I was about to state the reasons.

THE COURT: Well what is – I don't understand because you have to understand, you don't have an attorney.

MR. HARVIN: I'm talking about now, I'm talking about, you know, prior situations.

THE COURT: I don't want to talk about prior situations.

MR. HARVIN: Okay, ma'am.

THE COURT: You've had some excellent attorneys, I want you to understand, excellent attorneys.

MR. HARVIN: Your Honor, I've been down here for three years with no bond. I'm charged with a charge that according to the North Carolina statute doesn't exist. First-degree attempted murder doesn't even exist. Your Honor, I have – there was a illegally obtained evidence and they didn't even address the situation so how can –

THE COURT: Listen.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you have an attorney appointed to represent you, it is your attorney who will try your case and not you?

MR. HARVIN: But it's my right.

THE COURT: Listen to me.

MR. HARVIN: Yes, ma'am.

THE COURT: If an attorney is appointed to represent you, your attorney tries your case, you don't try your case. Are you willing to give up that right?

MR. HARVIN: Yes, ma'am.

THE COURT: Because you have a right to represent yourself.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: And you still choose to give up that right today?

MR. HARVIN: Yes, ma'am.

THE COURT: How soon can this case be set for trial?

[PROSECUTOR]: I wish to be heard. First and foremost, he's had four attorneys appointed to him. The last two he fired, said they didn't get along with him, irreconcilable differences. He was appointed Mr. Mediratta as standby counsel. We went through a whole soliloquy in December and we set April 23rd as the trial date so Mr. Mediratta and Mr. Harvin could be ready.

We're now here, Judge, and the defendant now wants an attorney. If he gets an attorney, he's not going to like his attorney, he doesn't like any attorneys. Two months from now, we're in the same position, he's going to fire an attorney and he's going to come back and he's going to want an attorney. This defendant is playing games with the system.

It's time. It's been over three years, Judge. The issue with any continuances for the State, Judge, is the fact that our cooperating witness got a year and a half probation back in December. We scheduled this trial three times during his probation term, during one of his probation terms he was to testify against the defendant. The defendant then is getting rewarded if he continues the case past the end of his probation in June, Judge. That's not fair to the State. The State has prepped this case for trial multiple times, flying in witnesses. We have two witnesses flying in across the country in the matter today, Judge.

It's not a fair trial to the State for this defendant to get another trial represented by another attorney that he again doesn't like. I think at this point the State would ask that he represent himself, use Mr. Mediratta who is standby counsel, or he forfeit his right to an attorney, Judge, because again he can't – he's going to fire his attorney, he's going to want a continuance and want to go back and forth and the State is prejudiced by any continuance at this point because of the June 8th date for Mr. Sampson, Judge.

That's the State's position regarding that, Judge.

THE COURT: Mr. Mediratta are you ready for this case?

> MR. MEDIRATTA: I am not. Your Honor, I'm appearing as standby counsel. He has not been communicating, he is not willing to work with me. Even with the discovery, we've had serious communication problems. I am not prepared to take this case to trial today, Your Honor.

The court then took a brief recess and after returning and continuing the hearing, heard testimony from the attorneys that had previously been appointed to represent Defendant but had been allowed to withdraw.

After this evidentiary hearing, the following colloquy transpired:

> [PROSECUTOR]: Judge, a few issues obviously we would ask the Court to consider in this case regarding the continued issues Mr. Harvin raises. I think obviously Mr. Harvin at this point is moving to get an attorney and he previously waived that counsel, so I think one of the questions the Court has to consider is whether he has forfeited that counsel by law and a lot of cases regarding forfeiture in North Carolina deal with erratic behavior by the defendant in the courtroom. That's not really at play here, Judge, but what case law has said is that in State v. Boyd, being the most prevalent case on point, 200 N.C. App. 97, that any willful actions on the part of the defendant that result in the absence of Defense Counsel constitutes a forfeiture of the right to counsel.
>
> In addition, the defendant may lose his constitutional right to be represented by counsel of his choice when a right to counsel is perverted for the purpose of obstructing and delaying a trial.
>
> Judge, I would argue in this case, the Boyd case, there's no erratic actions by the defendant, there's no hysteria in the courtroom or rude interjections of the defendant. But basically we have a similar fact pattern in which the defendant involved fired two different attorneys and was actually told on the day of trial that he was to represent himself.
>
> . . .
>
> I think it's clear that [Mr. Harvin's] actions in this case are to obstruct and delay the trial by asking for an attorney at this time. Again, this defendant, for the record, in

November was given the opportunity to have counsel. Mr. Evans withdrew, he denied that with Mr. Watson and then, Your Honor, on December 27th of last year, this defendant exercised on the record through colloquial questions that he wants to represent himself.

. . .

And now we're in the eve of trial and he makes this motion, Judge. I think it's clearly based on the timetable and timeline of those actions. This defendant is making those and asking to represent himself, obstructing and delaying the trial and, as a result, he has forfeited counsel and we ask you to deny the motion at this time and proceed to trial, Judge.

. . .

I would also argue that because this defendant on December 28th of 2017, waived his right to all counsel and elected to represent himself, that the Court did go through all the necessary questions with him, clearly advised him of his right to an attorney, clearly advised him of what he is being charged with and the nature and consequences of a conviction, what he could face. And that the defendant did elect to represent himself, signed a waiver, that waiver was signed knowingly and voluntary.

Judge, I would argue that in order to withdraw that waiver, there needs to be a showing by the defendant of good cause.

. . .

So I think clearly the timing is very, very suspect given the facts that all his other motions were denied, given the fact that he asked for you to be recused, you denied that and the motion to continue which was denied. And, Judge, I think on the record earlier today before, you know, we addressed the issue of, you know, going through the whole process, asking him about can you hear and understand me, I mean, it's my understanding that he said I would like an attorney so I would have more time to prepare my case. So I think that in and of itself and all these factors show that this is clearly a tactic to delay and frustrate the

orderly process of the trial court.

THE COURT: Mr. Harvin.

MR. HARVIN: Your Honor, no way I'm trying to frustrate the Court. Your Honor, all that I ask of the Court is that I was provided a reasonable time period to adequately prepare for my case. I actually didn't want to relinquish my spot as counsel, but at this point I feel compelled because, Your Honor, I ask that you take into consideration that I am not – I am not a counsel. I mean, I am not an attorney. I never went to school to become an attorney. I have been provided with the proper issues like essential like basic statutory law book, but, Your Honor, you also have to consider the experience. Experience is an important factor and I don't believe that this statutory provision would be sufficient enough to meet the threshold, you know, of adequate representation because it only provides you with certain things but it doesn't provide you with things that's accordingly to court rules and stuff like that.

As you can observe like, you know, even me questioning witnesses and stuff, I struggle with that because, you know, I kind of have a difficult time understanding the difference between, you know, direct examination, cross-examination and this is stuff that I'm learning as I'm proceeding. Like everything that I'm doing is that – everything I'm doing is a learning process while I'm proceeding to be prosecuted for life sentencing charges.

So I ask that you consider the severity of my charges and also the timeframe that I was presented to, you know, create a defense on my behalf. Your Honor, I believe like now it's a difficult time like. And, Your Honor, in all honesty, like I said, it's not something to delay or, you know, frustrate the Court but I don't believe that, you know, I'm adequately prepared, like I came in here today, Your Honor, you know, this notebook – I apologize but, you know, you can see like there's nothing on here. You feel what I'm saying? And if you decide to make your ruling accordingly to what the prosecution is stating, I'm at y'all's mercy, like, there's nothing on there for me to defend myself. I'm going through life and that's what I plan on doing.

I believe I am entitled to certain rights, that's required by law, statutory provision and also you know the Constitution of the United States and the Constitution of North Carolina, it doesn't specify certain things but I believe in your discretion, in the integrity of the Court, that you are supposed to, you know, be fair and take into consideration, like I presented to Your Honor, I have a –

THE COURT: I don't want to hear – I don't want you to repeat anything because I've already heard all of your previous arguments, so if you've got anything else that you want to add, I want to hear it, but don't repeat yourself.

MR. HARVIN: Okay, yes, ma'am.

. . .

I really believe, I don't believe that I can provide, you know, the representation that's required by law.

THE COURT: All right. You may have a seat. We'll first deal with the issue of capacity to proceed. The defendant stated earlier in these hearings that he had a disability, attention deficit disorder; that he had the inability to comprehend what he was reading. The Court has had an opportunity to observe the defendant for several hearings, that the defendant has been able to read, explain statutes, and case law to the Court, does not appear there has been a lack of understanding from this Court's observation.

The Court has heard from the testimony of the attorneys who previously represented the defendant: Attorneys Bruce Mason, Alex Nicely, Merritt Wagoner and Shawn Robert Evans. Each was asked whether or not there was any issue with the defendant's capacity to proceed to trial and each stated that in their opinion there was no issue as to the defendant's competency; that the defendant understands the nature of and the object of the proceedings, all the charges that he is charged with, and that he comprehends the situation in reference to these proceedings. And that he has at that point, up to this point, been representing himself in a rational and reasonable manner.

Now as to the defendant's request on the day of trial for an attorney, that on February 9, 2015, the Court appointed

Bruce Mason through the Public Defender who requested Mr. Mason to represent the defendant. Mr. Mason represented the defendant from February of 2015 to July 25th of 2016. Mr. Mason testified that he had to withdraw because he had other matters that were pressing, and that Mr. Nicely substituted to represent the defendant on or about July 25, 2016. . . .

Mr. Nicely testified and the record reflects that he was appointed on or about July 25, 2016, until May 12, 2017, when Merritt Wagoner was appointed by the Court to represent the defendant. Mr. Nicely testified that he represented him up until the time that he went to work in the Brunswick County District Attorney's Office. . . .

On or about May 12, 2017, the Court appointed Merritt Wagoner to represent the defendant and he represented the defendant until on or about September 28, 2017. Mr. Wagoner testified that he filed a motion to withdraw from the defendant's case at the defendant's request and was allowed to withdraw from the case on September 28, 2017. . . .

That on or about September 28, 2017, the Court allowed Mr. Wagoner to withdraw. The Court appointed Shawn Robert Evans to represent the defendant. Mr. Evans represented the defendant until he was removed from the case December 12, 2017.

. . .

That on December 12, 2017, Mr. Evans filed a motion to withdraw as counsel for the defendant at the Defendant's request. On December 12, 2017, the defendant at that time informed the Court that he wished to represent himself. Judge Watson at that time – the defendant at that time signed a waiver of his right to all counsel. Judge Watson at that time appointed Paul Mediratta as standby counsel.

That on December 28, 2017, this defendant was in front of this judge. At that time, he still intended to waive his right to counsel. This court advised defendant of his waiver of counsel. At that time he still intended to represent himself and he signed a waiver of his right to counsel.

At that time he did not wish to have an attorney, he wished to represent himself. That the defendant has had multiple

> opportunities to ask the Court for an attorney to represent him on his cases. That on January 28, 2018, the defendant was before this Court and at that time if he wished to have an attorney to represent him, he had the opportunity to ask the Court for an attorney and he did not.
>
> On March 26, 2018, he was before Judge Willey and at that time he had an opportunity to inform the Court of his – to ask the Court for an attorney. He did not.
>
> On April 3, 2018, the defendant was again before this Court. At that time, he had an opportunity to ask the Court for an attorney, he did not.
>
> The Court finds that he had no good cause as of today, the day of trial, to ask this Court for an attorney to represent him. That in fact this Court believes that based upon the defendant's actions from the time that Mr. Merritt Wagoner was appointed to represent him on May 12, 2017; Mr. Shawn Evans was appointed to represent him on September 28, 2017, the defendant requesting that both of these attorneys withdraw from representing him, finds that the defendant has forfeited his right to have an attorney to represent him at this trial; that his actions have been willful and that he has obstructed and delayed these court proceedings.
>
> Therefore the Court finds that the defendant has forfeited his right to have an attorney represent him at this trial. The State shall proceed to trial in this case this week. It is in my discretion as to whether or not the defendant will have an attorney as standby counsel. I'm going to keep Mr. Mediratta as standby counsel. If you choose to use him, you may but you do not have to.

Judge Gorham then heard pre-trial motions. Two days of jury selection followed. The trial lasted eight days.

On the eighth day of trial the jury returned verdicts of guilty on all of the offenses charged. The trial court sentenced Defendant to life in prison with the possibility of parole for the murder conviction. For the remaining convictions, however, the trial court determined Defendant to be a prior record level I offender and sentenced him to 200 to 254 months for attempted murder, 60 to 84 months for attempted robbery with a dangerous weapon, 60 to 84 months for AWDWIKISI, 60 to 84

months for robbery with a dangerous weapon, and 25 to 42 months for conspiracy to commit robbery with a dangerous weapon, ordering that the sentences run consecutively. Defendant entered notice of appeal in open court.

II. Analysis

The dispositive issue presented by this appeal is whether the trial court erred by concluding that Defendant had forfeited his right to counsel. We hold that it did, depriving Defendant of his right to counsel. Defendant is therefore entitled to a new trial. *See Dunlap*, 318 N.C. at 388-89, 348 S.E.2d at 804-05.

Individuals accused of serious crimes are guaranteed the right to counsel by the Sixth Amendment to the U.S. Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963)). This includes the right of indigent defendants to be represented by appointed counsel. *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013). This Court has recently reiterated, "[t]he right to counsel is one of the most closely guarded of all trial rights." *State v. Schumann*, ___ N.C. App. ___, ___, 810 S.E.2d 379, 386 (2018) (internal marks and citation omitted).

Whether there has been a deprivation of the right to counsel involves two related issues: (1) voluntary waiver of the right to counsel; and (2) forfeiture of the right to counsel. *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016). "Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). We review *de novo* the question of whether a defendant has forfeited the right to counsel. *State v. Pena*, ___ N.C. App. ___, ___, 809 S.E.2d 1, 5 (2017).

A. Voluntary Waiver

"First, a defendant may voluntarily waive the right to be represented by counsel[.]" *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. This category of voluntary waiver includes (1) waiver of the right to appointed counsel and (2) waiver of the right to counsel and the decision to proceed *pro se*. *State v. Curlee*, ___ N.C. App. ___, ___, 795 S.E.2d 266, 269-70 (2016). This is because the right to counsel includes "the right of an indigent defendant to appointed counsel," *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 68, the right of a defendant who can afford to retain counsel to "private counsel . . . of his choosing," *id.*, and the "right

[of a defendant] to handle his own case without interference by, or the assistance of, counsel," *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (citation omitted).

A circumstance that "arises with some frequency . . . is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow him time to obtain funds with which to retain counsel." *Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 270. In this situation,

> [b]y the time such a defendant realizes that he cannot afford to hire an attorney, his case may have been continued several times. At that point, judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial.

Id. Our Court has indicated that a voluntary waiver of the right to counsel is still possible in this situation:

> the trial court [may] inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

Id. (emphasis in original).

B. Forfeiture

There is also a circumstance in which "a criminal defendant may no longer have the right to be represented by counsel"; that is, where the "defendant engages in such serious misconduct that he forfeits his constitutional right to counsel." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (citation omitted). As this Court observed in *Blakeney*, although

> [t]here is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel[,] . . . forfeiture has generally been limited to

> situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

245 N.C. App. at 461-62, 782 S.E.2d at 94.

Despite the fact-specific nature of the inquiry, warnings by the trial court that a defendant may lose the right to counsel through dilatory conduct, *see Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 271-73, or observations by the trial court that the defendant has engaged or is engaging in dilatory conduct, *see State v. Simpkins*, ___ N.C. App. ___, ___, 826 S.E.2d 845, 850-51 (2019), are relevant to determining whether a defendant has forfeited the right to counsel. Relatedly, our Court has held that where the defendant had never indicated a desire to proceed *pro se*, a "defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone [] trial, [is] nowhere close to the 'serious misconduct' that has previously been held to constitute forfeiture of counsel." *Blakeney*, 245 N.C. App. at 463-64, 782 S.E.2d at 95.

C. Colloquy Required to Implement Constitutional Right to Counsel

Unless the defendant "engage[s] in such serious misconduct as to warrant forfeiture of the right to counsel[,] the trial court [is] required to comply with the mandate of North Carolina General Statute § 15A-1242." *Simpkins*, ___ N.C. App. at ___, 826 S.E.2d at 852 (internal marks and citation omitted). N.C. Gen. Stat. § 15A-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2017). The purpose of the colloquy required by N.C. Gen. Stat. § 15A-1242 is to comply with the constitutional requirement that a waiver of the right to counsel be made "knowingly, intelligently, and voluntarily[.]" *Blakeney*, 245 N.C. App. at 459-60, 782 S.E.2d at 93. The Supreme Court has held that this waiver "must be expressed clearly and unequivocally." *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475 (internal marks and citation omitted). And failure to comply with N.C. Gen. Stat. § 15A-1242 constitutes prejudicial error. *Id.* at 674, 417 S.E.2d at 476.

D. The Right to Proceed *Pro Se*

However, "[a] defendant has only two choices—'to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *Id.* at 677, 417 S.E.2d at 477 (internal marks and citation omitted). "The duties of standby counsel are limited . . . to assisting the defendant when called upon and to bringing to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion." *Id.* at 677, 417 S.E.2d at 478 (internal marks and citation omitted). The Supreme Court has therefore held that a waiver of the right to counsel is ineffective where the defendant clearly misunderstands the role of standby counsel and seeks "to proceed to trial as lead counsel of a defense team . . . includ[ing] licensed, appointed attorneys." *Id.* at 675, 417 S.E.2d at 476.

E. The Trial Court's Erroneous Forfeiture Conclusion

In the present case, the trial court attempted to complete the colloquy required by N.C. Gen. Stat. § 15A-1242 after Defendant requested replacement of his standby counsel, but instead of waiving his right to counsel, Defendant invoked it, and requested that counsel be appointed. Prior to concluding that Defendant had forfeited his right to counsel, during the hearings that took place over the years that Defendant was in jail awaiting trial, the trial court had not made any note of dilatory tactics in which Defendant had engaged, nor did the court warn Defendant that requesting new standby counsel or activating his standby counsel on the day set for trial could result in a finding that he had forfeited his right to counsel. Quite the contrary, in fact: on 12 December 2017, when Mr. Mediratta was appointed as Defendant's standby counsel, the court assured Defendant that Mr. Mediratta could be activated as primary counsel in the event that Defendant did not wish to continue to proceed *pro se*. Specifically, the following colloquy transpired:

> [MR HARVIN]: I would like to represent myself, but I would like assistance, perhaps.

> THE COURT: Okay. You have that option, of course. The court, in its discretion, can determine that you're entitled to standby counsel, which means that you can represent yourself, but standby counsel can be there to assist you if you have legal questions or process questions that you might need to refer to. You can do that through standby counsel.
>
> Of course, at any point in time, if you chose to then request standby counsel to be made first chair, then that would put you in the position to have to speak to another judge about that at the appropriate time.
>
> What I would like to do is observe your right to counsel. And that is, if you do wish to represent yourself, you always have that right. But you can't do it while you have an attorney already assigned if they are first chair in the case. Do you understand that?
>
> You would like to proceed representing yourself, but you would still like the assistance of counsel; is that correct?
>
> [MR. HARVIN]: Yes, sir.[2]

Over the State's objection, the trial court ruled on 12 December 2017 that it "[did] not find at this point in time that Mr. Harvin has vacated his right to request counsel, nor that any of his actions have forfeited his opportunity to have assigned counsel." The trial court thus not only did not warn Defendant that his subsequent decision to activate his standby counsel or request replacement standby counsel could result in forfeiture of his right to counsel—instead ruling that nothing Defendant had done supported a forfeiture conclusion as of 12 December 2017—the court did not inform Defendant that, if he did not wish to continue to

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2. As noted above, Defendant makes reference to his understanding of this 12 December 2017 exchange in his 23 April 2018 colloquy with Judge Gorham. Specifically, discussing standby counsel Defendant stated as follows: "So if it was the decision that he was able to replace me or take over the case, like, that's what I was told by Judge Watts [sic]. He said if I wanted to, that he could take over my case at any time if I had decided." This, in no uncertain terms, rebuts the dissent's assertion that "Defendant did not say anything during the 3 April 2018 pre-trial hearing or any other pre-trial hearing to indicate that he made his decision to represent himself in reliance on a representation that he could always call up his stand-by counsel into service." *Harvin*, *infra* at _____ (Dillon, J., dissenting); *see also State v. Blankenship*, 337 N.C. 543, 552, 447 S.E.2d 727, 732-33 (1994) (rejecting defendant's request for a new trial because there was "*no* showing in the record or transcript that defendant relied on anything the trial court said [regarding stand-by counsel] in choosing to represent himself.") (emphasis added).

proceed *pro se*, "he [would] be required to proceed to trial without the assistance of counsel[.]" *Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 270.

The record of the hearing before Judge Gorham on 23 April 2018 offers no support for the court's conclusion that Defendant had forfeited his right to counsel. During the hearing, as well as the two days of jury selection and eight days of trial that followed, Defendant comported himself with courtesy. The State conceded as much at the 23 April 2018 hearing, twice. Although the most recent attorney allowed to withdraw as counsel of record for Defendant was the fifth attorney appointed to represent him, the record of the 23 April 2018 hearing demonstrates that only two of the attorneys appointed to represent Defendant withdrew for reasons related to their relationship with Defendant. Neither of the two attorneys who requested to withdraw because of their relationship with Defendant appeared to have requested to withdraw because Defendant was refusing to *participate* in preparing a defense, or question the legitimacy of the proceeding against him, but instead due to differences related to the *preparation* of Defendant's defense.[3] Defendant's inquiry of the trial court during that hearing indicated that he did not understand the difference between the role of standby counsel and primary counsel, suggesting that he may have wished to lead a defense team as lead counsel consisting of himself and a licensed attorney, as in *Thomas*, although the record is not entirely clear on this point.

What is clear is that when Judge Gorham did not grant Defendant's request to activate his standby counsel on 23 April 2018, Defendant twice requested appointment of substitute standby counsel. When the court did not grant any of these requests and instead began to attempt to complete the colloquy required by N.C. Gen. Stat. § 15A-1242, Defendant clearly and unequivocally stated that he wished to waive his right to represent himself at trial rather than waive his right to counsel, stating no fewer than *five* times that he did not wish to represent himself at trial. As the record of that hearing reflects, however, Defendant's requests fell on deaf ears.[4]

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3. This case is therefore distinguishable from *State v. Boyd*, 200 N.C. App. 97, 102-03, 682 S.E.2d 463, 467 (2009), cited by the State in support of its forfeiture argument on 23 April 2018, in which the defendant repeatedly told his attorney that the case would not go to trial, refused to cooperate with multiple counsel, and obstructed and delayed the trial proceedings.

4. We note that the unequivocal statement by standby counsel at this hearing that he was not prepared to be activated as primary counsel on the date set for trial counseled by itself against proceeding with the trial of a self-represented defendant as scheduled; however, this unequivocal statement by Defendant's standby counsel strongly counseled against proceeding with the trial on 23 April when Defendant had politely and repeatedly

This Court's description of the defendant's conduct in *Simpkins*, in which the defendant was granted a new trial because of the trial court's deprivation of his right to counsel, aptly describes Defendant's conduct in the present case:

> [D]efendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so [D]efendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole [D]efendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process.

___ N.C. App. at ___, 826 S.E.2d at 851. As in *Blakeney*, Defendant "did not object to any of the prosecutor's questions," and the trial court did not *sua sponte* sustain any objections to the introduction of hearsay evidence by the State at trial, despite sustaining numerous objections by the State to Defendant's attempts to elicit hearsay testimony. 245 N.C. App. at 458, 782 S.E.2d at 92. Although the record reflects that Defendant "did eventually state that he would represent himself," as in *Pena*, "it was not an outright request[,] but was [instead] the decision he ultimately made when faced with no other option[.]" ___ N.C. App. at ___, 809 S.E.2d at 6. We hold that Defendant did not forfeit his right to counsel. The trial court's conclusion to the contrary was error, depriving Defendant of his right to counsel. Accordingly, a new trial is required.

III. Conclusion

The trial court deprived Defendant of his constitutional right to counsel by concluding that he had forfeited this right. This conclusion was error. Defendant is entitled to a new trial.

NEW TRIAL.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

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requested that a lawyer be appointed to represent him as primary counsel and, failing that request, that his standby counsel be activated. Assuming, *arguendo*, the trial court's forfeiture conclusion was not error, granting a continuance and appointing substitute standby counsel would have been advisable under the circumstances.

DILLON, Judge, dissenting.

This matter was called for trial on 23 April 2018 with Judge Gorham presiding. Defendant appeared *pro se*, having formally waived his right to counsel four months earlier. However, instead of indicating that he was ready to proceed, Defendant requested that Judge Gorham appoint his stand-by counsel to represent him, a request that would have required a continuance. Judge Gorham denied the request, and the matter proceeded to trial, resulting in several guilty verdicts.

On appeal, Defendant, now represented by appellate counsel, argues that (1) Judge Gorham erred in denying him appointed counsel and (2) Judge Gorham plainly erred in instructing the jury on an "acting in concert" theory of guilt.

The majority concludes that Defendant is entitled to a new trial based on Judge Gorham's decision not to appoint Defendant new counsel and allow the matter to be continued, never reaching the jury instruction issue. For the reasons stated below, I conclude that Judge Gorham did not commit reversible error regarding either issue raised by Defendant. Accordingly, I respectfully dissent.

I. No Error in Denying Defendant Counsel on Day of Trial

This issue on appeal involves the intersection of three legal concepts: (1) the right of a defendant to withdraw a previous waiver of counsel; (2) the authority of a trial court to deny a defendant's request for a continuance of the trial; and (3) the authority of a trial judge to declare that a defendant has forfeited his right to counsel. Admittedly, there are some inconsistencies in our case law. But, based on any view of our Court's jurisprudence and based on our Supreme Court's expressed concern of a defendant's effort to delay a trial by asserting a right to counsel at the last minute, I conclude Judge Gorham acted within her authority and discretion.

In my view, a defendant who has waived his right to an attorney should generally be able to withdraw his waiver by simply informing the trial court that he now wants to be represented.[1] That is, a judge

1. *See State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (stating that a waiver of counsel is good "until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him"); *see also State v. Sexton*, 141 N.C. App. 344, 348, 539 S.E.2d 675, 677 (2000) (ordering a new probation hearing where defendant, who had previously waived his right to counsel, clearly stated on the day of his revocation hearing that he wanted counsel appointed).

generally should not deny a *pro se* defendant's request to be represented (for instance, by stand-by counsel), even if made on the day of trial, if the request does not require any delay. But where the request, if granted, would require that the trial judge continue the trial to another term, our case law suggests that the defendant must generally show "good cause."[2]

Admittedly, some of our cases do suggest that a trial judge may only deny an 11th hour request if she determines that the defendant has "forfeited" his right to an attorney through some misconduct on his part.[3] However, other cases use the language that a trial judge may deny the request on a mere failure by the defendant to show "good cause."[4]

Our Supreme Court has quoted from one of our Court's "good cause" cases in stating that a defendant's *timing* in making last-minute request for counsel may be considered in deciding whether to grant the request:

> "[A] defendant wait[ing] until [the] day trial began to withdraw waiver and seek appointment of counsel [is] a tactic which, if 'employed successfully, [would permit] defendants . . . to control the course of litigation and sidetrack the trial[.]' "

State v. Blankenship, 337 N.C. 543, 553, 447 S.E.2d 727, 733 (1994) (quoting *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975)).[5]

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2. Our General Assembly has instructed that a trial judge may ordinarily deny a request for a continuance unless the party seeking the continuance can show "good cause[.]" N.C. Gen. Stat. § 15A-952(g)(4) (2018).

See, e.g., *State v. Hoover*, 174 N.C. App. 596, 598, 621 S.E.2d 303, 305 (2005) (stating that a defendant must show "good cause" to withdraw his waiver of counsel); *State v. Atkinson*, 51 N.C. App. 683, 685, 277 S.E.2d 464, 465 (1981) (holding that defendant "did not meet his burden of showing sufficient facts entitling him to a withdrawal of the waiver of right to counsel" made on the day of trial where he had previously indicated on multiple occasions that he was waiving his right to counsel).

3. *See State v. Blakeney*, 245 N.C. App. 452, 463, 782 S.E.2d 88, 95 (2016) (holding that a trial court should have granted a defendant's motion to continue in order to hire an attorney, "even if motivated by a wish to postpone his trial," where there was no showing that defendant had "forfeited" his right to counsel through "serious misconduct").

4. *See State v. Rogers*, 194 N.C. App. 131, 139-40, 669 S.E.2d 77, 83 (2008) (holding that the judge did not err in denying defendant's 11th hour request based on defendant's failure to show "good cause," even though defendant may not have otherwise "forfeited" his right to counsel).

5. *Blankenship* was overruled in part on other grounds in *State v. Barnes*, 345 N.C. 184, 230, 481 S.E.2d 44, 69 (1997). However, the right to counsel section of that opinion has not been overruled.

Indeed, our Supreme Court has expressed its concern about defendants delaying on invoking rights as a means of delay:

> We wish to make it abundantly clear that we do not approve of tactics by counsel or client which tend to delay the trial of cases" and that "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial.

State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977).

In any event, the concern raised by our Supreme Court in *Blankenship* and *McFadden* seems to be in line with the "forfeiture" standard articulated by our Court: namely, that a forfeiture "results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel." *State v. Cureton*, 223 N.C. App. 274, 288, 734 S.E.2d 572, 583 (2012).

Accordingly, it seems that the "good cause" standard and the "forfeiture" standard are generally treated similarly. That is, a *pro se* defendant's desire to be represented by counsel, in and of itself, generally constitutes "good cause" to justify a continuance. But the additional fact that defendant has been dilatory in making his request may support a finding that the defendant has failed to show "good cause" for a delay or otherwise has "forfeited" his right to his right to counsel where the invocation of the right would require a delay.

In either case, it is clear under our case law that a trial judge may deny a defendant's request to continue a trial to another term so that the defendant can be appointed counsel to represent him when the trial judge determines that the defendant has been dilatory in making the request. This is clear under either a failure to show "good cause" standard or a "forfeiture" standard. Perhaps our Supreme Court needs to clarify the ambiguity in our case law. But in *this* case, Judge Gorham articulated *both* standards to support her decision, her decision is supported by her findings, and her findings are supported by the evidence that was before her. Therefore, we should affirm her decision.

Specifically, in denying Defendant's request, Judge Gorham "found that [Defendant] had no *good cause* as of today, the day of trial, to ask this Court for an attorney to represent him" and that "based upon his actions from the time [his third attorney] was appointed to represent him [eleven months earlier] . . . [D]efendant has *forfeited* his right to

have an attorney to represent him at this trial, [finding] that **his actions have been willful and that he has obstructed and delayed these court proceedings**." (Emphasis added.) As the trial court judge, these are *her* findings to make,[6] and there is ample evidence to support her findings.

Judge Gorham's findings were supported by the record before her which demonstrated that Defendant had twice fired his appointed counsel during the previous nine months and knew that waiting until the last minute to request his stand-by counsel be pressed into action, if granted, would require a further delay which would greatly prejudice the State's ability to prove its case. Specifically, the evidence before Judge Gorham showed as follows:

> In December 2016, the State agreed to a sentence of probation for a cooperating witness, in exchange for that witness's testimony in Defendant's trial. The term of that probation was for eighteen (18) months, to expire in June 2018;
>
> In May 2017, Defendant was appointed counsel. At some point, it appeared likely that the trial would take place in the Fall of 2017;
>
> Four months later, in September 2017, Defendant fired his appointed counsel, new counsel was appointed, and the trial date was set for January 2018;
>
> Three months later, in December 2017, at a pre-trial hearing one month before the scheduled trial, Defendant fired his new counsel and formally waived his right to counsel. The trial court on its own appointed stand-by counsel, and the trial court granted Defendant's request for a continuance to 23 April 2018;
>
> On 28 January 2018 and on 26 March 2018, Defendant attended pre-trial hearings. He did not indicate at either hearing any change of heart regarding his decision to represent himself;
>
> On 3 April 2018, three weeks before the scheduled trial, Defendant attended a pre-trial hearing. At the hearing, he asked for another continuance. Judge Gorham denied his motion. Defendant's stand-by counsel then indicated that he would need several weeks to prepare if he was asked to take over full representation. Judge Gorham stated that Defendant was not making any such request, and that she would only deal with such request if it was made. For his part,

6. *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004). *See also State v. Siler*, 292 N.C. 543, 555, 234 S.E.2d 733, 741 (1977) ("The determinations of good cause [to continue a pre-trial hearing] and extraordinary cause are for the trial court.").

> Defendant never gave any indication that he had a change of heart regarding his decision to represent himself or of any reliance on his ability to change his mind at the last minute;
>
> On 23 April 2018, the matter was called for trial.
>
> --Defendant asked for new stand-by counsel, a request that was denied.
>
> --Defendant then again asked for a continuance.
>
> --But when it became obvious that his request would again be denied, Defendant asked that the stand-by counsel be appointed to represent him, knowing that his request, if granted, would accomplish his goal of delaying the trial again. Indeed, Defendant admitted to Judge Gorham during the hearing that he was making the request, not out of a desire to have stand-by counsel represent him, but because he was not prepared to proceed and wanted to delay the proceeding.
>
> --Before making her decision, Judge Gorham heard from the four attorneys who had been appointed in the past to represent Defendant in the matter. Their testimonies tended to show that Defendant was well-acquainted with the discovery and that he essentially fired his last two appointed attorneys.
>
> --Judge Gorham was also made aware that the probation period for the State's cooperating witness was set to expire and that the State had procured the attendance of other witnesses for the 23 April 2018 term of court.
>
> --Judge Gorham then made her ruling, denying Defendant's request.

I conclude that Judge Gorham's decision was not erroneous;[7] she acted within her authority to deny Defendant's attempt to delay the trial.

I note Defendant's argument that he was somehow misled by Judge Gorham's statements at the 3 April 2018 hearing, three weeks before trial; that is, he relied on a representation by Judge Gorham that she

7. Though the denial of a motion to continue is ordinarily reviewed for an abuse of discretion, our Supreme Court instructs that when a motion to continue "raises a constitutional issue [such as the right to the assistance of counsel], the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case[,]" *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982), but that "[t]he denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial *only upon a showing* by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Id.* (emphasis added). In this case, given the findings made by Judge Gorham, findings which are supported by the record, Judge Gorham did not legally err by denying Defendant's request.

would allow stand-by counsel to represent him whenever he requested it. Specifically, at that hearing, after Judge Gorham denied a motion by Defendant to delay the trial, which was set to start in three weeks, stand-by counsel expressed his concern that he was only preparing to act as stand-by counsel and would not be prepared to step in and represent Defendant if called to do so. Judge Gorham responded, stating that she was not going to address counsel's concern because Defendant had not made any such request that he do so:

> My understanding from him today is that he still intends to represent himself. So, unless he says that to me, that he does not want to represent himself anymore, then at that point I can appoint you, but that not what [he] has said.

Our Supreme Court rejected this identical "reliance" argument in *Blankenship*.

In *Blankenship*, the trial judge told the defendant at a pre-trial hearing that "[w]hen you tell me you want [stand-by counsel] for your lawyer, I will reinstate him as your lawyer." *Blankenship*, 337 N.C. at 552, 447 S.E.2d at 733. But on the day of trial, the trial judge denied the defendant's request to appoint stand-by counsel to represent him. *Id.* On appeal, our Supreme Court rejected the contention that defendant should be entitled to a new trial based on his alleged reliance, in part, because there was "no showing in the record or transcript that defendant relied on anything the trial court said in choosing to represent himself." *Id.* at 552, 447 S.E.2d at 732-33.

Similarly, here, Defendant did not say anything during the 3 April 2018 pre-trial hearing or any other pre-trial hearing to indicate that he made his decision to represent himself in reliance on a representation that he could always call up his stand-by counsel into service. Rather, the record shows that on the day of trial, 23 April 2018, Defendant admitted that he was only asking for his stand-by counsel to represent him as a way to delay the trial, as he made the request only moments after his request that his appointed stand-by counsel *be replaced* was denied and his subsequent motion to continue was denied. *See State v. Jordan*, 2019 N.C. App. LEXIS 404, *8-12 (N.C. Ct. App. May 7, 2019) (following *Blankenship* in finding no error where the defendant was denied a request made during trial that his stand-by counsel be appointed as his counsel, reasoning that the defendant was unable to show that he had relied on a statement of the trial court that he would appoint stand-by counsel as counsel).

II. No Plain Error in Jury Instructions

In his second argument, Defendant argues that Judge Gorham plainly erred by instructing the jury that Defendant could be found guilty on a theory of acting in concert. I have reviewed the record and conclude that the instruction was supported by the evidence. But assuming that the instruction was error in that regard, I conclude that such error did not rise to the level of plain error.

STATE OF NORTH CAROLINA
v.
DATREL K'CHAUN LYONS, Defendant

No. COA19-364

Filed 3 December 2019

1. Homicide—attempted first-degree murder—conspiracy to commit—cognizable offense

Considering an issue of first impression, the Court of Appeals held that conspiracy to commit attempted first-degree murder is a cognizable offense, and the offense does not require the State to prove that the defendant intended to fail to commit the attempted crime itself.

2. Homicide—attempted first-degree murder—sufficiency of the evidence—gun shot at law enforcement officer in vehicle

There was sufficient evidence to convict defendant of attempted first-degree murder where a law enforcement officer testified that defendant pointed a gun at her face from the window of his vehicle and that she heard a gunshot after she ducked behind the dashboard of her vehicle.

3. Sentencing—appeal—request to invoke Appellate Rule 2—sentences within presumptive range and overlapping with aggravated range

The Court of Appeals declined to invoke Appellate Rule 2 to consider defendant's arguments concerning his criminal sentences where the sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range.

Judge BERGER concurring in separate opinion.

Appeal by Defendant from judgments entered 24 September 2018 by Judge Imelda Pate in Johnston County Superior Court. Heard in the Court of Appeals 29 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

James R. Parish for Defendant-Appellant.

INMAN, Judge.

Datrel K'Chaun Lyons ("Defendant") appeals from judgments entered following a jury's verdict finding him guilty of attempted first degree murder and conspiracy to commit attempted first degree murder. Defendant argues that: (1) the conspiracy charge as set forth in the indictment is invalid, as it alleges a non-existent crime; (2) the trial court erred in denying his motion to dismiss both charges for insufficiency of the evidence; and (3) the trial court erred in finding duplicative aggravating circumstances at sentencing. After careful review, we hold that the indictment for conspiracy is valid and the trial court did not commit error in denying Defendant's motion to dismiss. We dismiss the portion of Defendant's appeal pertaining to his sentencing for lack of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented at trial tended to show the following:

On 24 October 2016, at approximately 9:30 p.m., two men robbed a Hardee's restaurant in Princeton, North Carolina as the employees were cleaning up and closing for the night. Ms. Ricks, the manager, was in her office doing bookkeeping for the day when she heard the alarm go off; suddenly, an unknown man appeared beside her, pointed a gun at her, and demanded she give him money. Ms. Ricks complied with his demand.

Ms. Ricks also observed a second man demanding that one of the cashiers open a cash drawer. Ms. Ricks explained to the robbers that the cashier could not open the cash drawer, but that she could. She then walked over and opened the drawer for them. Inside the drawer were rolls of coins and a burgundy BB&T bank cash bag containing approximately $500. One man took the BB&T bag and several rolls of coins and threw them into a "bookbag." The men then left the Hardee's and drove away in a Chevrolet Sonic vehicle. Ms. Ricks locked the doors and called the police.

At the time of the robbery, Johnston County Sheriff's Deputy Adriane Stone was driving a patrol car throughout the county. Sometime after the armed robbery was reported, Deputy Stone was driving on Cleveland Road when a car careened toward her at 78 to 79 miles per hour in a 55 mile per hour zone. Deputy Stone slowed to a stop and turned her emergency lights on, hopeful that the other car would slow down or stop. When the speeding car did not stop, Deputy Stone turned her vehicle around to give chase. Deputy Stone called dispatch and provided the license plate number of the vehicle, later identified as a Chevrolet Sonic, and reported she was making a traffic stop. She had no idea at that time that the vehicle was connected with the armed robbery at the Hardee's.

At one point during the pursuit, the Sonic slowed down suddenly and pulled over onto the shoulder of the road. Deputy Stone rolled to a stop behind the Sonic and exited her vehicle. After she did so, the Sonic sped away. Deputy Stone resumed the chase and called on the radio for back up. As the pursuit continued, the Sonic made a sudden stop a second time. Deputy Stone again stopped close behind.

After she had stopped, Deputy Stone observed a man, later identified as Defendant, lean his torso out of the back window of the Sonic and point a gun directly at her face. Deputy Stone immediately ducked behind her dashboard, heard a gunshot, and shifted her car into reverse. The driver of the Sonic then fled the scene. Deputy Stone, meanwhile, called dispatch to report shots fired, gathered her resolve, and resumed the chase.

Deputy Stone caught up to the fleeing Sonic and watched as it came to a stop at the end of a cul-de-sac. She parked her patrol car behind the Sonic, drawing her service pistol as she stepped out of the vehicle. The driver of the Sonic then turned around and drove the vehicle towards her. Deputy Stone fired 3-5 shots, striking the car. After the Sonic passed, Deputy Stone got back into her vehicle and heard another officer, Deputy Michael Savage, announce over the radio that the Sonic had crashed.

Deputy Savage arrived on the scene shortly after Deputy Stone had discharged her weapon, and observed that the Sonic had crashed into a mailbox off the side of the road. He saw three men jump out of the car and run into nearby woods. He called for help and Deputy Stone arrived a short time later. The two officers discussed what to do next and began to search inside the Sonic for firearms. They discovered a pellet gun in the backseat and a black Berretta pistol on the floorboard of the front passenger seat.

Clayton Police K-9 Officer Justin Vause arrived at the crash site. As he was approaching the site, he observed a man running into the woods. Officer Vause exited his vehicle and loudly warned the fleeing man that he was preparing to release his dog, Major, to find and subdue him. That man, later identified as Defendant, replied, "I'm over here, sir[,]" and surrendered, at which time Officer Vause arrested him. Officer Vause and Major then began to track a scent from the crashed Sonic, which eventually led them back to the woods where Defendant was arrested. Major searched the area and discovered a brown BB&T bank bag filled with money.

Believing the remaining suspects were in the nearby wooded area, law enforcement officers established a perimeter and deployed another tracking canine and a thermal imaging camera. They soon located another suspect, later identified as Gerald Holmes. Mr. Holmes did not initially cooperate with the police, but was quickly subdued by Major. Law enforcement later identified Antonio Pratt as the third suspect and arrested him several weeks after the chase.

Defendant was indicted on 7 November 2016 on charges of attempted first degree murder and conspiracy to commit attempted first degree murder.

At trial, Deputy Stone, Deputy Savage, Officer Vause, and Mr. Pratt testified to the events of the evening in detail. Describing the police chase, Mr. Pratt testified that when he first saw Deputy Stone's car, he began to panic because he was speeding and did not have a driver's license. He further testified that, at one point during the chase, Mr. Holmes told him to pull over; when he did, he heard Mr. Holmes yell to Defendant, "Shoot, bro. Shoot." Mr. Pratt testified that he then heard a loud boom, which he identified as a gunshot.

At the close of the State's evidence, Defendant moved to dismiss all claims for insufficiency of the evidence. That motion was denied. Defendant offered no evidence, and the jury found Defendant guilty on both charges. After the verdict was announced, Defendant admitted to the existence of three aggravating factors as part of a plea bargain. The trial court sentenced Defendant to 157 to 201 months imprisonment for attempted first degree murder and a consecutive sentence of 73 to 100 months imprisonment for conspiracy to commit attempted first degree murder. Both sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. Standard of Review

We review challenges to the validity of indictments *de novo*. *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011). To be valid, "an indictment must allege every essential element of the criminal offense it purports to charge." *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958). An indictment that falls short of this standard fails to confer subject-matter jurisdiction on the trial court. *Billinger*, 213 N.C. App. at 255, 714 S.E.2d at 206.

The *de novo* standard also applies to our review of a trial court's denial of a motion to dismiss for insufficiency of the evidence. *Id.* at 253, 714 S.E.2d at 205. We "determine whether the State has presented substantial evidence (1) of each essential element of the offense, and (2) of the defendant's being the perpetrator." *Id.* at 252-53, 714 S.E.2d at 204-05 (citations omitted). We view the evidence "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).[1]

B. Conspiracy to Commit Attempted Murder

[1] Defendant contends that the indictment charging him with conspiracy "to commit the felony of Attempted First Degree Murder, [N.C. Gen. Stat. §] 14-17 against Adriane Stone" is invalid, as it alleges he conspired to commit a crime that does not exist. Whether conspiracy to commit attempted first degree murder is a crime is an issue of first impression for this Court, and presents, Defendant argues, "an illogical impossibility and a legal absurdity[,]" insofar as it would criminalize agreements *not* to commit murder. Though this argument does appear convincing at first blush, a full examination of the common law surrounding both conspiracy and attempted first degree murder lead us to hold that the indictment is valid.

At the outset, we note that the indictment alleges the elements of criminal conspiracy as a technical matter. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act

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1. At oral argument, Defendant conceded that he could not appeal his sentence as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal.

or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citations omitted). Attempted first degree murder is most certainly a crime. *State v. Collins*, 334 N.C. 54, 59, 431 S.E.2d 188, 191 (1993). Thus, from a purely formulaic perspective, the indictment alleges both elements of conspiracy: (1) an agreement between Mr. Holmes and Defendant; (2) to commit an unlawful act, i.e., attempted first degree murder. *Cf. United States v. Clay*, 495 F.2d 700, 710 (7th Cir. 1974) (holding an indictment alleging conspiracy to attempt to break into a bank was valid because the general federal criminal conspiracy statute required "the object alleged . . . be an offense against the United States" and a specific criminal statute recognized attempted bank robbery as just such an offense).

To ultimately convict a defendant of conspiracy, however, "the State must prove there was an agreement to perform every element of the underlying offense[,]" *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (citation omitted), and the "elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Melton*, ___ N.C. ___, ___, 821 S.E.2d 424, 428 (2018).[2] The phrase "conspiracy to commit attempted first degree murder" sounds discordant to the lawyerly ear because it suggests the conspirators must have intended to fail to commit a crime. While two or more people who collude to "make an attempt on" another's life or agree to "try" and kill someone have engaged in a criminal conspiracy, an indictment alleging a conspiracy "to commit the felony of Attempted First Degree Murder" strikes a less natural tone.

The State argues intent to fail is not in actuality an essential element of conspiracy to commit attempted first degree murder, contending that if the implication of an intent to fail is removed, so too is any disharmony in the indictment.

Crucially, conspiracy is a common law crime in North Carolina, *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991), as is attempted first degree murder. *Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing, apparently for the first time outside of *dicta*, the existence of the

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2. We note that decisions by our Supreme Court do not consistently identify failure as a discrete third element of attempt. *See, e.g.*, *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) ("The *two* elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." (emphasis added) (citations omitted)).

crime). We may hold failure is not an essential element of conspiracy to commit attempted first degree murder—as a species of the common law crime of conspiracy—if our Supreme Court's precedents so indicate. *Cf. State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) (holding the Supreme Court "possesses the authority to alter judicially created common law when it deems it necessary"); *State v. Lane*, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994) (observing that this Court lacks the authority to modify or abandon the accepted common law).

Numerous decisions from our Supreme Court support the conclusion that failure is not strictly necessary to complete the crime of attempt.[3] In *State v. Baker*, 369 N.C. 586, 799 S.E.2d 816 (2017), a defendant was tried and convicted of attempted rape, even though the substantial evidence introduced at trial showed that the rape was completed. 369 N.C. at 592-93, 799 S.E.2d at 820. This Court held that the trial court erred in denying the defendant's motion to dismiss that charge, reasoning that "while there may have been substantial evidence for the jury to find defendant guilty of rape . . . there was insufficient evidence to support his conviction for attempted rape." *State v. Baker*, 245 N.C. App. 94, 99, 781 S.E.2d 851, 855 (2016). Our Supreme Court reversed that decision and held that "evidence of a completed rape is sufficient to support an attempted rape conviction." *Baker*, 369 N.C. at 597, 799 S.E.2d at 823.

Although the Supreme Court recited the elements of attempt as including failure, it also favorably cited *State v. Primus*, 227 N.C. App. 428, 430-32, 742 S.E.2d 310, 312-13 (2013), in which we "rejected the defendant's argument that guilt of the crime of attempted larceny requires that the defendant's act supporting the attempt charge fall short of the competed offense in order to be sufficient to support an attempt conviction, a conclusion that accords with the modern view concerning criminal liability for attempt." *Baker*, 369 N.C. at 596-97, 799 S.E.2d at 823 (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5, at 230 (2d ed. 2003)).

It also favorably quoted this Court's statement in *State v. Canup*, 117 N.C. App. 424, 451 S.E.2d 9 (1994), that " 'nothing in the philosophy of juridicial [sic] science requires that an attempt must fail in order to receive recognition.' " *Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11). Thus, *Baker* suggests

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3. Stated differently, the cases discussed *infra* suggest that a successful premeditated killing of a human being is a necessary element of first degree murder, but not for attempted first degree murder.

that while failure precludes a conviction for a completed crime, it is not *necessary* to support a conviction for criminal attempt of that same crime.

Such an understanding is consistent with the common law's treatment of attempted first degree murder as a lesser included offense of first degree murder. *See Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing attempted murder as a lesser included offense of murder). Our Supreme Court has long employed "a definitional test for determining whether one crime is a lesser included offense of another crime." *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011) (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 377 (1982)). "[T]he test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense." *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847. "In other words, *all* of the essential elements of the lesser crime must also be essential elements included in the greater crime." *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379 (emphasis added), *overruled in part on other grounds by Collins*, 334 N.C. at 61, 431 S.E.2d at 193.

Thus, a conclusion that failure to kill is an essential and necessary element of attempted first degree murder cannot be squared with the definition of a lesser included offense, as failure is most certainly not an element of the greater offense of a completed first degree murder. *Cf. State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (reciting the elements of both first degree murder and the lesser included offense of attempted first degree murder).

Other states have held conspiracy to commit an attempted crime is a cognizable offense where the common law crime of attempt does not require failure as an essential element. As pointed out by Defendant,[4] Maryland recognizes the existence of the crime of conspiracy to attempt first degree murder. *Stevenson v. State*, 423 Md. 42, 52 (2011) ("'[C]onspiracy to attempt a first degree murder' is a cognizable offense." (citing *Townes v. State*, 314 Md. 71 (1988)). In *Townes*, Maryland's highest appellate court reviewed an indictment for "conspiracy to attempt to

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4. Defendant cites to an unpublished decision of Maryland's intermediate appellate court, *Knuckles v. State*, 2018 WL 2113969 (Md. Ct. Spec. App. May 8, 2018), for this proposition. *Knuckles*, however, relied exclusively on published cases from Maryland's highest court. Our discussion, therefore, focuses on those published cases rather than on *Knuckles* itself.

commit the crime of obtaining money by false pretenses[,]" which it held charged a valid crime. 314 Md. at 75. The court in *Townes* first recognized that the indictment was technically sufficient to allege conspiracy:

> If we mechanically assemble the building blocks of the crime of conspiracy in the context of this case, it would seem that the crime of conspiracy to attempt to commit the crime of obtaining money by false pretenses fits the established mold. Obtaining money by false pretenses is a crime. Attempting to obtain money by false pretenses is a separate, self-standing crime. Accordingly, if a criminal conspiracy consists of an agreement to commit a crime, and an attempt to obtain money by false pretenses is a crime, it follows that the crime of conspiracy to attempt to obtain money by false pretenses fits the legal definition of conspiracy.

Id. at 75-76 (citations omitted). The court in *Townes* then went on to address and reject as inapplicable the argument—also presented in this case—that one cannot criminally intend not to complete a crime:

> Townes' argument fails to take into consideration an established principle of Maryland law. In this State, unlike a minority of other states, failure to consummate the intended crime is *not* an essential element of an attempt.
>
> . . . .
>
> The logical inconsistency postulated by Townes simply does not exist in this State. A person intending to commit a crime intends also to attempt to commit that crime. The intent to attempt is viewed as correlative to and included within the intent to consummate. Accordingly, one who conspires to commit a crime concurrently conspires to attempt to commit that crime.

Id. at 76-77 (citations omitted).

Our Supreme Court's decisions recounted *supra* align with the reasoning espoused in *Townes*. *Cf. Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (holding evidence of a completed rape is sufficient to support a conviction for attempted rape in part because " '[t]he completed commission of a crime must of necessity include an attempt to commit the crime' " (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11) (alteration in original)).

Although Defendant relies on several decisions by other courts that have reached the opposite result, those decisions all arose in jurisdictions where either the crimes in question were statutorily delineated or failure was considered by the deciding court to be a necessary element of conspiracy to attempt. *See, e.g.*, *People v. Iniguez*, 96 Cal. App. 4th 75, 79 (2002) (holding conspiracy to commit attempted murder was not a crime where the attempt statute provided " '[e]very person who attempts to commit any crime, but fails, . . .' is guilty of a crime" (citation omitted)); *Wilhoite v. State*, 7 N.E.3d 350, 353 (Ind. Ct. App. 2014) (relying on *Iniguez* to hold that conspiracy to commit attempted robbery was not a cognizable crime because "colloquially speaking, to 'attempt' a crime is to 'try' without actually completing the crime" (citation omitted)); *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (distinguishing *Clay*, holding that Congress did not intend to create a crime of conspiracy to attempt to commit federal drug crimes under 21 U.S.C. §§ 846 & 963, and observing that conspiracy to attempt to fail is "the height of absurdity").

In short, given that failure need not actually be shown or proven to convict a defendant of attempt, *Baker*, 369 N.C. at 596, 799 S.E.2d at 822, and that attempted first degree murder is a lesser included offense of first degree murder, *Collins*, 334 N.C. at 59, 431 S.E.2d at 191, the charge of conspiracy to commit attempted first degree murder does not require the state to prove defendant intended to fail to commit the attempted crime itself. As a result, we hold that conspiracy to commit attempted first degree murder is a cognizable offense and, with all other elements of conspiracy appearing in the indictment, was adequately charged in this case.

C. Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying his motion to dismiss all charges for insufficiency of the evidence, contending that the evidence shows only that he fired a pellet gun in an attempt to scare Deputy Stone away. Such evidence, Defendant contends, defeats every element of attempted first degree murder. Defendant also applies that same argument to the conspiracy charge and reasserts that the State was required to—and could not—prove an intent to fail.

Defendant is incorrect in his claim that the evidence shows only that he fired a pellet gun with an intent to scare off Deputy Stone. Deputy Stone testified that she saw Defendant point a gun at her face and that she heard a gunshot after ducking behind her dashboard. Though it is true that she did not directly observe where the gun was pointed at the

time it was fired, she further testified that this series of events happened "fast[,]" and testified on cross-examination that "once I saw the gun at my face, I yelled out, 'Oh, s--t,' and I started to go down. . . . [A]s I'm going down, I hear the gunshot."

While it is possible that the gun was not pointed at Deputy Stone when Defendant pulled the trigger, the jury could draw a reasonable inference from Deputy Stone's testimony to find the gun remained pointed at her when she heard it seconds later. Contrary to Defendant's argument, such an inference is no less reasonable because Deputy Stone took quick evasive action in the interest of self-preservation. Mr. Pratt, who was the getaway driver during the chase, also provided the following testimony indicating that Defendant discharged a firearm rather than a pellet gun: "I heard [Mr. Holmes] say 'Shoot, bro. Shoot.' . . . He had to be talking to [Defendant]. . . . I just looked at Holmes. I heard [a] boom. . . . I want to say [Defendant] fired the shot."

Further, Mr. Pratt was unequivocal in his testimony that Mr. Holmes did not have a gun in his hand when the shot rang out. Our standard of review on a motion to dismiss compels us to adopt the reasonable inference most favorable to the State from this evidence, *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, which, in this case, is an inference that Defendant aimed and fired a gun at Deputy Stone following instruction from Mr. Holmes. Defendant's argument is overruled.

We likewise hold that the trial court did not err in denying the motion to dismiss as to the conspiracy charge. The jury could reasonably infer Defendant, in a conspiracy with Mr. Holmes, attempted to kill Deputy Stone by firing a gun at her. Because intentional failure is not necessary to a charge of conspiracy to commit attempted murder, as explained *supra*, the State was not required to demonstrate Defendant intended to fail in his attempt to take Deputy Stone's life. Defendant's argument on this point is likewise overruled.

D. Sentencing

[3] At oral argument, Defendant conceded that he could not appeal his sentences as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal. *See State v. Daniels*, 203 N.C. App. 350, 354-55, 691 S.E.2d 78, 81-82 (2010) (dismissing a defendant's appeal from sentencing under N.C. Gen. Stat.

§ 15A-1444(a1) when defendant's sentence in the presumptive range nonetheless overlapped with the aggravated range).

III. CONCLUSION

We hold the indictment in this case validly charged Defendant with a criminal conspiracy. The evidence introduced at trial was sufficient to submit both charges of attempted murder and conspiracy to the jury. Defendant's appeal from sentencing is dismissed for want of jurisdiction. We find no error in the jury's verdicts or in the judgments entered thereon.

DISMISSED IN PART; NO ERROR IN PART.

Judge TYSON concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority. However, I write separately because I would reach the same result through different reasoning.

"[T]he primary purpose of an indictment is to enable the accused to prepare for trial." *State v. Silas*, 360 N.C. 377, 382, 627 S.E.2d 604, 607 (2006) (citation and quotation marks omitted). "The indictment must also enable the court to know what judgment to pronounce in case of conviction." *State v. Nicholson*, 78 N.C. App. 398, 401, 337 S.E.2d 654, 657 (1985) (citation and quotation marks omitted). It is well-settled in North Carolina that any allegations in an indictment beyond those essential to the crime sought to be charged "are irrelevant and may be treated as mere surplusage." *State v. Bowens*, 140 N.C. App. 217, 224, 535 S.E.2d 870, 875 (2000). So long as surplusage contained within an indictment does not prejudice the defendant, such language can properly be ignored. *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 745-46 (1985).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). Notably, "a conspiracy indictment need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime." *Nicholson*, 78 N.C. App. at 401, 337 S.E.2d at 657. To convict a defendant of conspiracy, the State

must prove beyond a reasonable doubt that the defendant was member to an agreement to perform every element of the underlying offense. *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

The offense of first-degree murder is established and defined by Section 14-17 of the North Carolina General Statutes. N.C. Gen. Stat. § 14-17 (2017). In the present case, Defendant was indicted for "conspir[ing] with Gerald Holmes to commit the felony of Attempted First Degree Murder, N.C.G.S. 14-17." Accordingly, the indictment was sufficient to allow Defendant to prepare for trial because it contained the two essential elements of the crime of conspiracy: (1) an agreement with Gerald Holmes, and (2) to commit the unlawful act of first-degree murder pursuant to Section 14-17. The inclusion of the word "attempted" is irrelevant to the indictment and may be treated as surplusage. Moreover, so long as the inclusion of the word "attempted" in the indictment did not prejudice Defendant at trial, which it did not, this surplusage can properly be ignored.

For a defendant to be found guilty of the common law offense of attempted first-degree murder, the State must prove the following elements beyond a reasonable doubt "(1) the intent to commit [first-degree murder], and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citation and quotation marks omitted). At trial, following the conclusion of the State's case-in-chief, Defendant did not present any evidence in his own defense. Relying on the charging indictment, the trial court subsequently instructed the jury on felonious conspiracy to attempt first-degree murder.

As noted by the majority, the State presented sufficient evidence by which a reasonable juror could conclude that Defendant satisfied the first element of conspiracy to commit attempted first-degree murder. For Defendant to satisfy this first element, the jury was required to find, beyond a reasonable doubt, that Defendant was member to an agreement with "the intent to commit first-degree murder." By necessity, then, the jury must also have found, beyond a reasonable doubt, that Defendant participated in an agreement with the intent to perform every element of first-degree murder. Therefore, the State satisfied its burden of proving that Defendant was member to a conspiracy to commit first-degree murder.

As a result of Defendant being found guilty of conspiracy to commit attempted first-degree murder, he was sentenced for a Class C felony

instead of a B2 felony. N.C. Gen. Stat. §§ 14-2.4; 14-2.5; 14-7 (2017). Thus, Defendant is not entitled to relief on appeal based upon the inclusion of the word "attempted" in his indictment because the word's inclusion did not prejudice Defendant at trial. Any error stemming from this surplusage in the indictment was in Defendant's favor.

STATE OF NORTH CAROLINA
v.
ALI AWNI SAID MARZOUQ, DEFENDANT

No. COA19-471

Filed 3 December 2019

Constitutional Law—effective assistance of counsel—failure to advise—immigration consequences of guilty plea—prejudice —N.C.G.S. § 15A-1022(a)

Where defendant, an immigrant, pleaded guilty to possession of a controlled substance and possession with intent to sell heroin, which presumptively subjected him to deportation under a federal statute, his lawyer's advice that he "may" be deported if he pleaded guilty constituted ineffective assistance of counsel. Nevertheless, the case was remanded to determine if defendant was prejudiced, because it was unclear whether the trial court concluded he was already deportable on other grounds (or that the court had all the facts before it to make that conclusion). Additionally, the Court of Appeals emphasized that, although defendant asserted U.S. citizenship at trial, N.C.G.S. § 15A-1022(a) still required the trial court to warn defendant of any deportation risk before accepting his guilty plea.

Appeal by defendant from order entered 28 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 31 October 2019.

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

Tin Fulton Walker & Owen, PLLC, by Jim Melo, Esq., for defendant-appellant.

North Carolina Advocates for Justice, by Helen L. Parsonage, and North Carolina Justice Center, by Raul A. Pinto, amici curiae.

YOUNG, Judge.

Where defendant's guilty plea presumptively subjected him to deportation, trial counsel's advice that defendant "may" be deported constituted ineffective assistance of counsel. However, where the record does not affirmatively show whether the trial court considered defendant's prior convictions to determine prejudice, we must remand for further findings. We affirm in part, but remand in part.

I. Factual and Procedural Background

On 3 August 2015, Ali Awni Said Marzouq (defendant) was indicted by the Nash County Grand Jury for possession with intent to sell and deliver heroin, and possession of a Schedule II controlled substance. At some point he was also charged with maintaining a vehicle or dwelling place for the keeping or selling of controlled substances. Defendant pleaded guilty to the charges of possession of heroin and maintaining a vehicle or dwelling place, and the trial court entered judgment, namely a two-year suspended sentence. On the transcript of plea, next to Question 8, which asks whether the defendant understands that a guilty plea may result in deportation, defendant wrote "Permanent resident."

On 12 July 2018, defendant filed a motion for appropriate relief (MAR), seeking to withdraw his guilty plea. Defendant, an immigrant, alleged that roughly one year into his two-year suspended sentence, he was seized by Immigration and Customs Enforcement and placed into detention and removal proceedings. He argued that, had he known the plea would impact his immigration status and result in deportation, he would not have taken it. On 10 September 2018, the trial court entered an order, finding that defendant's indication of "Permanent resident" in response to Question 8 on the transcript of plea indicated an affirmative response. The court therefore denied defendant's MAR.

On 8 November 2018, this Court granted certiorari. In an order, this Court required the trial court to review "whether petitioner's Alford plea was induced by misadvice of counsel regarding the immigration consequences of the plea and whether any misadvice resulted in prejudice to petitioner." The matter was remanded to the trial court for review, and on 28 December 2018, the trial court entered another order. The court found that defendant had been advised that if he pleaded guilty, he might be deported; that defendant had further been advised to speak to an immigration attorney; that defendant asserted to the trial court that he was a citizen, not a permanent resident, of the United States; and that this assertion "precluded any further inquiry into his immigration status

and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received." The court therefore found that counsel's advice did not constitute ineffective assistance of counsel, and that defendant failed to show prejudice. The trial court once more denied defendant's MAR.

On 11 March 2019, this Court granted certiorari to review the trial court's 28 December 2018 order denying defendant's MAR.

II. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted).

III. Ineffective Assistance of Counsel

In his first argument, defendant contends that the trial court erred in finding that defense counsel's conduct was not ineffective assistance of counsel. We agree.

In his MAR, defendant alleged that counsel informed him that his plea "may affect his immigration status or . . . that it would not affect his immigration status in any manner." Defendant attached to his MAR three affidavits. In one, his own, defendant averred that his attorney "specifically told me not to worry about Immigration." In another, his fiancée Shannon Pitt averred that defense counsel "said that [defendant] would not have anything to worry about with his immigration status." Defendant, citing the case of *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), noted that counsel is "constitutionally ineffective if he fails to advise – or misadvises – his client about the immigration consequences of a guilty plea." Defendant therefore argued in his MAR, and argues now on appeal, that he received ineffective assistance of counsel as a result of his attorney's misadvice.

This Court has held that "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to

advise the client only that there is a risk of deportation." *State v. Nkiam*, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015). In the instant case, defendant's plea concerned possession of heroin and maintaining a dwelling place, two drug-related offenses. Federal law requires an alien or permanent resident to be deported who "has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana[.]" 8 U.S.C. § 1227(a)(2)(B)(i). This statute provides an explicit mandate – such an alien "shall" be removed if he or she falls within this or other categories.

We hold that where federal statute mandates removal, there is a presumption that deportation will happen. As such, pursuant to *Padilla* and *Nkiam*, it is not sufficient for counsel to suggest that deportation "may" happen or is possible. It is incumbent upon counsel, in a situation like this where deportation is presumed where a defendant pleads or is found guilty, to specify that deportation is probable, or presumptive. Waffling language suggesting a mere possibility of deportation does not adequately inform the client of the risk before him or her, and does not permit a defendant to make a reasoned and informed decision.

In the instant case, the evidence is somewhat inconsistent. Defendant contends that counsel did not inform him whatsoever of the consequences of his plea, while counsel avers that he informed him there may be consequences. At most, however, the evidence would permit the trial court to find that counsel only offered the possibility of deportation – "may" language, instead of "presumptive" language. As we have held, such language is insufficient when a defendant is facing presumptive deportation. Accordingly, we hold that defendant received ineffective assistance of counsel, and the trial court erred in finding otherwise.

We note, however, that a showing of ineffective assistance of counsel is insufficient to grant defendant the relief he seeks; he must also show prejudice. For this reason, we continue to examine defendant's arguments.

IV. Prejudice

In his second argument, defendant contends that the trial court erred in finding that defendant was not prejudiced by defense counsel's conduct. We disagree.

Defendant argues that the decision to reject the plea bargain and go to trial would have been a rational one, had he known of the immigration consequences of his decision. As a result, he contends that this guilty

plea subjected him to prejudice, namely deportation, where he otherwise might not have been subject.

"Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

The State, in its brief, cites to numerous federal cases which suggest that a defendant who is facing deportation on other grounds cannot show prejudice. *See, e.g.*, *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir. 2016) (holding that, where a defendant was "already deportable for having overstayed his visa[,]" he "failed to show prejudice"). We agree with the State, in principle. A showing of prejudice requires a showing that, absent the allegedly erroneous action, a different outcome would have resulted. If a defendant was facing deportation for a separate charge, then regardless of whether he pleaded or went to trial on the instant charge, deportation would still result. As such, we hold that a defendant already facing deportation could not show prejudice, notwithstanding the otherwise ineffective assistance of trial counsel.

The problem that confronts us, however, is the insufficiency of the record. The State notes that "the Department of Homeland Security has taken the position that Defendant is subject to removal on the basis of two convictions: (1) his 30 June 2016 conviction for possession of drug paraphernalia, and (2) his 2 March 2017 conviction for possession of heroin." Moreover, defendant's trial counsel acknowledged his prior conviction for possession of drug paraphernalia. However, it is not clear to this Court that the trial court had the complete factual background, including the position of the Department of Homeland Security, before it.

The State concedes, and we so hold, that a conviction for possession of drug paraphernalia, as opposed to a conviction more directly relating to a controlled substance, does not render a noncitizen presumptively removable. *See, e.g.*, *Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 645 (9th Cir. 2015) (holding that a conviction for possession of drug paraphernalia is "not categorically for violation of a law relating to a controlled substance").

In the instant case, the trial court's order noted a number of defendant's pending charges in other cases. It did not, however, contain any findings as to other *convictions*, nor as to whether these convictions made defendant eligible for deportation. Rather, the trial court, upon finding and concluding that defendant did not receive ineffective

assistance of counsel, somewhat summarily found and concluded that defendant was not prejudiced by same.

It is true that, in a case such as this, where the trial court's findings are supported by competent evidence, they are binding upon this Court. And it is true that defendant's counsel conceded the existence of his prior conviction for possession of drug paraphernalia. However, such a conviction does not render defendant presumptively removable, and it is not clear that the trial court had the position of Homeland Security before it to support that determination. As such, it is not clear to this Court that there was, in fact, competent evidence to support the trial court's finding that there was no prejudice. We therefore remand this issue to the trial court for the entry of findings consistent with this opinion. On remand, the trial court shall consider whether defendant was prejudiced based on the ineffective assistance of counsel, and shall specifically consider whether defendant is subject to deportation on other charges.

V. Assertion of Citizenship

In his third argument, defendant contends that the trial court erred in finding that defendant's assertion of United States citizenship rendered his MAR moot. While we need not address this issue, as we have remanded this matter for further proceedings, we feel we nonetheless must clarify a matter of trial procedure.

In its order denying defendant's MAR, the trial court found:

> 23. When questioned by the Court during the plea colloquy on March 2, 2017, defendant told the Court that he was a citizen of the United States.
>
> 24. Defendant subsequently admitted that he told the Court he was a citizen of the United States.
>
> 25. Defendant's presentation to the Court that he was in fact a citizen of the United States precluded any further inquiry into his immigration status and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received.

As a result, the trial court concluded that "[t]he defendant's assertion to the Court that he was a citizen renders this MAR moot." Defendant contends that this conclusion was erroneous.

Simply put, the trial court's analysis was in error. Pursuant to our General Statutes:

> Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
>
> (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2017). No provision is made that permits the trial court to bypass one of these questions. Indeed, all are mandatory. It was therefore error for the trial court to determine that, where defendant asserted his citizenship, it was not necessary for the trial court to inform him of the risk of deportation.

However, the trial court was nonetheless correct, but for a different reason. Our General Statutes also provide that "[n]oncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2017). In other words, despite the trial court's failure to engage in proper colloquy with defendant, in violation of N.C. Gen. Stat. § 15A-1022, that failure ceased to be grounds for review when the time for appeal had passed. Defendant's MAR was filed in 2018, long after the

appeal period had passed, and as such, any argument concerning the trial court's failure to comply with statute was indeed rendered moot.

We nonetheless feel the need to reinforce the importance of following this procedure. The requirements outlined in N.C. Gen. Stat. § 15A-1022 are mandatory, regardless of what a defendant might say, and we advise the courts of this State to comply with them.

AFFIRMED IN PART, REMANDED IN PART.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
ANTONIO MORQUETT PHILLIPS

No. COA19-372

Filed 3 December 2019

1. Appeal and Error—preservation of issues—timeliness of objection—at time evidence is introduced—interruption by voir dire hearing

Defendant's objection was timely where he objected to certain testimony and was overruled in the presence of the jury (when the witness stated that she could answer the State's questions only if "made to do so"), the trial court then excused the jury and conducted a voir dire hearing on the issue and announced that defendant's objection would "continue to be overruled," and after voir dire the witness gave the challenged testimony without further objection by defendant. The issue was preserved for appellate review.

2. Evidence—expert testimony—sufficient facts or data—product of reliable principles and methods—DNA evidence—inconclusive sample

In a statutory rape prosecution, the trial court violated Evidence Rule 702(a) by admitting the testimony of an expert witness, who performed the DNA analysis in the case, regarding the minor contributor's alleles on the victim's external genitalia swab. The testimony comparing an inconclusive unknown sample with a known sample was based on insufficient facts or data because the witness herself testified that the minor contributor's DNA profile was not

of sufficient quality and quantity for comparison purposes. Further, the testimony could not reasonably be considered the product of reliable principles and methods because the witness repeatedly stated that the comparison the State asked her to perform would be against the policy of any lab in the country.

3. Evidence—expert testimony—DNA evidence—prejudice analysis

In a statutory rape prosecution, expert testimony concerning DNA comparison admitted in violation of Evidence Rule 702(a) was more than mere corroboration of the State's other evidence because it discredited evidence that corroborated defendant's theory of the case—that another person transferred defendant's DNA to the prosecuting witness. There was a reasonable possibility that, had the error not been committed, a different result would have been reached at trial.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 31 August 2018 by Judge William A. Wood II in Catawba County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein and Chief Deputy Attorney General Alexander M. Peters for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

TYSON, Judge.

Antonio Morquett Phillips ("Defendant") appeals from the jury's conviction of statutory rape of C.C., a 13-year-old female. *See* N.C. R. App. P. 42(b)(3) (initials are used instead of a minor's name in appeals filed under N.C. Gen. Stat. § 7A-27 involving sexual offenses committed against a minor). We find prejudicial error, and reverse and remand for a new trial.

I. Background

C.C., then 13 years old, and her friend Justine Eckard, then 21 years old, were at Defendant's apartment on the evening of 8 December 2013. The first trial resulting from the events of that evening ended in an acquittal on some charges and a mistrial on this charge. At a second

trial, C.C., Eckard, and Defendant each testified to different versions of how the three individuals arrived at Defendant's apartment, how they left, and what happened while all three were there and afterwards.

A. C.C.'s Testimony

C.C. testified she and Eckard walked to a McDonald's restaurant to access the restaurant's wireless internet. They encountered Defendant there and he invited them back to his apartment. Eckard knew Defendant and told C.C. "it was a good idea." C.C. had previously met Defendant once before, and she trusted Eckard. Defendant drove both of them to his apartment. They entered through the back door. Defendant and C.C. smoked marijuana, while the three of them talked.

C.C. smoked "too much" marijuana, which caused her to "get really relaxed" and "take down [her] guard." Eckard had to leave the apartment around 9:00 p.m., Defendant called her a cab, and she left. C.C. was interested in staying with Defendant and smoking more marijuana. C.C. relied upon Eckard and "knew she wouldn't leave me in a situation that I wouldn't be okay in."

Defendant told C.C. that "he wanted to treat [her] like a real man." He bent her over and initiated sexual contact with her after Eckard had left. C.C. told Defendant she "was not comfortable with things that he did to [her]." Defendant penetrated C.C. anally, orally, and vaginally. C.C. did not remember if Defendant ejaculated, but she assumed he did when he finished.

Defendant then gave C.C. a black tank top he owned, called a cab for C.C., and she left. C.C. told her mother she had been raped when she arrived home. Her mother called the police, who responded. Paramedics also arrived and transported C.C. to Frye Regional Medical Center. C.C. testified she had no sexual contact with Eckard or any other person other than Defendant while at his apartment.

B. Eckard's Testimony

Eckard testified she and C.C. had walked to McDonald's "trying to find something to do." C.C. had Defendant's phone number and had the idea to contact him. Eckard agreed they should send Defendant a text message and go to his apartment. Defendant picked them up and drove them to his apartment. They entered through the front door. Eckard played a game on her phone and listened to music, while C.C. and Defendant smoked marijuana. Eckard wanted to leave and get home to comply with her mother's curfew. She left Defendant's apartment around 9:30 or 10:00 p.m. in a cab he had called for her. Although Eckard

testified she had "begged" C.C. to leave with her, C.C. chose to stay behind. Eckard also testified she had no sexual contact with Defendant or with C.C. that night.

C. Defendant's Testimony

Defendant, age 36 at the time of the incident, testified he first saw C.C. and Eckard walking up the sidewalk from his front porch. He had neither seen them at McDonald's, nor picked them up, and had not driven them to his apartment. Defendant had not received a text message from them "because neither one of them [had] my number." On Defendant's porch, he and C.C. smoked marijuana while Eckard "play[ed] a little game on her phone."

Eckard repeatedly asked Defendant for money, which irritated him, until he asked her what she was going to do for the money. She said she would make it "worth [his] while." Eckard and Defendant walked into the apartment, leaving C.C. outside on the porch. Eckard then performed oral sex on Defendant. Defendant ejaculated during his contact with Eckard and went into the restroom to take a shower. When he left the restroom, he found both Eckard and C.C. laying on his bed. Defendant saw Eckard's face and hands between C.C.'s legs, with Eckard's finger "inside [C.C.]"

Defendant "snapped" and asked them what they were doing. Eckard asked for her money, which Defendant gave her. He told them to get their stuff together and leave. Eckard and C.C. left together. Defendant then saw C.C. walking back up the street by herself. When Defendant asked her what she was doing, she said she needed a ride home. Defendant called her a cab and she left. Defendant denied any sexual acts or contact with C.C.

Defendant's testimony at trial conflicted with previous statements he had made to police during the investigation. During an interview with an investigator, Defendant initially claimed he did not know "whether [C.C.] was legal or not," but at trial he admitted he knew C.C. was thirteen years old. He initially claimed neither C.C. nor Eckard had entered into his apartment that night but had entered only the building. When his DNA sample was taken, he insisted investigators would "absolutely not" find his DNA in C.C.'s rape kit.

D. DNA Evidence

C.C. presented at the hospital in the same condition as she had arrived home, because her mother did not allow her to change clothes, shower, wash, or use the bathroom. A sexual assault nurse examiner

collected a rape kit and examined C.C. "head to toe." She took oral, vaginal, and anal swabs from C.C., and gathered all of C.C.'s clothing.

Dr. Melinda Wilson, a forensic biologist with the North Carolina State Crime Lab, qualified as an expert witness in the area of DNA analysis, and testified at trial. She received DNA profiles from C.C., Defendant, and Eckard, and tested C.C.'s clothes and swabs for DNA.

The DNA testing process takes multiple steps. Dr. Wilson testified she extracted DNA from very small samples of the evidence, quantified how much DNA was potentially present in each sample, made "billions and billions and billions of copies" of each sample to improve visibility, and then created a graphical electropherogram ("graph") of each unknown donor sample to compare with the known donor samples. Because DNA is microscopic and not visible to the human eye, the graphs represent between fifteen and twenty-seven locations on the DNA molecule in each person's DNA, "kind of like an address." At each location on the graph, Dr. Wilson sees a number representing an "allele," which she testified "is a result that I would see as part of a DNA profile." Each graph is representative of a DNA profile that comes either from an unknown sample of evidence or a known sample profile.

Dr. Wilson testified a DNA "match" occurs when the alleles at every location on an unknown sample are the same as all twenty-seven of the locations she views on a known sample. If every location is not tested, there cannot be a "match." If not all the locations are tested, but all tested locations are the same, the unknown sample is "consistent with" the known sample, which Dr. Wilson testified "is not an exclusion." An "exclusion" is the result when the unknown sample evidence "could not come from the known standard" in the comparison.

A DNA profile is "conclusive" when it is of sufficient quality and quantity for comparison purposes, and "inconclusive" when it is not. Dr. Wilson testified, when a component is inconclusive, "you cannot include someone as a possible source of DNA and you also cannot exclude them as a possible source of DNA."

One of the five samples Dr. Wilson tested, C.C.'s external genitalia swab, contained a "mixture of three contributors": two "major" contributors and one "minor." Dr. Wilson presumed C.C. was one of the major contributors as the donor of the sample and determined Defendant's DNA profile was consistent with the other major contributor. The minor contributor's profile was "inconclusive due to complexity and/or insufficient quality of recovered DNA."

The prosecutor then asked Dr. Wilson if she was "able to see anything" about that minor contributor's profile. Dr. Wilson answered:

> No. So when a profile is inconclusive, we are not allowed by policy to make a comparison, period. So I can't look at it and say, well, this alleles that are there, or results that are there in that profile, look like it's this other person. You can't do that. So it's just is what it is. It's inconclusive and we don't make comparisons to it and don't make statements about it.

After a few questions about alleles, the prosecutor continued to ask Dr. Wilson to make statements about the inconclusive minor contribution:

> Q: Okay. And were you able to see any alleles in that minor profile?
>
> A: I did see alleles.
>
> Q: How many did you see?
>
> A: Six.
>
> Q: Six alleles?
>
> A: Uh-huh (Affirmative).
>
> Q: Okay.
>
> A: Yes.
>
> Q: And looking at those six alleles, were you able to look at Justine Eckard's alleles at those same markers and determine if she happened to have any of those same alleles as those same markers?
>
> A: No; because that's against policy because it's inconclusive.
>
> Q: Okay. If I asked you to look at those, are you able to do it here?
>
> A: If made to do so, yes.

Defendant's counsel objected, but was overruled.

The prosecutor continued:

> Q: Unfortunately, Ms. Wilson, I'm making you do that.
>
> A: Okay.

> Q: If you could tell me at those same markers if any of those alleles are the same or different.
>
> A: Okay. I'm going to do this and I'm going to preface this with this is not scientifically accurate, so what I'm about to do, we do not do at the State Crime Lab, the FBI does not do it. No lab in this country, I'm assuming most labs in the world, do not do this because it's inconclusive. So you cannot make a conclusion on an inconclusive component regardless of whether the alleles are the same, that's not a match; if they're different, it's not an exclusion.

After Dr. Wilson's preface, the court excused the jury *sua sponte*. The trial court asked Defendant's counsel: "you objected and I overruled your objection. Would you like to be heard?" Defendant's counsel argued, *inter alia*:

> [Dr. Wilson] stated that this is not procedure; this is not anything that anyone can follow; that it's not anything that anyone would use, but he can make her make this comparison.
>
> So I don't know. Absent at least an offer of proof as to what's going to come forward, Your Honor, and then you make your ruling because I don't know what's about to come on this. . . . [T]his is new science and this is not accepted science so to me, I don't understand -- I mean, I don't think that it's going to -- it doesn't meet the standards.

The prosecutor responded, *inter alia*:

> What I'm about to do is . . . because the sample is not, for lack of a better term, not a good sample, they're not able to make any conclusions whether it is or isn't somebody. But just because it's not a good sample doesn't mean they can't see certain things, and what they're seeing is scientif -- is what they're seeing. It is reliable. It's based on science.
>
> So when she says she sees these alleles, she sees those alleles. But because the sample is so . . . minimal or not a good sample or not scientifically a good sample, they don't want to render an opinion. She's not going to render an opinion as to whether this is or is not someone. But what she can do is look to see if the alleles there do or do not match the alleles for any individual I ask her to do it.

> The reason why I asked her to do it with Justine Eckard is you know in the last trial [Defendant's counsel] argued with the samples that were inconclusive that this could possibly be Justine Eckard. Justine Eckard's saliva, that's what that is, ladies and gentlemen.
>
> I think I have a right, knowing that that happened in the other trial, to somehow try to show that that's unlikely. And I think it's up to the jurors to determine, based on the caveats that Ms. Wilson will give, as to whether or not it's possible. And Ms. Wilson will say she's not giving any opinion, so if there is a possibility -- but we look and what we see are three of those alleles are not, are not, Justine Eckard. And Justine Eckard has been excluded from almost every other place.
>
> That's information I think they need to know. If I'm not able to present that, then that allows her to argue that that could be Justine Eckard without me arguing no, I don't think it is because what we see on there, even though it's not the most scientific thing, what we're able to see, my argument is, doesn't show that it's Justine Eckard.
>
> And I just think that's fair.

The trial court then asked the witness for a proffer of the contested testimony. The prosecutor asked Dr. Wilson to clarify if any of what he had just said was inaccurate. Dr. Wilson answered:

> The samples -- all I can say about the samples . . . is, you see results that don't match someone. I don't know that because I don't make the comparison because per policy I'm not allowed to, period.
>
> So we have to be very careful in doing this, so I have to preface to the jury, this is not something -- I would be in big trouble if I did that in the Lab. I'm not allowed to do this. So I don't want them to think that just because three alleles are not the same that it's an exclusion because it's not.
>
> I know like it sounds like it would be and it's a hard concept to understand, but it's not an exclusion and it's also not inclusion.

The court requested Dr. Wilson's proffer be taken as *voir dire*. In response to a question about "seeing" the minor contributor's alleles, Dr. Wilson again explained:

> Yes. So it's real DNA. It's not that it's not real DNA. It's absolutely real DNA. . . . It's a person but we don't know who it is. You can't include; you can't exclude.
>
> . . .
>
> I hate to keep beating a dead horse, but the scientific community does not do this. We do not do it. It's not just our Lab. The FBI doesn't do it. The forensic community as a whole cannot make comparisons because it's not that they're unreliable or that it's inaccurate information, it's just some may be missing, and with sampling, meaning if I run this sample several times, the three results that don't match could pop up and match.
>
> So every time you run the sample you get a different answer, and in validation studies that we do, developmentally at the company that creates the kits we use and also in-house at the Lab, has shown over and over and time and time again, you cannot include or exclude from these.

The prosecutor stated he would not ask Dr. Wilson to render an opinion, "but you can look at those six alleles and determine if any of those alleles match any profile that you have on file; is that correct?" Dr. Wilson replied: "I can if you ask me to, yes. But that's why I prefaced it with I want them to understand this is not a match; it is not an exclusion. It is not anything. It is real DNA that's there and I can't say a thing about it."

The prosecutor led Dr. Wilson through the comparison of the six alleles of the minor contributor with Eckard's profile. Dr. Wilson testified that three of the alleles were the same as Eckard's profile, and three were different. The prosecutor reiterated that Dr. Wilson was not rendering any opinion and was just stating facts about the alleles.

Defendant's counsel restated Dr. Wilson's testimony and asked one question emphasizing an analogy Dr. Wilson had used, that the evidence was like seeing two people clearly standing under a street light and a third dimly in the shadows: "there are three people on that street corner?" Dr. Wilson answered, "That's correct." Defendant's counsel asked no further questions.

The prosecutor asserted:

> Your Honor, the State is asking her to say what is there. We're not asking her to do anything different; we're not preventing her from saying any caveats. We're being candid with this jury of what this is. But I think the jury has a right to know fully everything what is there; what can we see from that. That's all I'm doing.

After discussion of discovery materials provided on this issue, the court asked Defendant's counsel if she wished to be heard any further on the minor contributor's alleles. Defendant's counsel replied, "No, Your Honor, not as far as that. I mean, that I have a fairly good understanding of." After further *voir dire* of another issue, the trial court issued its ruling: "With regard to the defendant's objection to the testimony about the alleles being present or absent from the mixture that the witness was observing, that will continue to be overruled."

The jury returned and Dr. Wilson's testimony resumed. Dr. Wilson testified, without further objection by Defendant's counsel, "three of the six total alleles that I see in the minor component of the external genitalia swabs, Justine Eckard shares three of them and three she does not have." The prosecutor, "in all fairness," asked Dr. Wilson to confirm, "[what] we're talking about with the six is an inconclusive [component]?" Dr. Wilson answered, "That's correct. Yes."

The jury returned a verdict finding Defendant guilty of statutory rape of a 13-year-old. The court sentenced Defendant to a term of imprisonment of 420 to 564 months. Defendant gave notice of appeal in open court and also in a timely filing.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Defendant argues the trial court erred by requiring Dr. Wilson to compare and contrast the DNA profile of the minor contributor with Eckard's DNA profile. Defendant argues this testimony was inadmissible under N.C. R. Evid. 702(a) and N.C. R. Evid. 403. Alternatively, Defendant argues the trial court committed plain error by allowing this testimony.

Defendant also argues the testimony was misleading and had a material impact on the verdict. Lastly, Defendant argues the State deprived him of due process by presenting misleading testimony.

IV. Preservation

[1] The State argues Defendant waived the issues presented on appeal by not objecting to the challenged testimony in either a timely or specific manner when it was presented to the jury. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. It is insufficient to object only to the presenting party's forecast of the evidence.

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and internal quotation marks omitted).

In *Ray*, the defendant objected "only during a hearing out of the jury's presence. In other words, [the] defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was actually introduced at trial." *Id.* (citation omitted). Our Supreme Court held such an objection was not timely and failed to preserve for appellate review the trial court's decision to admit the contested evidence. *Id.*

The State's reliance upon *Ray* and other similar cases is misplaced. Defendant's first objection was made in the jury's presence. Defendant's counsel objected after Dr. Wilson testified she could only answer the State's questions about the comparison of the minor contributor to Eckard's profile "[i]f made to do so." This objection was made and overruled on the record and in the presence of the jury.

After Dr. Wilson's subsequent, extensive preface quoted above, the trial court paused the line of questioning, excused the jury *sua sponte*, and asked Defendant's counsel if she would like to be heard on the overruled objection. After extensive discussion and further objections by Defendant during the *voir dire*, the trial court held Defendant's objection would "continue to be overruled," confirming the discussion and ruling related back to the first objection. Defendant's objection was timely made, renewed and preserved for appellate review.

The State also argues Defendant's counsel did not state the specific grounds for the objection, as is required by Rule 10. The Rules only

require specific grounds if "not apparent from the context." N.C. R. App. P. 10(a)(1). At the end of the discussion out of the jury's presence, the trial court specifically stated it was ruling on Defendant's "objection to the testimony about the alleles being present or absent from the mixture that the witness was observing." These specific grounds were apparent from the context. Defendant's counsel's argument during the *voir dire* discussion that the proffered testimony would not "meet the standards" of "accepted science" further specifies the grounds for the objection.

Defendant's objection to Dr. Wilson's testimony about the minor contributor's alleles was timely made and the specific grounds were apparent from the context. The Rule 702 objection is preserved. At oral argument, Defendant's counsel conceded both the Rule 403 and constitutional due process issues were not objected to at trial and were not preserved for appellate review, even for plain error or harmless error.

V. Standard of Review

A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When the issue is whether "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, __ N.C. App. __, __, 828 S.E.2d 719, 725 (2019) (citation omitted).

VI. Analysis

Defendant argues Dr. Wilson's testimony concerning the minor contributor's alleles violated Rule 702(a). The State argues Dr. Wilson's testimony was not improper scientific expert opinion testimony and was beyond the scope of Rule 702(a). Alternatively, the State argues the trial court did not abuse its discretion by admitting the testimony because any error to Defendant was not prejudicial.

A. Scope of Rule 702(a)

[2] Rule 702(a) allows for testimony by qualified experts "in the form of an opinion, or otherwise" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). "In order to assist the trier of fact, expert testimony must provide insight

beyond the conclusions that jurors can readily draw from their ordinary experience." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation and internal quotation marks omitted).

By contrast, lay testimony is "rationally based on the perception of the witness." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). Lay witnesses may state "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, *derived from observation of a variety of facts presented to the senses at one and the same time*." *State v. Broyhill*, 254 N.C. App. 478, 485, 803 S.E.2d 832, 838 (2017) (emphasis original) (quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911)).

"[W]hen an expert witness moves beyond reporting what he saw or experienced through [her] senses, and turns to interpretation or assessment to assist the jury based on his specialized knowledge, [she] is rendering an expert opinion." *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016) (citation and internal quotation marks omitted). "[D]etermining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context." *Id.*

The State argues Dr. Wilson's testimony concerning the objected-to testimony was not expert opinion testimony, because she was not asked to render an opinion, but only to state what alleles she could "see" in the minor contribution. We disagree. Although Dr. Wilson testified to the alleles she "saw," she made clear in her testimony that DNA is invisible to the human eye. The alleles she "saw" were numbers on the graphs she had prepared, using her expertise and experience as a forensic scientist. Her testimony moved beyond reporting what she had seen through her senses and turned to assessment and analysis based on her specialized knowledge. Despite the State's careful framing, and the State's argument otherwise, she was asked and rendered expert opinion testimony and interpretations subject to the requirements of Rule 702(a).

B. Requirements of Rule 702(a)

Under Rule 702(a), expert opinion testimony must be "based upon sufficient facts or data[,] the product of reliable principles and methods," and the expert witness must "appl[y] the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3). Dr. Wilson's testimony regarding the minor contributor's alleles was neither based upon sufficient facts or data nor was the product of reliable principles and methods. As an admitted expert witness, she even testified to this absence or omission of reliability herself.

Dr. Wilson testified the minor contributor's profile was "inconclusive due to the complexity and/or insufficient quality of recovered DNA." She also testified an "inconclusive" profile is not of sufficient quality and quantity for comparison purposes. By repeatedly asking Dr. Wilson to break with the State Lab's policy and established scientific procedures and testify to the alleles she could see in the minor contributor's graph, the State asked Dr. Wilson to give expert opinion testimony based upon admittedly insufficient facts or data in violation of the first prong of Rule 702(a).

The testimony also violated the second prong of Rule 702(a). Dr. Wilson further disclaimed, repeatedly, that the testimony she was required to give was "not scientifically accurate." The State's request was not something done by the State Crime Lab, the FBI, any "lab in the country," or "most labs in the world." Given her strenuous preface, this testimony cannot reasonably be considered the product of reliable principles or methods. *Id.*; *see also McGrady*, 368 N.C. at 884, 787 S.E.2d at 5 (the 2011 amendments to N.C. R. Evid. 702(a) adopted the federal standards articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and other cases).

The challenged testimony, describing the alleles of the minor contributor, was neither "based upon sufficient facts or data" nor "the product of reliable principles and methods." N.C. R. Evid. 702(a)(1)-(2). The trial court erred in allowing and admitting this testimony over Defendant's objection.

C. Prejudice to Defendant

[3] [E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial. A defendant is prejudiced by evidentiary error when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

State v. Wilkerson, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations and internal quotation marks omitted), *cert. denied*, 569 U.S. 1074, 176 L. Ed. 2d 73 (2010). Prejudicial error will not be found if the other unchallenged and properly admitted evidence presented by the State against Defendant is overwhelming, or the evidence erroneously admitted is of "relative insignificance." *Id.*

The State argues the other unchallenged and properly admitted evidence in this case overwhelmingly proves Defendant's guilt to overcome

any prejudice. The State notes Defendant did not challenge Dr. Wilson's testimony regarding her analysis of the other DNA samples. A review of that testimony shows Dr. Wilson reported her analysis of five samples:

1. In the rectal swab, she found two fractions of DNA: one was a sperm fraction, with a mixture of two contributors. Dr. Wilson presumed C.C. was one of the sources, as the known donor of the sample. After removing her contribution, the "derived component" was consistent with Defendant's profile. The non-sperm fraction was consistent with a mixture of two contributors. Dr. Wilson was able to match C.C. with the predominant contributor to that fraction, but could make no conclusion regarding its minor contributor "due to insufficient quality and/or quantity." Eckard's profile did not match the conclusive contributors to either of these fractions.

2. The internal vaginal swab contained two fractions as well. The sperm fraction matched Defendant. The non-sperm fraction was consistent with a mixture of two contributors. Dr. Wilson matched C.C. with the predominant contributor, but again could make no conclusion regarding its minor contributor "due to insufficient quality and/or quantity." Eckard's profile did not match either of these fractions.

3. A cutting from C.C.'s underpants was tested and, again, the results found sperm and non-sperm fractions. The sperm fraction was consistent with a mixture of two contributors. The predominant contributor matched Defendant, and the other contributor was consistent with C.C. The non-sperm fraction matched C.C.

4. The tank top Defendant gave to C.C. was tested and also found to contain sperm and non-sperm fractions. The sperm fraction matched Defendant. The non-sperm fraction was consistent with a mixture of two contributors. The predominant contributor matched Defendant, but no conclusion could be made regarding the minor contributor "due to insufficient quality and/or quantity."

5. The external genitalia swab, which is at issue in this appeal, contained no sperm and was interpreted as a mixture of three contributors. Dr. Wilson presumed C.C. was one of the major contributors, and the other major contributor was consistent with Defendant. The minor contributor profile to this mixture was

> inconclusive, but Dr. Wilson was erroneously instructed at trial to compare the specific alleles between it and Eckard's profile.

Dr. Wilson was able to compare Eckard's profile with each of the conclusive contributors' in each sample and it did not match any.

In summary: Dr. Wilson analyzed five DNA samples, four of which contain mixtures of two contributors and one which contains a mixture of three. Defendant is matched to or consistent with at least one contribution in each of the five samples. C.C. is matched or consistent with at least one contribution in each, except for the tank top. Eckard did not match any of the conclusive contributor profiles. Only one sample, the underpants, does not contain an inconclusive contributor; the other four all have an inconclusive contributor in at least one fraction.

The State argues Defendant's theory of the case does not match the other four samples and other physical evidence and asserts his testimony does not explain how his DNA ended up in the rectal swab. Defendant's testimony was merely that he saw Eckard's "face and her hands" between C.C.'s legs, and that he observed Eckard's "finger inside" C.C. Although nothing about this testimony explicitly implicates the vaginal or rectal swabs, nothing about this testimony precludes them either.

We also note several inconsistencies in evidence between Defendant's initial interview with investigators and his subsequent trial testimony. Defendant's initial version of the events barely resembles his trial testimony. In addition to his initial denials that C.C. and Eckard were inside his apartment or that he knew C.C. was a minor, Defendant also made no mention whatsoever of any sexual contact between any of the three individuals and told the investigator he would "absolutely not" find his DNA in C.C.'s rape kit. Defendant's testimony at trial changed from his initial interview after learning his DNA was present.

However, these inconsistencies in Defendant's versions of events, as well as the inconsistencies between all three witnesses' statements and testimonies, speak to the witnesses' credibility, issues that solely rest within the province of the jury. "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial -- determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (citations omitted).

While these inconsistencies are relevant for our review of potential prejudice to Defendant, we cannot conclude the witnesses' testimony in this case is overwhelming evidence of guilt to exclude the reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.

The State also points to other, uncontroverted and properly admitted physical evidence, namely that C.C. immediately presented at the hospital with red and painful inner thighs, when she was examined after the events in question. Undoubtedly, something occurred that night at Defendant's apartment, which C.C. reported immediately to her mother upon returning home. The uncontroverted and admitted physical evidence in this case shows that C.C. had bruised and red thighs following the events in question, that DNA matching or consistent with Defendant's profile was present in several internal swabs taken from C.C., and that at least one of those DNA swabs showed the presence of a third person other than Defendant or C.C.

The State's likely, and also admitted, objective in presenting the challenged testimony regarding the presence and identity of the minor contributor's alleles during its case-in-chief was to anticipate and undercut a key fact in Defendant's defense of the case. A third DNA contributor present in the external genitalia swab raises the possibility that Eckard was the means by which his DNA was transferred to and found on the swabs taken from C.C.'s body. The prosecutor admitted his purpose to the trial court in the *voir dire*: "you know in the last trial [Defendant's counsel] argued with the samples that were inconclusive that this could possibly be Justine Eckard." If the State had not insisted on preemptively forcing Dr. Wilson to state the unscientific and reluctant testimony that allowed the jury to more easily infer Eckard could not have been the minor contributor, a reasonable possibility existed a jury would have reached a different result at trial.

The prosecutor's stated objective demonstrates this reasonable possibility. At the first trial, Defendant argued the evidence of a third, inconclusive DNA contributor. The previous jury acquitted Defendant on numerous related charges and could not reach a unanimous verdict to convict Defendant on this charge. A different result was reasonably possible without the erroneous admission of this testimony.

The State's cases cited to argue the error was not prejudicial are unpersuasive. The issues in *State v. Williams*, 190 N.C. App. 173, 660 S.E.2d 200 (2008), also dealt with rape kit DNA analysis, but in the context of improper closing arguments, rather than improper admission of prejudicial expert testimony. *Id.* at 175, 660 S.E.2d at 202. Two other cases the State cites dealt with challenges to the admission of expert testimony. *State v. Trogdon*, 216 N.C. App. 15, 715 S.E.2d 635 (2011) (challenge to bite mark analysis); *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145 (2001) (challenge to barefoot impression analysis). In both cases this Court held the "error was harmless where the testimony was merely

corroborative of other evidence." *Id.* at 206, 546 S.E.2d at 158; *see also Trogdon*, 216 N.C. App. at 24–25, 715 S.E.2d at 641.

Here, the challenged and improper testimony is not "merely corroborative of other evidence"; it potentially discredits evidence that supports Defendant's defense and theory of the case. While the State presented other evidence tending to show Defendant's guilt than just this DNA evidence, the testimony regarding the minor contributor's alleles was more than merely corroborative of the State's other evidence.

This evidence called into question the very inference that Eckard purportedly transferred Defendant's DNA to C.C., which Defendant's defense reasonably relied upon. Although *Trogdon*, *Berry*, and other cases show how errors in the admission of expert testimony can be nonprejudicial, where there is additional inculpatory evidence, the facts and testimony here deals instead with the erroneous admission of expert testimony that both purposefully anticipates and undercuts potentially-exculpatory evidence.

Our Supreme Court has recognized "the heightened credence juries tend to give scientific evidence" in the specific context of erroneous admissions of expert testimony. *State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998). This "heightened credence" may be especially true concerning testimony where the expert herself repeatedly warns of jury confusion if presented. *Id.*

Dr. Wilson went to great lengths to emphasize she did not "want [the jury] to think that just because three [of the six] alleles are not the same that it's an exclusion [of Eckard] because it's not. I know like it sounds like it would be and it's a hard concept to understand, but it's not an exclusion and it's also not inclusion." She further explained, "with sampling, meaning if I run this sample several times, the three results that don't match could pop up and match."

The erroneously-admitted evidence was insisted upon by the State to allow the jury to make an inference that these results discredited Defendant's theory of the case. Dr. Wilson's testimony also suggests the evidence itself was of such insufficient quality that the specific alleles the prosecutor wanted the jury to hear, that were not attributable to Eckard, could have been different had the quality of the sample been sufficient for analysis.

"The evidence presented at trial was clearly sufficient to send the case to the jury and to support a jury finding of guilty . . . . However, that is not the question before us. The question is not one of sufficiency of

the evidence to support the jury verdict." *Helms*, 348 N.C. at 583, 504 S.E.2d at 296. The question on prejudicial error is whether, "had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial." *Id.* We conclude such a reasonable possibility of a different result does exist in this case. Defendant was prejudiced by the erroneous admission of the challenged testimony. This prejudice is not overcome by the State's other evidence tending to show Defendant's guilt.

VII. Conclusion

Defendant's objection before the jury to the admission of Dr. Wilson's testimony regarding the alleles of the minor contributor was properly preserved. This testimony consisted of expert opinion testimony that is within the scope and requirements of Rule 702(a). The challenged testimony was neither based upon sufficient facts or data nor is the product of reliable scientific principles and methods. We all agree the trial court erred in allowing and admitting this testimony which prejudiced Defendant. The majority of us agree this admission also violates Rule 702(a).

The erroneous admission of the testimony was more than mere corroboration of the State's other evidence. It anticipated, pre-empted, and potentially discredited evidence that corroborated Defendant's anticipated theory of the case. It was not offered in rebuttal.

A reasonable possibility exists that, had the erroneous testimony not been admitted, a different result would have been reached at trial. Defendant was prejudiced by the erroneous admission of this testimony. We reverse and remand for a new trial. *It is so ordered.*

NEW TRIAL.

Judge COLLINS concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

For each of the reasons stated below, I conclude that Defendant received a fair trial, free from reversible error. Accordingly, I respectfully dissent.

I. Factual Background

Defendant was convicted of statutory rape of C.C., a 13-year old girl.

The State's evidence at trial tended to show that Defendant had C.C. and a 21-year old named Justine over to his apartment to smoke marijuana. After a while, Justine left, and C.C. stayed to smoke more marijuana. Defendant then engaged in multiple sex acts with C.C. C.C. left and reported the assault to her mother. Defendant told an investigator that he did see C.C. and Justine on the night in question, but that they never entered his apartment. Defendant's DNA was found inside C.C.'s vagina and anus as well as on her body.

In his defense, Defendant testified at trial, contradicting much of what he had told the investigator. He explained how his DNA came to be found inside of and on C.C. He admitted that C.C. and Justine did come back to his apartment but that he engaged in a sexual act only with Justine, with her consent, an act which caused him to ejaculate. He then went into his bathroom. When he came back out, he saw Justine performing a sex act on C.C., during which his DNA wound up on and inside of C.C.

II. Testimony Challenged on Appeal

On appeal, Defendant challenges certain testimony from the State's DNA expert, which he claims was inadmissible but likely was construed by the jury as an attack on his version of the events.

A. DNA Expert's Preliminary Testimony

During the trial, the DNA expert testified concerning: (1) the methodology in matching DNA found on a victim against the DNA of a suspect and (2) her conclusions about the DNA found on the swabs taken from C.C.'s body.

Each swab taken from C.C. contained samples from more than one DNA profile; that is, each swab contained DNA from more than one contributor.

Whether a DNA profile contained on a swab can be matched against the DNA of a known person depends on the completeness of the sample. If the sample is complete enough, then enough "markers" from the sample can be compared with the DNA of a known person to determine whether or not there is a match. However, if the sample is not complete enough, that is, if there are not enough markers detectable from the sample, then there is no attempt to try and match the sample with the DNA of a known person, as any such attempt would be scientifically unreliable.

The swabs from inside C.C.'s vaginal and rectal areas and from the exterior of C.C.'s genital area all contained sufficient amounts of DNA from two different profiles to test for a match. One DNA profile found

on all the swabs matched a sample of C.C.'s own DNA. The other DNA profile found on all the swabs matched Defendant's DNA.

A sample from a *third* DNA profile, that is, the DNA from a third source, was found on a swab taken from outside C.C.'s genital area, though this DNA profile was not found on the swabs taken from inside C.C.'s vaginal or rectal areas. This third profile sample, however, was not complete enough such that it could be scientifically determined whether or not the DNA matched that of Justine or anyone else. Specifically, this sample only contained six markers which could be compared with markers from the DNA of a known person, not enough to be able to determine someone as a match.

The State's DNA expert explained that she did not try to match the third DNA profile with that of Justine, because, with only six markers, the sample was simply too small to make any scientifically reliable determination. She explained that she *could*, if compelled, try to match the six markers with that of Justine, but the potential matches would be scientifically insignificant since the sample was not large enough.

B. Defendant's Objection

The State asked the DNA expert if she could state *how many* of the six markers from the third DNA profile matched the six markers taken from Justine's known sample. It seems that the State wanted its expert to say that not all of the markers were a match so as to cast doubt on Defendant's theory that the third DNA profile *could possibly be* that of Justine.

Defendant's counsel objected, not knowing exactly what information the State was trying to elicit. The trial court sent the jury out and allowed a *voir dire* of the DNA expert to be conducted. After conducting the *voir dire*, it became evident that the DNA expert would state that three markers matched that of Justine, and three did not, but that these results were scientifically insignificant. The State did not ask the DNA expert for her opinion regarding whether or not she thought the profile matched that of Justine.

In any event, the trial judge ruled that the testimony was admissible. The jury was called back in; the State elicited the testimony that three of the six markers taken from C.C.'s body matched three of the six markers taken from Justine's DNA, but that there was no match as to the other three markers. The DNA expert also testified that the sample was too small for an opinion to be given as to whether Justine could be included or excluded as the contributor of the third DNA profile sample.

Defendant's attorney never objected after the jury came back in following the *voir dire*.

III. Argument

I agree with the majority that the DNA expert's testimony was improperly admitted. However, I conclude that the error in admitting the testimony did not constitute reversible error. I so conclude for three independent reasons, each stated below.

A. Defendant's Failure to Object on the Right Grounds-No Plain Error

Defendant concedes that he objected based on Rule 702, that the DNA's expert was not scientifically reliable, but *not* based on Rule 402, that the evidence was irrelevant, or on Rule 403, that the evidence was unduly prejudicial.

I conclude that the testimony *actually elicited* did not violate Rule 702, as it was scientifically accurate. North Carolina is now a *Daubert* state. *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). As such, Rule 702 prohibits expert testimony unless the testimony satisfies all three prongs of Rule 702(a), that:

> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Id. at 887, 787 S.E.2d at 7 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011)). An expert may testify "in the form of an opinion, or otherwise" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" *Id.*

Significantly, here, the DNA expert was never asked to provide an opinion about whether the third DNA profile matched that of Justine. Had she done so, she would have violated Rule 702, as she admitted that it is widely accepted that a match cannot be made based on such a small sample.

Rather, she was only asked whether any of the six markers from the sample matched the six markers from Justine's DNA. There is no indication that she did not have the expertise to compare the markers that she had in front of her or that her answers were not scientifically reliable *on this narrow point*. And, she further explained that these results were

variable, as another sample from Justine's DNA could produce different results and as the sample from the swab was simply too small to make any reliable conclusions. I am confident that her answers, opinions, and explanation were scientifically accurate.

However, though her testimony was scientifically accurate, her testimony on this point was irrelevant. What difference does it make how many markers matched? Any answer would not tend to prove or disprove whether the DNA on the swab matched that of Justine. Therefore, it should not have been allowed under Rule 402.

Further, though her testimony was scientifically accurate, it was unduly prejudicial. That is, though she explained the unreliability of three markers not matching Justine's DNA, it is possible that the jury took that to mean that the DNA *must not* have belonged to Justine. Creating this impression was the reason the State wanted the testimony admitted. Therefore, the testimony should not have been allowed under Rule 403.

However, since Defendant did not base his objection on Rule 402 or 403, but only on Rule 702, his objection is not preserved. We, therefore, only review for plain error. And, here, because there was substantial evidence of Defendant's guilt; e.g., his DNA found inside of C.C. and C.C.'s testimony, any error by allowing the expert's testimony did not rise to the level of plain error.

B. Defendant's Failure to Object After *Voir Dire*-No Plain Error

Even if Defendant's objection based on Rule 702 was proper, he failed to preserve his objection when he failed to object at the time the testimony was actually elicited.

It is well-settled that a defendant who objects during *voir dire*, outside the presence of the jury, waives his objection if he fails to object when the evidence is actually introduced to the jury. *See State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010). Here, though, Defendant admittedly did lodge an objection in the presence of the jury when the State started questioning its DNA expert generally about whether she *could* match the markers. It is a close question as to whether this objection "counts." Defendant admitted when making the objection that he did not know exactly where the State was going with its questioning, and the State had yet to ask the DNA expert about whether the six markers matched. Thus, Defendant needed to object after the *voir dire*, when the State "actually introduced" its expert testimony about her comparisons of the six markers. *Id.*

C. No Prejudicial Error

Even if Defendant's Rule 702 objection was properly preserved, I do not believe that, based on the overwhelming evidence in this case of Defendant's guilt, the error was prejudicial. I do not think it is reasonably possible that the jury reached its verdict based on the expert's testimony concerning certain DNA found on a swab from *outside* C.C.'s genital area. I believe that the jury convicted Defendant because of its view of the other evidence. Defendant's explanation of how his DNA was found on *and inside* of C.C. is simply incredible, given that the DNA from the third source was found only on a swab taken from the external area of C.C.'s genitals and that Defendant changed his story between the time he spoke with investigators and the time of trial.

STATE OF NORTH CAROLINA
v.
DAVID WILLIAM WARDEN II

No. COA19-335

Filed 3 December 2019

Evidence—sexual abuse of a minor—no physical evidence—improper vouching—plain error analysis

The admission of testimony from a child protective services investigator vouching for the truthfulness of a minor's allegations of sexual abuse by defendant (that her office had "substantiated" defendant as the perpetrator and believed the victim's allegations to be true) amounted to plain error where there was no physical or other contemporaneous incriminating evidence and the victim's credibility was the central issue to be decided by the jury.

Judge YOUNG dissenting.

Appeal by defendant from judgment entered 12 September 2018 by Judge Gregory R. Hayes in Rockingham County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

David William Warden II ("Defendant") appeals from jury convictions of sexual offense with a child by an adult, child abuse by a sexual act, and taking indecent liberties with a child, "Virginia." *See* N.C. R. App. P. 42(b)(3) (pseudonyms used in appeals filed under N.C. Gen. Stat. § 7A-27 involving sexual offenses committed against a minor). We reverse and remand for a new trial.

I. Background

Virginia is Defendant's biological daughter. Defendant and Virginia's mother were married for ten years and had two children: Virginia and her brother. Defendant and Virginia's mother separated in 2011. After their parents separated, Virginia and her brother frequently visited with their father.

Virginia was 15 years old in June 2017. Members of the family argued about where to spend Father's Day. The disagreement concerned whether Virginia and her brother would ride back from a campsite with their grandfather, Defendant's father, instead of riding with Defendant. The children's grandfather thought they should ride with Defendant. He was upset by the suggestion the children apparently preferred to ride with him.

While their grandfather was speaking to Virginia over the phone about the issue, he asked her, "Why don't you want to ride back with him? It's not like he molested y'all or anything." Virginia "got quiet" and "didn't say anything" in response.

After this phone call, Virginia told her mother that Defendant had made her perform fellatio on him when she was nine years old. Virginia's mother and maternal grandmother took her to the Rockingham County Sheriff's Department the next day. A sheriff's deputy interviewed Virginia and the Department opened an investigation. As part of this investigation, a detective contacted DSS and Help, Incorporated to set up a forensic interview with Virginia.

At trial, Virginia testified to this alleged initial incident and two other similar incidents with Defendant, which allegedly occurred three years later when Virginia was 12 years old. No one else witnessed any of these incidents, nor was there any contemporaneous corroborating or physical evidence presented. The trial court issued the jury a limiting instruction that Virginia's testimony about those two later alleged incidents was being admitted solely for the purpose of showing identity of Defendant,

a common scheme or purpose, or other permissible reasons under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

Also, solely for the limited purposes of Rule 404(b), Defendant's sister testified that Defendant had molested her multiple times when she was between the ages of 7 or 8 and 12 years old. Virginia's mother, maternal grandmother, and paternal grandfather testified to corroborate only the events surrounding Virginia's first reporting of her allegations and changes in her behavior growing up. No other witnesses with direct knowledge of the allegations at the time they had allegedly occurred, or any other witness to whom she had contemporaneously "disclosed" these allegations corroborated Virginia's allegations. No physical evidence arising from or supporting any of the allegations was presented.

DSS Child Protective Services Investigator Melissa McClary testified, without objection by Defendant, that DSS believed Virginia's allegations against Defendant to be true:

> Q. [D]oes your office either substantiate or un-substantiate a claim?
>
> A. Yes. . . . [P]art of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would un-substantiate a case.
>
> . . .
>
> Q. And what was the case decision that DSS or CPS decided on?
>
> A. We substantiated sexual abuse naming David Warden as the perpetrator.

Peg Stephenson, of Help, Incorporated, qualified and testified as an expert witness in the area of child sexual abuse and forensic interviewing. She explained the concept of a "delayed disclosure" and stated, in her professional opinion, Virginia's allegations in this case were "definitely a delayed disclosure." Defendant's counsel failed to object to any of the testimony now at issue on appeal.

Defendant testified on his own behalf. He denied molesting Virginia. He also denied molesting his sister. On cross-examination, Defendant repeatedly denied the allegations, saying, "I didn't do what my daughter's

saying I did." Defendant's testimony was the entirety of his defense case-in-chief.

The jury returned a verdict and found Defendant guilty as charged of the three offenses. The trial court entered judgment for all three charges and sentenced Defendant to consecutive, active sentences: 300 to 369 months for the sexual offense with a child by an adult; 29 to 44 months for the child abuse by a sexual act; and, 19 to 32 months for the indecent liberties with a child. Defendant gave notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Defendant argues the trial court committed plain error by allowing two witnesses to improperly vouch for or bolster Virginia's credibility. Alternatively, Defendant argues he was denied effective assistance of counsel by his counsel's failure to object to the improper testimony.

IV. Standard of Review

Defendant concedes his trial counsel failed to object to the challenged testimony and the issue is not preserved on appeal. Unpreserved issues are reviewed for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [Plain error] is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

Id. (emphasis original) (citations and internal quotation marks omitted).

V. Analysis

Defendant challenges the admissibility of testimony from two of the State's expert witnesses, McCrary and Stephenson, on the grounds they improperly vouched for the truthfulness of Virginia's accusations and bolstered her credibility. As regards McCrary's testimony, we agree.

The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the *only proper entity* to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (emphasis supplied). Following our Supreme Court's long-standing rule this Court has held "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

Prior precedents have repeatedly admonished: "a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). "This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness." *State v. Dixon*, 150 N.C. App. 46, 53, 563 S.E.2d 594, 599 (2002) (citation omitted). This prohibition against vouching for the credibility of the complainant or another witness applies to the testimony of a lay witness as well as an expert witness. *See, e.g.*, *State v. Coble*, 63 N.C. App. 537, 541, 306 S.E.2d 120, 122 (1983).

Our Supreme Court has held, "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Chandler*, 364 N.C. 313, 318, 697 S.E.2d 327, 331 (2010) (citations omitted).

In *State v. Giddens*, this Court held plain error occurred when a DSS child protective services investigator testified the defendant in that case "was substantiated as the perpetrator." *Giddens*, 199 N.C. App. at 118, 681 S.E.2d at 506. That investigator testified "substantiated" meant "the examiners found evidence throughout the course of [their] investigation to believe that the alleged abuse and neglect did occur." *Id.*

> Kent's testimony that DSS had "substantiated" Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency had concluded Defendant was guilty. DSS is charged with the responsibility of conducting the investigation and gathering evidence to present the allegation of abuse to the court. Although Kent was not qualified as an

> expert witness, Kent is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion. Thus, it was error to admit Kent's testimony regarding the conclusion reached by DSS.

Id. at 121-22, 681 S.E.2d at 508.

Like the witness, Kent, in *Giddens*, McClary is a child protective services investigator for DSS. McClary's testimony in this case, that her office "determine[s] whether or not we believe allegations to be true or not true" and then "substantiated sexual abuse naming David Warden as the perpetrator," is indistinguishable from the erroneously admitted testimony in *Giddens*. The trial court erred by allowing McClary to vouch for the credibility of Virginia's allegations against Defendant by testifying to the conclusion reached by DSS based upon those allegations. We review whether the Defendant has shown the error was so prejudicial to amount to plain error.

Plain error occurs when, absent the testimony admitted in error, "the jury would have been left with only the children's testimony and the evidence corroborating their testimony," *Giddens*, 199 N.C. App. at 123, 681 S.E.2d at 509, or where "the central issue to be decided by the jury was the credibility of the victim." *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004). "[I]t is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." *State v. Davis*, 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008) (citation omitted).

In this case, we need not speculate upon what evidence the State's case rested or whether the credibility of the victim was the central, if not sole, issue to be decided. The prosecutor succinctly summarized the State's case in the closing argument:

> What this case comes down to is whether or not you believe [Virginia]. If you believe [Virginia], there's no reasonable doubt. It really doesn't matter if you fully believe [Virginia's mother], or if you fully believe [Defendant's sister], or if you fully believe the Defendant's father. Those are extra. Those are corroborating evidence. What matters is if you believe [Virginia]. If you believe what she says, then it happened.

The only direct witnesses to the alleged incidents in this case were Virginia and Defendant, both of whom testified. As the State itself

highlighted in closing, for the State to carry its burden of proof, the sole question for the jury was to weigh and accept the credibility of the victim in the absence of any physical or other contemporaneous incriminating evidence. *See id.* We hold the admission of McClary's testimony that DSS "substantiated" Virginia's claim to be true and that Defendant "[w]as the perpetrator" to be plain error.

Because we find plain error and prejudice to Defendant is shown in the admission of McClary's testimony, we need not reach Defendant's other issues raised on appeal.

VI. Conclusion

The trial court committed plain error in admitting witness testimony that DSS had "substantiated" the victim's claim of sexual abuse, naming Defendant "as the perpetrator." This testimony improperly bolstered or vouched for the victim's credibility. Where, as argued by the State in closing argument, the credibility of the complainant was the central, if not the only, issue to be decided by the jury, this plain error of admitting vouching or bolstering testimony by the State was prejudicial to Defendant to mandate a new trial. *It is so ordered.*

NEW TRIAL.

Judge COLLINS concurs.

Judge YOUNG dissents with separate opinion.

YOUNG, Judge, dissenting.

The majority has held that, because the State's case rested upon Virginia's credibility, and McClary improperly reinforced that credibility, the admission of McClary's testimony was prejudicial and plain error. For the following reasons, I respectfully dissent.

I agree with the majority that McClary's testimony was improper and erroneously admitted. However, even acknowledging that this testimony was admitted in error, Defendant has the burden, on plain error review, to show that it was prejudicial. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (holding that, on plain error review, "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result"). I acknowledge that, had the only evidence been Defendant's testimony, Virginia's testimony, and the testimony of McClary and Stephenson, the

admission of the experts' improper bolstering of Virginia's testimony may well have been prejudicial. *See Giddens*, 199 N.C. App. at 123, 681 S.E2d at 509 (holding that, where the jury "would have been left with" only the testimony of the victim and the defendant, the introduction of corroborating testimony was plain error). However, as the majority notes, this Court has also held that "it is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." *Davis*, 191 N.C. App. at 541, 664 S.E.2d at 25 (citation omitted).

Indeed, even setting aside the testimony of McClary and Stephenson, Defendant and Virginia were not the only ones to testify at trial. Defendant's sister testified as to how Defendant molested her multiple times in her childhood, corroborating Virginia's description of events. And Virginia's grandmother and grandfather testified as to Virginia's change in behavior and personality after the alleged events occurred. Given this evidence, as well as Virginia's testimony, the recording of her interview with Stephenson, and Virginia's police report, I cannot agree with the majority that, absent McClary and Stephenson improperly bolstering Virginia's credibility, "the jury probably would have reached a different result." I would instead hold that Defendant has not shown prejudice and, accordingly, that the trial court did not commit plain error in admitting the challenged testimony.

In an alternative argument, which the majority, having found plain error, declined to consider, Defendant contended that trial counsel's failure to object to the testimony constituted ineffective assistance of counsel. However, as I believe Defendant failed to show prejudice with respect to plain error, Defendant would likewise be unable to show prejudice with respect to any acts or omissions of counsel. As such, I would similarly hold that Defendant did not receive ineffective assistance of counsel.

THOMAS A. STEVENS, ELLEN M. STEVENS, AND MARYLYNN STEVENS, PLAINTIFFS
v.
SHANDA HELLER, JOHN BOSTON HELLER, AND BFD PROPERTIES INC.
D/B/A RE/MAX UNITED, DEFENDANTS

No. COA19-344

Filed 3 December 2019

1. Appeal and Error—untimely submission of appellate brief—two days late—non-jurisdictional violation—no dismissal

Plaintiff's failure to request an extension of the time to file an appellate brief until two days after the deadline was a non-jurisdictional violation of the appellate rules (Rule 13(a)) and did not justify the extreme sanction of dismissal where the non-compliance did not impair appellate review or frustrate the adversarial process.

2. Real Property—failure to conduct reasonable diligence—no inspections—notice of potential problems

Plaintiff-buyers' failure to conduct any inspection during the due diligence period or prior to closing on real property—even after they received a written report from defendant-sellers in the form of invoices from an HVAC contractor, signaling potential problems with the HVAC system—was a failure to conduct reasonable diligence under the circumstances, so defendants were entitled to summary judgment on plaintiffs' claims regarding the defective HVAC system.

3. Real Property—seller a licensed real estate broker—duty of disclosure—same as ordinary seller

The Court of Appeals rejected the assertion that a licensed real estate broker selling her own property owed plaintiffs a heightened duty of disclosure compared to any ordinary seller of real property.

Appeal by Plaintiffs from order entered 11 October 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 3 October 2019.

Thomas A. Stevens, pro se.

Manning Fulton & Skinner P.A., by William C. Smith, Jr., for the Defendants.

BROOK, Judge.

Thomas A. Stevens, Ellen M. Stevens, and MaryLynn Stevens ("Plaintiffs") appeal the trial court's order granting summary judgment in favor of Shanda Heller, John Boston Heller, and BFD Properties, Inc. d/b/a RE/MAX United ("Defendants") and denying their partial cross-motion for summary judgment. We affirm.

I. Background

Thomas Stevens is a lawyer who lives in Delaware with his wife, Ellen Stevens. Shanda Heller and John Boston Heller are married and live in North Carolina. The Hellers own BFD Properties, Inc. ("BFD Properties"), a real estate agency located in Cary, North Carolina that does business as RE/MAX United. Ms. Heller is a real estate broker and an independent contractor and agent of BFD Properties.

On 29 June 2017 a real estate broker engaged by Mr. Stevens presented an offer to Ms. Heller to purchase real property located at 1431 Collegiate Circle in Raleigh, North Carolina. Ms. Heller counter-offered the following day. In her counter-offer Ms. Heller explained that she and her husband owned the property as an investment but had decided to sell it because their son was leaving home for college, presenting the Hellers with the opportunity to obtain housing for their son for his college years through a tax-deferred exchange. Attaching residential property disclosures to her counter-offer, Ms. Heller noted:

> I have checked a few items as "No Representation" because we've never lived in the property and I am not 100% sure (i.e. type of plumbing, age of roof) of ages or types of systems. To our knowledge everything is in good working order. I can try to verify when roof was replaced and plumbing with management company . . . .

Mr. Stevens and his broker both electronically confirmed receipt of the disclosures and Mr. Stevens and Ms. Heller then executed a purchase agreement for the property that same day, on 30 June 2017. The purchase agreement set 14 July 2017 as the settlement date for the transaction. It stipulated that Mr. Stevens's due diligence period began on 30 June 2017, the date of the purchase agreement, and concluded at 5:00 p.m. on 13 July 2017, the day before the date set for settlement.

On 14 July 2017, the date set for settlement and the day after the expiration of the due diligence period, a contractor performed maintenance on the HVAC system in the property, damaging the system in the process. The contractor informed the Hellers of the damage and that the damage had been repaired and Ms. Heller conveyed this information

to Mr. Stevens, providing Mr. Stevens with copies of invoices for the work. The transaction then closed three days later on 17 July 2017. Ultimately, no inspection of the property was conducted by Mr. Stevens or anyone acting on his behalf prior to the closing of the transaction.[1]

Plaintiffs thereafter initiated the present action in Wake County Superior Court. In their first amended complaint, Plaintiffs asserted claims for breach of contract, fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive practices, alleging essentially that the HVAC system in the property needed to be completely replaced and that Defendants knew or should have known about this defect but failed to disclose it to Mr. Stevens prior to the closing of the transaction. Throughout their complaint, Plaintiffs advanced the theory that the duty of Ms. Heller to disclose information about latent defects of which she was or should have been aware was heightened because she was both an owner of the property and a licensed real estate broker.

On 23 July 2018 Defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 13 September 2018 Plaintiffs filed a partial cross-motion for summary judgment on liability only. The motions came on for hearing on 24 September 2018 before the Honorable A. Graham Shirley, II. In an order entered on 11 October 2018, Judge Shirley granted Defendants' motion and denied Plaintiffs' motion. Plaintiffs entered timely written notice of appeal on 8 November 2018.

II. Analysis

Mr. Stevens makes several arguments on appeal, which we address after resolving a pending motion to dismiss the appeal.

A. Motion to Dismiss

[1] While Plaintiffs' notice of appeal was timely, Mr. Stevens's appellate brief was not timely filed.

On 10 May 2019, Mr. Stevens filed a motion requesting an extension of the time to file an appellate brief. This Court allowed the motion in a

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1. In reply to a congratulatory e-mail from his broker sent over the weekend following the execution of the purchase agreement, Mr. Stevens related that because of the "tight closing schedule," he was disinclined to conduct an inspection of the property prior to closing, unless his broker advised otherwise. His broker inquired in response: "Are you 100% sure you don't want an inspection? Just want to make sure[.]" Mr. Stevens replied by stating that it was "up to ML," meaning MaryLynn Stevens, his daughter. However, no inspection was conducted by either Mr. Stevens or his daughter or anyone acting on their behalf before the transaction closed.

14 May 2019 order, setting a new deadline of 20 May 2019 for filing and service of Mr. Stevens's appellate brief.

By 20 May 2019, however, Mr. Stevens did not file and serve his appellate brief, as ordered on 14 May 2019, nor did he request a second extension prior to the new deadline set on 14 May 2019 expiring.

On 22 May 2019, two days after the deadline set on 14 May 2019 had expired, Mr. Stevens filed a second motion requesting an extension of time to file an appellate brief. This Court allowed the motion in a 23 May 2019 order, setting a new deadline of 24 May 2019 for filing and service of Mr. Stevens's appellate brief.

That same day, Defendants filed a motion requesting that the Court reconsider or vacate its 23 May 2019 order allowing Mr. Stevens an additional extension to file and serve his appellate brief because of his failure to file or request an extension of the time to file his appellate brief by 20 May 2019. This Court denied the motion on 24 May 2019.

Mr. Stevens finally filed and served his appellate brief on 24 May 2019.

Defendants therefore move that this appeal be dismissed for non-compliance with Rule 13(a) of the North Carolina Rules of Appellate Procedure based on Mr. Stevens's failure to file and serve his appellate brief or request an extension of the time to file and serve his appellate brief by 20 May 2019. *See* N.C. R. App. P. 13(a) ("Within thirty days after the record on appeal has been filed . . . , the appellant shall file a brief . . . and serve copies thereof upon all other parties").

Mr. Stevens's two-day period of non-compliance with Rule 13(a) constitutes a non-jurisdictional violation of the appellate rules. *See Dogwood Dev. and Mgmt. v. White Oak Transp.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 364-65 (2008) (observing that jurisdictional rule violations consist of failures to comply with the rules "necessary to vest jurisdiction in the appellate court," such as Rule 3 and Rule 4(a)(2)). "[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365. We hold that Mr. Stevens's non-compliance with Rule 13(a) does not rise to the level of a "substantial failure or gross violation" justifying the "extreme sanction" of dismissal because in the present case the non-compliance has not impaired our "task of review[,] and . . . review on the merits would [not] frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67. Defendants' motion to dismiss the appeal is therefore denied.

B. Motions for Summary Judgment

Mr. Stevens argues that the trial court erred by granting summary judgment in favor of Defendants and denying Plaintiffs' partial cross-motion for summary judgment on liability only because there were genuine issues of material fact regarding Defendants' alleged misrepresentations and Ms. Heller owed him a heightened duty of disclosure as both an owner of the real property and a licensed real estate broker. We disagree.

1. Introduction and Standard of Review

Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2017). "[A]n issue is genuine if it is supported by substantial evidence[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal marks and citation omitted). "[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]" *Id.* (internal marks and citation omitted). "Substantial evidence is . . . evidence [] a reasonable mind might accept as adequate to support a conclusion[.]" *Id.* (internal marks and citation omitted).

However, when ruling on a motion for summary judgment or reviewing such a ruling on appeal, "[a]ll facts asserted by the adverse party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal marks and citation omitted). "The Court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences." *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997) (citation omitted). "The party moving for summary judgment bears the burden of establishing the lack of a triable issue of fact." *Purcell v. Downey*, 162 N.C. App. 529, 531-32, 591 S.E.2d 556, 558 (2004).

The standard of review in an appeal from an order granting a motion for summary judgment and denying a partial cross-motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the

trial court." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012) (citation omitted).

2. Buyer's and Seller's Duties

In North Carolina, the Residential Property Disclosure Act ("the Act") applies to sales of "residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesman[.]" N.C. Gen. Stat. § 47E-4(a)(1) (2017). The Act in relevant part requires that "the owner of real property [] furnish to a purchaser a residential property disclosure statement," including information about the "characteristics and conditions of the . . . plumbing, electrical, heating, cooling, and other mechanical systems[.]" *Id.* § 47E-4(b)(3). However, unless an owner of real property chooses to make no representation with respect to a "characteristic or condition" about which N.C. Gen. Stat. § 47E-4(b) requires disclosure, the Act does not affect "[t]he rights of the parties to a real estate contract as to conditions of the property of which the owner ha[s] no actual knowledge[.]" *Id.* § 47E-6. The Act additionally provides as follows:

> the owner may discharge the duty to disclose . . . by providing a written report attached to the residential property disclosure statement by a public agency or by an attorney, engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency's functions or the expert's license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it.

Id. § 47E-7.

However, while a seller of real property is entitled to reasonable reliance on the opinions and information provided by professionals when discharging the duties of disclosure imposed by N.C. Gen. Stat. § 47E-4(b), *see id.*, "a purchaser [] [who] has the opportunity to exercise reasonable diligence and fails to do so . . . has no action for fraud," *MacFadden v. Louf*, 182 N.C. App. 745, 748, 643 S.E.2d 432, 434 (2007) (citation omitted). This Court has held:

> [w]ith respect to the purchase of property, reliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations.

RD&J Props. v. Lauralea-Dilton Enters., 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (internal marks and citation omitted). A buyer of real property is therefore not entitled to rely solely on the property disclosure statement prepared by the seller and conduct no independent due diligence and then subsequently maintain an action against the seller for failure to disclose a latent defect unless the buyer can show that the seller's misrepresentations caused the lack of reasonable diligence. *See Folmar v. Kesiah*, 235 N.C. App. 20, 26-27, 760 S.E.2d 365, 369-70 (2014) (affirming summary judgment on claim by buyer based on content of disclosure statement where buyer's inspection report notified buyer of defects before closing but buyer chose to consummate sale anyway); *MacFadden*, 182 N.C. App. at 748-49, 643 S.E.2d at 434-35 (same); *Swain v. Preston Falls East*, 156 N.C. App. 357, 361-62, 576 S.E.2d 699, 702-03 (2003) (affirming summary judgment on claim by buyer notified in addendum to purchase contract about potential exterior coating defect, noting language from disclosure statement encouraging buyer to obtain independent inspection prior to closing).

3. Mr. Stevens's Failure to Conduct Reasonable Diligence

[2] In the present case, the purchase agreement entered into by Mr. Stevens and the Hellers provided in relevant part as follows:

> 4. BUYER'S DUE DILIGENCE PROCESS:
>
> . . .
>
> During the Due Diligence Period, Buyer or Buyer's agents or representatives, at Buyer's expense, shall be entitled to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as Buyer deems appropriate, including but NOT limited to the following:
>
> (i) Inspections: Inspections to determine the condition of any improvements on the Property, the presence of unusual drainage conditions or evidence of excessive

> moisture adversely affecting any improvements on the Property, the presence of asbestos or existing environmental contamination, evidence of wood-destroying insects or damage therefrom, and the presence and level of radon gas on the Property.
>
> . . .
>
> Buyer acknowledges and understands that unless the parties agree otherwise, THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION. Buyer and Seller acknowledge and understand that they may, but are not required to, engage in negotiations for repairs/improvements to the Property. Buyer is advised to make any repair/improvement requests in sufficient time to allow repair/improvement negotiations to be concluded prior to the expiration of the Due Diligence Period.

(Emphasis in original.) The purchase agreement also required the Hellers to provide Mr. Stevens with "reasonable access to the Property (including working, existing utilities) the earlier of Closing or possession by Buyer, including, but not limited to, allowing Buyer an opportunity to conduct a final walk-through inspection of the Property."

As required by N.C. Gen. Stat. § 47E-4(b), the residential property disclosure statement prepared by Ms. Heller stated as follows:

> 2. You must respond to each of the questions on the following pages of this form by filling in the requested information or by placing a check [] in the appropriate box. In responding to the questions, you are only obligated to disclose information about which you have actual knowledge.
>
> a. If you check "Yes" for any question, you must explain your answer and either describe any problem or attach a report from an attorney, engineer, contractor, pest control operator or other expert or public agency describing it. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in it so long as you were not grossly negligent in obtaining or transmitting the information.
>
> b. If you check "No," you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misstatement.

> c. If you check "No Representation," you are choosing not to disclose the conditions or characteristics of the property, even if you have actual knowledge of them or should have known of them.
>
> d. If you check "Yes" or "No" and something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem.

The first page of the disclosure statement additionally noted that it was "not a substitute for any inspections [the purchasers] may wish to obtain," stating further that "[p]urchasers are strongly encouraged to obtain their own inspections from a licensed home inspector[.]"

The second page of the disclosure statement went on to specify that the representations it contained only concerned characteristics or conditions of the property about which the owners had "actual knowledge," consistent with N.C. Gen. Stat. § 47E-6. Question nine on the following page of the disclosure statement asked:

> 9. Is there any problem, malfunction or defect with the dwelling's heating and/or air conditioning?

Ms. Heller checked the box indicating that the answer to this question was "No," representing that she had no actual knowledge of any defects with the HVAC system as of 30 June 2017, the date Ms. Heller executed the disclosure and Mr. Stevens acknowledged it.

Ms. Heller supplemented her response to question nine of the disclosure statement by providing Mr. Stevens with "written report[s]" within the meaning of N.C. Gen. Stat. § 47E-7 on 14 July 2017 in the form of invoices from the HVAC contractor that performed the maintenance and repair work on the system. By this point, Mr. Stevens had chosen not to conduct an inspection during the due diligence period, and Mr. Stevens did not investigate the issues with the HVAC system prior to the closing of the transaction on 17 July 2017. There is no record evidence supporting an inference that the Hellers' disclosures on 30 July 2017 in the residential disclosure statement were knowing misrepresentations or that the Hellers were grossly negligent in their choice of HVAC contractor. Viewing the evidence in the light most favorable to Plaintiffs and giving Plaintiffs the benefit of every *reasonable* inference, as we are required to do, we hold that the failure of Mr. Stevens to conduct any inspection of the property during the due diligence period or prior to closing,

after being notified of potential problems with the HVAC system, constituted a failure by Mr. Stevens to conduct reasonable diligence under the circumstances. Accordingly, with respect to Defendants' motion, we affirm the trial court's decision to grant summary judgment in favor of Defendants; likewise, we therefore affirm the trial court's decision to deny Plaintiffs' partial cross-motion on liability only, as our determination that Defendants were entitled to judgment as a matter of law entails.

4. Duty of Sellers Who Are Licensed Real Estate Brokers

[3] As noted previously, throughout the amended complaint and the appellate brief filed by Mr. Stevens, Mr. Stevens repeatedly asserts that Ms. Heller owed him a heightened duty of disclosure compared to an ordinary seller of real property because she was a licensed real estate broker and an owner of the property, not an ordinary seller. Mr. Stevens repeats this assertion often but offers no authority to support it.[2] We are not aware of any either. We therefore decline to endorse the viewpoint advocated by Mr. Stevens that licensed real estate brokers owe buyers they do not represent as agents any heightened duty of disclosure when they also own the property they are selling; that is, we expressly reject the argument that owners of real property who sell that property while also acting in the capacity of a licensed real estate broker with respect to such sales are transformed into buyer's agents or dual agents by operation of law. Accordingly, we reiterate our holding that the trial court correctly concluded that Plaintiffs were not entitled to judgment as a matter of law on liability only.

III. Conclusion

The trial court correctly concluded that Defendants were entitled to judgment as a matter of law where there is no genuine issue of material fact that Mr. Stevens failed to exercise reasonable diligence prior

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2. The best Mr. Stevens does to support this proposition is to cite provisions of Chapter 93A of the General Statutes, which sets out the regulatory requirements applicable to licensed real estate brokers, such as the prohibition in N.C. Gen. Stat. § 93A-6(a)(1) against "willful or negligent misrepresentation or any willful or negligent omission of material fact." N.C. Gen. Stat. § 93A-6(a)(1) (2017). This provision sets out an instance of conduct that is subject to discipline by the North Carolina Real Estate Commission, the body tasked with enforcing the regulatory requirements applicable to real estate brokers in North Carolina; it does not support the proposition that real estate brokers who own property they are also engaged in selling in their capacity as brokers owe a heightened duty to the *buyers* of such property. Licensed real estate brokers who are selling property they own do not become the buyers' fiduciaries simply by virtue of being both brokers and self-represented sellers in the transaction.

to consummating the purchase from the Hellers. Additionally, despite being a licensed real estate broker, Ms. Heller owed Mr. Stevens no duty to him greater than that owed by an ordinary seller to an ordinary buyer of real property. We therefore affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and INMAN concur.

CHERYL JERNIGAN WICKER, Plaintiff
v.
GILLES ANDRE WICKER, Defendant

No. COA18-1212

Filed 3 December 2019

Attorneys—motion to withdraw—after case settled—ongoing obligations—conditions of withdrawal—lack of basis

In a post-divorce action concerning the breach of a property settlement agreement, the trial court erred by denying an attorney's motion to withdraw after the parties settled their claims by consent order. Although there were no indications that withdrawal would prejudice the client, delay ongoing proceedings, or disrupt the orderly administration of justice, the trial court not only denied the motion but also impermissibly set forth conditions which needed to be met before the request to withdraw could be reconsidered—based on the opposing party's argument that the unrepresented person would be difficult to reach since he frequently moved between various out-of-state locations—all of which were premised on future noncompliance with the consent order but none of which were required to carry out the obligations contained in the consent order. On remand, the trial court was directed to allow the motion, but it could still consider whether to hold further proceedings or to enter additional orders to address noncompliance concerns.

Appeal by defendant's counsel from order entered 26 June 2018 by Judge Joseph Buckner in Orange County District Court. Heard in the Court of Appeals 10 September 2019.

Collins Family Law Group, by Rebecca K. Watts, for appellant Melissa Averett.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., and Epting & Hackney, by Joe Hackney, for plaintiff-appellee.

DIETZ, Judge.

After a successful mediation, the trial court in this family law dispute entered a consent order that, among other things, required Defendant regularly to provide certain financial information to the Plaintiff, and required the parties to communicate with each other solely through their attorneys or agents.

Defendant's counsel, Melissa Averett, later sought to withdraw on the ground that her representation of Defendant had ended and that she and her client had not agreed on new terms of engagement. Plaintiff opposed the motion, primarily on the basis that Defendant lived in many locations—some overseas—throughout the year and that Defendant would be difficult to locate if Averett withdrew.

The trial court entered an order denying Averett's motion to withdraw "at this time" but stated in the order that the court would allow the motion if Defendant retained a new attorney, appointed a registered agent for service of process, or posted a security bond.

We reverse that order. As explained below, the record on appeal does not contain any evidence that would support these conditions—all of which appear aimed at Defendant's future noncompliance with the consent order. The trial court properly could require Defendant to identify a suitable attorney or agent for communication when Averett withdraws, as that is necessary to effectuate portions of the consent order. Likewise, with appropriate evidence, the trial court could impose additional conditions on Defendant, like those in the challenged order, to prevent Defendant from evading his obligations under the consent order. But the record before us does not contain that evidence.

We therefore reverse the court's order and remand for entry of an order permitting Averett to withdraw. We leave it to the trial court's sound discretion on remand whether to conduct further proceedings or enter any additional orders to ensure Defendant's compliance with the consent order.

Facts and Procedural History

Plaintiff and Defendant divorced in 2006. In 2016, Plaintiff filed a complaint alleging that Defendant was in breach of a property separation agreement that the couple entered into before their divorce. That

contract dispute largely involved two businesses in which Defendant is a stakeholder and from which Defendant derives significant disbursements of some kind. Defendant retained Melissa Averett to represent him in the North Carolina proceeding.

The parties mediated their contract dispute and reached a settlement. On 31 October 2017, the trial court entered a consent order, resolving all claims between the parties. Among other things, the order requires Defendant to execute authorization to allow the businesses in which he is a stakeholder to send his future distributions to a CPA and to authorize the CPA to remit portions of those distributions to Plaintiff. It also requires Defendant to provide certain financial reporting information about the businesses to Plaintiff. Finally, the order provides that the parties cannot communicate directly and instead must communicate through their attorneys or designated agents.

Six months later, Averett filed a motion to withdraw as Defendant's counsel. Plaintiff opposed Averett's motion. Plaintiff asserted that Averett needed to remain as counsel of record because Defendant was not a resident of North Carolina and lives in various locations throughout the year, both in the United States and overseas. Thus, Plaintiff asserted, if Defendant violated the consent order, "service under Rules 4 and 5 of the Rules of Civil Procedure . . . may become effectively impossible." Plaintiff also asserted that the consent order requires the parties to communicate through attorneys or agents and, other than Averett, Defendant had no attorney or agent through whom Plaintiff could communicate.

After a non-evidentiary hearing, the trial court entered a written order denying Averett's motion to withdraw "at this time." The order stated that Averett's motion would be allowed if Defendant retained another attorney, designated a registered agent for service of process, or posted a surety bond. Averett appealed the trial court's order.

Analysis

Averett argues that the trial court abused its discretion by denying her motion to withdraw as counsel. Because the trial court's order imposes conditions on Averett's withdrawal that are unsupported either by findings or by the record on appeal, we reverse the court's order.

"The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990). "An attorney may withdraw from an action after making an appearance if there is (1) justifiable cause, (2)

reasonable notice to his clients, and (3) permission of the court." *Lamb v. Groce*, 95 N.C. App. 220, 221, 382 S.E.2d 234, 235 (1989). "Whether an attorney is justified in withdrawing from a case will depend upon the particular circumstances, and no all-embracing rule can be formularized." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965).

Here, many of the typical reasons justifying withdrawal are present. Both Averett and her client want to end the representation. There is no evidence that Averett's withdrawal would prejudice her client in any way. Likewise, there is no ongoing litigation or work to be done before the trial court in this case. The parties settled their dispute and the court entered a consent order. All that remains is ongoing compliance with that order, whose terms continue indefinitely. And there is no evidence that Averett's client has failed to comply with that consent order or that future litigation concerning the order is imminent.

In short, this was not a case where withdrawal could prejudice the client, delay ongoing proceedings, or disrupt the orderly administration of justice. *Benton*, 97 N.C. App. at 587, 389 S.E.2d at 413. Instead, Plaintiff opposed Averett's motion to withdraw on the ground that Defendant lives in several homes throughout the year in locations around the world, making his location at any given time difficult to ascertain. Plaintiff also pointed to an earlier agreement between the parties that prohibits them from speaking directly and requires them to communicate through attorneys or agents.

Based on these arguments, the trial court entered an order providing that Averett's motion to withdraw is "denied at this time." The order then states that Averett's motion "shall be reconsidered and allowed" if one of three conditions is met:

> Provided, such Motion shall be reconsidered and allowed if one of the following conditions is met:
>
> 1. A general appearance is made in the action by substitute counsel for Defendant, an attorney licensed to practice law in North Carolina
>
> 2. A registered agent for Defendant submits a properly executed registration with the North Carolina Secretary of State.
>
> 3. A surety bond, satisfactory to the Court, is executed and placed in the custody of an agreed upon fiduciary.

We are mindful that trial courts should be given broad discretion to assess whether withdrawal is appropriate. *Benton*, 97 N.C. App. at

587, 389 S.E.2d at 412. But here, the trial court's conditions put Averett and her client in an unjust position. Nothing in the record on appeal indicates that Defendant's compliance with the consent order requires the ongoing assistance of legal counsel. Moreover, nothing in the record indicates that Defendant likely will not comply with the terms of the agreement.

Nevertheless, the terms of withdrawal imposed by the court are directed at future noncompliance. They require Defendant to either retain a new attorney, retain a registered agent for service of process, or post a security bond. All of these conditions are designed to assist Plaintiff in the event that Defendant violates the terms of the order and further court proceedings are necessary. Yet we find no evidence in the record on appeal that indicates a likelihood that Defendant will violate the court's order. As a result, the court's order forces both Defendant and Averett to continue in a legal representation neither wants, or forces Defendant to take actions that, so long as he complies with the order, are both costly and entirely unnecessary. Thus, on the record before this Court, the conditions imposed in the trial court's order are unsupported by evidence, would impose an unfair burden on Defendant in order for Averett to withdraw, and are thus outside the court's discretion.

Our holding should not be read as a requirement that trial courts must conduct an evidentiary hearing, or make any specific fact findings, when ruling on a motion to withdraw. The challenged order is atypical—it conditioned withdrawal that both the attorney and client desired, in a case without any ongoing court proceedings, on the client taking steps to assist the opposing party in the event of a future violation of a final court order. To support the sort of conditions imposed in this order, the trial court's discretionary decision must be based on "facts disclosed by the record." *Smith*, 264 N.C. at 211, 141 S.E.2d at 306.

To be sure, there is a portion of the court's consent order that is complicated by Averett's proposed withdrawal. The consent order prohibits the parties from communicating directly and requires them to communicate with each other through attorneys or agents. Moreover, the order requires the parties to regularly communicate—specifically, Defendant must provide Plaintiff with financial reports on businesses in which he is a stakeholder. Thus, the trial court properly could require, in connection with Averett's withdrawal, that Defendant identify an attorney or agent through which the parties can communicate.

But the trial court's order denying Averett's motion to withdraw does not do so. As explained above, it is aimed at remedies for future

noncompliance and resulting court proceedings. It requires Defendant to either retain another attorney, retain a registered agent for service of process, or post a security bond. None of these steps is necessary to comply with the consent order. That consent order, to which both parties assented, could have required Defendant always to retain a licensed North Carolina attorney; it did not. It permits Defendant to designate an agent through whom Plaintiff may communicate, and that agent need not reside in North Carolina. Thus, although the trial court would be well within its sound discretion to order Defendant to identify an attorney or agent for communication upon Averett's withdrawal, the challenged order does not do so.

We therefore reverse the trial court's order and remand with instructions to allow Averett's motion to withdraw. But we note that, although we find no evidence in the record on appeal concerning Defendant's likelihood of noncompliance with the consent order, there are unverified allegations from Plaintiff that Defendant willfully and deliberately violated past orders and may seek to use corporate laws or rules of another state as a basis to refuse to comply in the future.

Our holding does not prevent the trial court, in the court's discretion, from conducting further proceedings or entering additional orders to ensure compliance with the consent order. This could include an order requiring Defendant to identify an attorney or agent for communications under the consent order and, with appropriate evidence, an order requiring Defendant to take other actions that would prevent him from evading the terms of the consent order. We hold only that, on the record before us, there was justifiable cause to permit Averett's withdrawal and insufficient evidence to support the conditions imposed on that withdrawal in the challenged order. We therefore reverse the trial court's order and remand for entry of an order allowing Melissa Averett to withdraw as counsel.

Conclusion

We reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

Judges MURPHY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 December 2019)

Case	Court	Disposition
HOWARD v. COLL. OF THE ALBEMARLE No. 18-1131	N.C. Industrial Commission (TA-25672)	Dismissed
IN RE A.H. No. 19-57	Guilford (16JT71) (16JT72)	Vacated and Remanded
IN RE B.T. No. 19-153	Davie (16JT25) (16JT26) (16JT27)	Affirmed
IN RE D.A.I.P. No. 18-1093	Rockingham (15JT68) (16JT123)	Affirmed
IN RE D.D.H. No. 19-155	Rowan (16JT100)	Affirmed
IN RE L.M. No. 18-790	Johnston (17JB205)	Affirmed in part, remanded in part
JORDAN v. ALBERS No. 19-389	Cabarrus (15CVD3917)	Affirmed in part, Reversed and Remanded in Part
LEQUIRE v. SE. CONSTR. & EQUIP. CO., INC. No. 19-603	N.C. Industrial Commission (16-744994)	Affirmed
LITTLE WILLIE CTR. CMTY. DEV. CORP. v. CITY OF GREENVILLE No. 19-357	Pitt (18CVS1548)	Affirmed
PITT CNTY. EX REL. LABRECQUE v. WORTHINGTON No. 19-177	Pitt (11CVD318)	Vacated and Remanded
PITT CNTY. EX REL. McLAMB v. WORTHINGTON No. 19-178	Pitt (15CVD2450)	Vacated and Remanded
SHORT v. PNC BANK, N.A. No. 19-198	Wake (18CVS9470)	Affirmed in part; dismissed in part.
STATE v. AUSTIN No. 19-148	New Hanover (17CRS59354)	Affirmed

STATE v. BAREFOOT No. 19-336	Nash (17CRS54867)	No error in part, dismissed in part.
STATE v. BENFIELD No. 18-1193	Forsyth (17CRS490)	Dismissed
STATE v. ELLIOTT No. 19-116	Union (16CRS53852) (17CRS55496-97)	Affirmed
STATE v. EVANS No. 19-91	New Hanover (17CRS61032) (18CRS50125-26)	Dismissed
STATE v. GILLARD No. 18-1250	Wake (16CRS211605)	Affirmed in part and remanded in part
STATE v. GROOMS No. 18-1211	Warren (15CRS50470-72)	No Error
STATE v. HOLLOMAN No. 19-5	Wayne (15CRS52352)	No Error
STATE v. HUNTER No. 18-1029	Columbus (13CRS53110-11) (13CRS946-47)	No Error
STATE v. JOHNSON No. 18-1218	Rowan (13CRS54510)	No Prejudicial Error
STATE v. KELLY No. 19-136	Johnston (16CRS57114-16)	Dismissed in part; vacated in part and remanded.
STATE v. LOCKLEAR No. 19-447	Robeson (17CRS53313)	Vacated and Remanded
STATE v. McPHAIL No. 19-144	New Hanover (18CRS1359) (18CRS50187)	Affirmed
STATE v. NANCE No. 18-1273	Alamance (16CRS51226) (16CRS51227)	No Error
STATE v. NESBITT No. 19-286	Davie (17CRS50165) (17CRS50170-71) (17CRS50219)	Affirmed

STATE v. QUINN No. 19-251	Mecklenburg (16CRS222461-62) (16CRS222465-66) (16CRS222469) (16CRS222471) (17CRS7406)	NO PREJUDICIAL ERROR
STATE v. RANGEL No. 19-131	Mecklenburg (15CRS207225-27)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. RHODES No. 19-127	Sampson (14CRS52905) (15CRS202)	No Error

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