270 N.C. App.—No. 1 Pages 1-203

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*FEBRUARY 5, 2021*

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

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**OF**

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# COURT OF APPEALS

## CASES REPORTED

### FILED 18 FEBRUARY 2020



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



## HEADNOTE INDEX

**APPEAL AND ERROR**

**Interlocutory appeal—substantial right—order denying preliminary injunction—challenge to voter ID law—**An interlocutory order denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law—which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections—was immediately appealable because it affected plaintiffs' substantial right to vote on an equal basis with other North Carolina citizens, and this right would be lost absent immediate appeal. **Holmes v. Moore, 7.**

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the merits in demonstrating that racial discrimination was a "substantial" or "motivating" factor behind the law's enactment, while the defendants (including state legislators) failed to show the law would have been enacted regardless of any discriminatory intent. Further, plaintiffs showed they were likely to suffer irreparable harm (denial of equal treatment when voting in upcoming elections) if the law were not enjoined. **Holmes v. Moore, 7.**

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**Rule 602—third party testimony—defendant's knowledge of shooting—plain error analysis—**In a murder prosecution, although testimony from a witness regarding whether defendant knew her brother planned to shoot the victim should not have been admitted due to a lack of foundation, the erroneous admission did not amount to plain error given the substantial other evidence, though circumstantial, of defendant's participation in the events that led to the shooting and which supported the State's theory that defendant conspired to murder the victim. **State v. Mitchell, 136.**

**Rule 701—inferential testimony—lack of foundation—plain error analysis—**In a murder prosecution, although the admission of testimony from two witnesses

## SCHEDULE FOR HEARING APPEALS DURING 2021

## NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

Additional dates to be determined; all dates are subject to change.

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

CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

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PATRICIA BARNARD, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF
v.
JOHNSTON HEALTH SERVICES CORPORATION D/B/A JOHNSTON HEALTH, AND ACCELERATED CLAIMS, INC., DEFENDANTS

No. COA19-290

Filed 18 February 2020

**1. Insurance—medical payments coverage—assignment of benefits—automobile accident**

Where plaintiff was in an automobile accident and signed a consent form authorizing defendant hospital to collect "all health and liability insurance" on her behalf to cover her medical treatment, her assignment of benefits applied to her medical payments benefits from her automobile insurance policy.

**2. Insurance—medical payments coverage—overpayment credit—subrogation by health insurer**

Where plaintiff's automobile insurer—through medical payments coverage—and her health insurer both made payments toward plaintiff's hospital bill after an automobile accident, resulting in an overpayment credit on plaintiff's account, plaintiff's health insurer (and not plaintiff) was entitled to receive the overpayment credit based on its equitable subrogation rights.

Appeal by plaintiffs from order entered 1 November 2018 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 15 October 2019.

*The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III and L. Lamar Armstrong, Jr. and White & Stradley, PLLC, by J. David Stradley for plaintiff-appellant.*

*Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and Allison J. Becker, for defendant-appellee Johnston Health Services Corporation d/b/a Johnston Health.*

*Kilpatrick Townsend & Stockton LLP, by John M. Moye, for defendant-appellee Accelerated Claims, Inc.*

BRYANT, Judge.

Where the clauses for assignment of benefits and subrogation properly applied to plaintiff's MedPay benefits, we affirm the trial court's judgment on the pleadings in favor of defendants.

Plaintiff Patricia Barnard sustained injuries in a motor vehicle collision on 17 October 2016 and was taken to Johnston Health Hospital ("Johnston Health") for treatment. Per Johnston Health's patient intake practice, upon entry, patients are asked to sign admission paperwork, provide proof of health insurance and confirm if treatment is sought as a result of an automobile accident. Accelerated Claims, Inc. ("ACI"), an account management company, regularly assisted Johnston Health with account management for emergency patients involved in motor vehicle accidents. Once a patient is determined to have an automobile liability policy that contains medical payments coverage, Johnston Health assigns the patient account to ACI for collection of benefits.

Upon arriving at Johnston Health's emergency department, plaintiff executed a "General Consent for Treatment" form. The consent form contained an assignment of benefits clause which stated, *inter alia*, the following:

> I request that payment of authorized benefits be made to the appropriate UNC Health Care affiliate[, Johnston Health,] on my behalf. I authorize [Johnston Health] to bill directly and assign the right to *all health and liability insurance benefits* otherwise payable to me, and I authorize direct payment to [Johnston Health].

(emphasis added).

At the time of admission, plaintiff had an automobile insurance policy with State Farm Mutual Automobile Insurance Company ("State

Farm"). The State Farm policy, in part, provided plaintiff, as the insured, with coverage for medical expenses caused by a motor vehicle accident (hereinafter "MedPay"). Plaintiff, a former state employee, was also insured by Blue Cross Blue Shield ("BCBS") through its State Health Plan.[1] After plaintiff was discharged, Johnston Health submitted claims regarding medical expenses incurred by plaintiff to both insurers. ACI was assigned plaintiff's account to manage and collect payments under the automobile insurance policy from State Farm.

On 13 January 2017, Johnston Health received a payment of $2,000 from State Farm—the maximum MedPay available under the policy. The payment was credited to plaintiff's account. On 2 May 2017, Johnston Health received payment of $694.63 from BCBS. After the BCBS payment was applied, plaintiff's account had a credit balance. Johnston Health refunded the credit to BCBS pursuant to the subrogation clause in plaintiff's BCBS policy.

In 2018, plaintiff initiated a class action lawsuit[2] against Johnston Health and ACI, alleging that defendants improperly conspired to recover payments from automobile insurance companies, who insure emergency room patients in car accidents. Plaintiff filed a complaint and an amended complaint. Defendants filed separate answers denying wrongdoing. Defendants asserted that plaintiff executed an assignment of all health and liability insurance benefits, otherwise payable to her, prior to receiving medical treatment.

On 18 October 2018, plaintiff filed for a motion for partial judgment on the pleadings arguing that defendants were not entitled to collect MedPay from State Farm. Defendants answered and moved for judgment on the pleadings as to all claims asserted by plaintiff.

On 1 November 2018, the trial court denied plaintiff's motion and granted defendants' motion for judgment on the pleadings. The trial court found that "[p]laintiff executed an [a]ssignment of [b]enefits [to Johnston Health] which [the] language included 'the right to all health and liability insurance benefits otherwise payable to [plaintiff],' " that "MedPay benefits do constitute, at least in part, health insurance benefits," and that BCBS had the right to recover any amount paid on plaintiff's behalf from other insurance.

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1. Plaintiff is a retired state employee and contracted her State Health Plan insurance with BCBS.

2. A review of the record reveals no indication that a class was ever certified, and we note plaintiff's notice of appeal is on her behalf only.

Plaintiff filed notice of appeal.

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On appeal, plaintiff argues the trial court erred by: I) entering judgment in favor of defendants regarding her MedPay benefits, and II) finding that BCBS was entitled to recover the overpayment from her account.

We review the trial court's ruling for a motion for judgment on the pleadings *de novo*. *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 241, 742 S.E.2d 803, 807 (2013). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* (citation omitted). In considering a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "All well[-]pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.*

*I*

**[1]** First, plaintiff argues the trial court erred by finding that the assignment of "health and liability insurance" plaintiff executed at the hospital applied to her MedPay benefits with State Farm. We disagree.

"[T]he objective of construction of terms in the insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). "[T]o the extent there are any ambiguities, [we] provide a construction which a reasonable person in the position of the insured would have understood it to mean." *Wehrlen v. Amica Mut. Ins. Co.*, 118 N.C. App. 64, 69, 453 S.E.2d 557, 559 (1995) (citation and quotation marks omitted). "When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise." *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. "In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Id.*

In the instant case, plaintiff signed a consent form upon being admitted at the hospital—containing an assignment of benefits clause—which

authorized Johnston Health to collect "all health and liability insurance" on plaintiff's behalf to cover her medical treatment. The declaration page of plaintiff's State Farm policy contains the following relevant provision addressing coverage for medical payments: "[State Farm] will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury caused by accident and sustained by an insured."

The State Farm policy defined "bodily injury" as bodily harm, sickness or disease, including death. It provided the insured with MedPay only if the expenses were reasonably related to medical services; stating, "expenses are reasonable only if they are consistent with the usual fees . . . of similar medical providers in the geographical area in which the expenses were incurred for a specific medical service." The policy provision further allowed payment for services necessary "in achieving maximum medical improvement" for injuries sustained in car accidents and administered by a licensed medical provider in practice.

The purpose of MedPay in the State Farm policy is to afford financial assistance to the insured for medical services and treatment sought as a result of a car accident. By these terms, it is reasonable that a person, insured with State Farm, should interpret MedPay as providing additional health insurance benefits. Therefore, it was not error for the trial court to determine that MedPay benefits constitute—at least in part—health benefits and that plaintiff's assignment of benefits included those MedPay benefits.

Plaintiff's argument is overruled.

*II*

**[2]** Finally, plaintiff argues the trial court erred by finding that BCBS had a right to receive the overpayment on her account. Notably, plaintiff does not dispute the subrogation clause within her policy with BCBS, which allows BCBS to recover or to be reimbursed for payments towards plaintiff's injury. Rather, plaintiff argues that the subrogation clause is unenforceable towards her MedPay benefits. We disagree.

"It is well-settled in North Carolina that an insurer is subrogated to its insured's rights to recover medical expenses resulting from injuries inflicted by a tortfeasor when the insurer has paid such medical expenses pursuant to a medical payments provision in the insurance policy." *Moore v. Beacon Ins. Co.*, 54 N.C. App. 669, 670, 284 S.E.2d 136, 138 (1981).

Here, the subrogation clause in plaintiff's BCBS policy provides, in pertinent part, that BCBS "be subrogated to all rights of recovery a member has against any party potentially responsible for making payment to a member, due to a member's injuries, illness or condition, to the full extent of benefits provided[.]" Moreover, BCBS retains "the right to recover from, and be reimbursed by, the member for all amounts [BCBS] has paid and will pay as a result of the [member's] injury or illness[.]"

Plaintiff paid premiums on the BCBS policy as a part of the State Health Plan, and in exchange, was insured for accident and health insurance coverage. Following her accident, compensation was paid for medical expenses due to the injuries sustained during her accident. The compensation received by the hospital for plaintiff's medical expenses from State Farm and from BCBS resulted in a credit balance to her account. Because of the subrogation clause in the BCBS's State Health Plan, BCBS was refunded the overpayment.

Plaintiff argues the BCBS subrogation clause in the plan could not be enforced against MedPay benefits from State Farm. Plaintiff argues that N.C. Gen. Stat. § 135-48, which allows subrogation by BCBS, actually bars BCBS's right to subrogation. We find plaintiff's argument to be without merit. However, even if there was some merit afforded to plaintiff's argument, our Court has recognized that an insurer has equitable subrogation rights in recovering payments pursuant to medical payment provisions in an automobile insurance policy. *See id.* at 670–71, 284 S.E.2d at 138 ("[I]f the insurer has made payments to the insured for the loss covered by the policy and the insured thereafter recovers for such loss from the tortfeasor [or an insurance company], the insurer can recover from the insured the amount it had paid the insured, on the theory that otherwise the insured would be unjustly enriched by having been paid twice for the same loss.").

Therefore, plaintiff's coverage with State Farm entitled BCBS, not plaintiff, to be reimbursed for any overpayment of medical expenses. Plaintiff's argument is overruled.

Accordingly, for the foregoing reasons, the trial court's judgment on the pleadings for defendants is

AFFIRMED.

Judges TYSON and BROOK concur.

**HOLMES v. MOORE**

[270 N.C. App. 7 (2020)]

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, AND PAUL KEARNEY, SR., PLAINTIFFS

v.

TIMOTHY K. MOORE IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. COA19-762

Filed 18 February 2020

**1. Appeal and Error—interlocutory appeal—substantial right—order denying preliminary injunction—challenge to voter ID law**

An interlocutory order denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law—which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections—was immediately appealable because it affected plaintiffs' substantial right to vote on an equal basis with other North Carolina citizens, and this right would be lost absent immediate appeal.

**2. Constitutional Law—North Carolina—equal protection—entitlement to preliminary injunction—voter ID law—racial discrimination**

The trial court erred in denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law, which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections. Under the factors set forth in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), plaintiffs showed a likelihood of success on the merits in demonstrating that racial discrimination was a "substantial" or "motivating" factor behind the law's enactment, while the defendants (including state legislators) failed to show the law would have been enacted regardless of any discriminatory intent. Further, plaintiffs showed they were likely to suffer irreparable harm (denial of equal treatment when voting in upcoming elections) if the law were not enjoined.

Appeal by Plaintiffs from Order entered 19 July 2019 by Judges Nathaniel J. Poovey, Vince M. Rozier, Jr., and Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Southern Coalition for Social Justice, by Jeffrey Loperfido and Allison J. Riggs, and Paul, Weiss, Rifkind, Wharton & Garrison LLP, by Andrew J. Ehrlich, Ethan Merel, Apeksha Vora, Jane B. O'Brien, Paul D. Brachman, Jessica Anne Morton, and Laura E. Cox, pro hac vice, for plaintiffs-appellants.*

*Phelps Dunbar LLP, by Nathan A. Huff, and Cooper & Kirk, PLLC, by David H. Thompson, Peter A. Patterson, and Nicole Frazer Reaves, pro hac vice, and by Nicole J. Moss, for legislative defendants-appellees.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, Senior Deputy Attorney General Amar Majmundar, and Special Deputy Attorney General Paul M. Cox, for defendants-appellees the State of North Carolina and the North Carolina State Board of Elections.*

HAMPSON, Judge.

## Factual and Procedural Background

Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown, and Paul Kearney, Sr. (collectively, Plaintiffs)[1] appeal from an Order Denying Plaintiffs' Motion for Preliminary Injunction and Denying in Part and Granting in Part Defendants' Motions to Dismiss (Order) filed on 19 July 2019, concluding in part Plaintiffs were not entitled to a preliminary injunction enjoining Senate Bill 824, titled "An Act to Implement the Constitutional Amendment Requiring

1. On 18 September 2019, Plaintiffs filed a Motion with this Court requesting we take judicial notice of Plaintiff Shakoya Carrie Brown's Notice of Voluntary Dismissal filed with the trial court on 16 September 2019. However, Plaintiffs have failed to make a motion to amend the Record under N.C.R. App. P. 9(b)(5), which is "the proper method to request amendment of the record[.]" *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 267, 468 S.E.2d 856, 857 (1996). Further, "we will not take judicial notice of a document outside the record when no effort has been made to include it." *Id.* at 268, 468 S.E.2d at 858. Accordingly, we deny Plaintiffs' Motion. Plaintiffs also have not filed any motion in this Court requesting Ms. Brown be dismissed or permitted to withdraw from this appeal.

Photographic Identification to Vote," (S.B. 824),[2] which established, *inter alia*, photographic voter identification (photo ID) requirements for elections in North Carolina. The Record before us tends to show the following:

On 6 November 2018, a majority of North Carolina voters, approximately 55%, voted in favor of amending Article VI of the North Carolina Constitution by requiring voters to present qualifying photo ID before casting a ballot. Sections 2(4) and 3(2) of Article VI of the North Carolina Constitution now provide:

> Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

N.C. Const. art. VI, §§ 2(4), 3(2).

Less than a month after approval of this constitutional Amendment and during a "lame-duck" legislative session, the General Assembly passed S.B. 824 as implementing legislation on 6 December 2018. Governor Roy Cooper (Governor Cooper) vetoed S.B. 824 on 14 December 2018. Five days later, the General Assembly reconvened and overrode Governor Cooper's veto. Thus, on 19 December 2018, S.B. 824 became law. 2018 N.C. Sess. Law 144.

At its core, S.B. 824 requires all voters, both those voting in person or by absentee ballot, "produce" an acceptable form of identification "that contain[s] a photograph of the registered voter[.]" *Id.* § 1.2(a); *see also id.* § 1.2(e). Section 1.2(a) designates ten different forms of acceptable IDs:

1. North Carolina driver's licenses;

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2. S.B. 824 was subsequently enacted as North Carolina Session Law 2018-144. *See* 2018 N.C. Sess. Law 144 (N.C. 2018) (codified as amended at N.C. Gen. Stat. §§ 20-37.7; 130A-93.1; 161-10; 163A-741, -821, -867, -869, -869.1, -913, -1133-34, -1137, -1145.1-3, -1298, -1300, -1303, -1306-10, -1315, -1368, -1389, -1411, -1520 (2018)); *see also* 2018 N.C. Sess. Law 146, § 3.1(a) (N.C. 2018) (authorizing the recodification of Chapter 163A into Chapters 163, 138A, and 120C). The challenged provisions of S.B. 824 are now found at Sections 163-82.8A (photo-ID requirement), -166.16 (list of valid photo IDs), -166.17 (student-ID requirements), -166.18 (government-ID requirements), -229 (absentee ballots), -230.2 (absentee ballots), -166.7, -227.2, and -22 of our General Statutes. *See* N.C. Gen. Stat. §§ 163-82.8A; -166.16-18; -229; -230.2; -166.7; -227.2; -22 (2019). Because the parties refer to Session Law 824 as S.B. 824, we too refer to it as S.B. 824.

2. Certain nontemporary IDs issued by the Division of Motor Vehicles (DMV);
3. United States passports;
4. North Carolina voter photo-ID cards;
5. Tribal enrollment cards issued by a state or federally recognized tribe;
6. Certain student IDs issued by post-secondary institutions;
7. Certain employee IDs issued by a state or local government entity;
8. Out-of-state driver's licenses or special ID cards for nonoperators for newly registered voters;
9. Military IDs issued by the United States government; and
10. Veterans IDs issued by the United States Department of Veterans Affairs.

*Id.* § 1.2(a). Under this Section, the first eight forms of ID may be used only if "valid and unexpired, or . . . expired for one year or less[.]" *Id.* Whereas, military and veterans IDs may be used "regardless of whether the identification contains a printed expiration or issuance date[.]" *Id.* Moreover, if a voter is sixty-five years old or older, any expired form of identification allowed above is deemed valid if it was unexpired on the voter's sixty-fifth birthday. *Id.* Student and government-employee IDs, however, do not automatically qualify as acceptable IDs. Instead, post-secondary institutions and public employers must apply to the North Carolina State Board of Elections for approval of their IDs. *See id.* §§ 1.2(b)-(c) (containing original approval process); *see also* 2019 N.C. Sess. Law 22, §§ 2-3 (N.C. 2019) (amending approval process).

S.B. 824 also contains two ways for voters to obtain free photo-ID cards. First, a registered voter may visit their county board of elections and receive an ID "without charge" so long as the voter provides their name, date of birth, and the last four digits of their social security number. 2018 N.C. Sess. Law 144, § 1.1(a). Second, under Section 1.3(a), voters over the age of seventeen may obtain free of charge a nonoperator-ID card from the DMV as long as the voter provides certain documentation, such as a birth certificate. *Id.* § 1.3(a). If the voter does not have this documentation, the State must supply it free of charge.

*See id.* § 3.2(b). Similarly, if a registered voter's driver's license has been "seized or surrendered due to cancellation, disqualification, suspension, or revocation[,]" the DMV must automatically mail the voter a "special identification card" that can be used for voting. *Id.* § 1.3(a).

Lastly, S.B. 824 contains several exemptions to its photo-ID requirements. Exemptions exist for voters who (1) have "a religious objection to being photographed," (2) are victims of a recent natural disaster, or (3) "suffer[ ] from a reasonable impediment that prevents [them] from presenting photograph identification[.]" *Id.* § 1.2(a). If one of these circumstances applies, a voter may cast a "provisional ballot" by "complet[ing] an affidavit under penalty of perjury at the voting place" affirming their identity and their reason for not presenting photo ID. *Id.* After submitting this affidavit, the county board of elections "shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false." *Id.* In a similar vein, if a registered voter fails to bring their acceptable ID to the polls, the voter may "cast a provisional ballot that is counted only if the registered voter brings an acceptable form of photograph identification . . . to the county board of elections no later than the end of business on the business day prior to the canvass . . . of elections[.]" *Id.*

On the same day S.B. 824 became law, Plaintiffs filed their Verified Complaint (Complaint) in this action in Wake County Superior Court against Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session (collectively, Legislative Defendants); the State of North Carolina; and the North Carolina State Board of Elections (collectively, State Defendants).[3] In their Complaint, Plaintiffs alleged six causes of action claiming S.B. 824 facially violates various provisions of the North Carolina Constitution. In particular, Plaintiffs alleged S.B. 824 violates the Equal Protection Clause found in Article I, Section 19 of the North Carolina Constitution, claiming S.B. 824 was enacted with racially discriminatory intent and thereby intentionally discriminates against voters of color (Discriminatory-Intent Claim). The same day, Plaintiffs also filed a Motion for Preliminary Injunction (Preliminary-Injunction Motion) seeking a preliminary injunction to

3. We refer to both Legislative and State Defendants collectively as Defendants.

prevent "Defendants from implementing in any regard, relying on, enforcing, conducting elections, or preparing to conduct any elections in conformity with the voter ID provisions of [S.B.] 824, specifically Parts I and IV." In response, Legislative and State Defendants each filed Motions to Dismiss on 22 January and 21 February 2019, respectively.

The Chief Justice of the North Carolina Supreme Court transferred this case to a three-judge panel on 19 March 2019. *See* N.C. Gen. Stat. § 1-267.1(a1) (2019) (requiring the transfer of "any facial challenge to the validity of an act of the General Assembly" to a three-judge panel of the Superior Court of Wake County). After hearing arguments from the parties, the three-judge panel entered its Order on Defendants' Motions to Dismiss and Plaintiffs' Preliminary-Injunction Motion on 19 July 2019. In its Order, the trial court dismissed all of Plaintiffs' claims except for Plaintiffs' Discriminatory-Intent Claim, concluding "Plaintiffs have made sufficient factual allegations to support" this Claim. However, a majority of the panel denied Plaintiffs' Preliminary-Injunction Motion, concluding "Plaintiffs have failed to demonstrate a likelihood of success on the merits" of their Discriminatory-Intent Claim. One judge dissented from the portion of the Order denying Plaintiffs' Preliminary-Injunction Motion because, in his opinion and based on the evidence before the panel, "Plaintiffs have shown a reasonable probability of success on the merits [of Plaintiffs' Discriminatory-Intent Claim] and that the issuance of an injunction is necessary to protect Plaintiffs' rights during the litigation." (citation omitted). On 24 July 2019, Plaintiffs filed Notice of Appeal from the trial court's Order. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019).

## Appellate Jurisdiction

**[1]** The trial court's Order in this case both partially dismissed Plaintiffs' claims and denied the Preliminary-Injunction Motion. This Order does not contain a certification of the dismissed claims for immediate appeal under Rule 54(b), and Plaintiffs do not bring forward any arguments regarding the dismissed claims. Thus, we do not address the trial court's dismissal of those claims and leave that aspect of the Order undisturbed. Rather, Plaintiffs only contend the trial court erred in denying the Preliminary-Injunction Motion.

The denial of a preliminary injunction is interlocutory in nature. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted); *see also Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) ("An interlocutory order . . . is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle

and determine the entire controversy." (citation omitted)). A party may appeal an interlocutory order if it "deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Industries*, 308 N.C. at 400, 302 S.E.2d at 759.

A substantial right has consistently been defined as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration, citation, and quotation marks omitted). "The burden is on the appellant to establish that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Coates v. Durham Cty.*, ___ N.C. App. ___, ___, 831 S.E.2d 392, 394 (2019) (citation and quotation marks omitted). "We consider whether a right is substantial on a case-by-case basis." *Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605.

Here, Plaintiffs assert the Order affects a substantial right of theirs—namely, "the right to vote on equal terms and free from intentional discrimination[.]" Indeed, our Supreme Court has recognized: "The right to vote is one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (citing U.S. Const. amend. XV; N.C. Const. art. I, §§ 9, 10, 11); *see also Wesberry v. Sanders*, 376 U.S. 1, 17, 11 L. Ed. 2d 481, 492 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). More specifically, though, Plaintiffs contend their substantial right—"to go to the polls in the March 2020 primary [and in the fall general elections] under laws that were not designed to make it harder for them and other voters of color to vote"—will be lost absent review and imposition of a preliminary injunction by this Court.

In contrast, Legislative Defendants argue no substantial right of these *individual* Plaintiffs will be lost absent review because all Plaintiffs will be able to vote under S.B. 824. However, Legislative Defendants fundamentally miss the point—and, indeed, the substantial right that would be lost absent appeal. "In decision after decision, [the United States Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an *equal basis* with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 31 L. Ed. 2d 274, 280 (1972) (emphasis added) (citations omitted). Thus,

where Plaintiffs have sufficiently alleged, as discussed in more detail *infra*, S.B. 824 denies Plaintiffs the "right to participate in elections on an equal basis with other citizens in [North Carolina]" because S.B. 824's restrictions, which were enacted with discriminatory intent, disproportionately impact African American voters'—and thus Plaintiffs'—ability to vote in comparison to white voters, Plaintiffs have demonstrated a substantial right that will be lost absent immediate appeal. *Id.* (citations omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229-30 (4th Cir. 2014) (addressing an interlocutory appeal from a district court's denial of a preliminary injunction where the plaintiffs challenged H.B. 589, North Carolina's previous voter-ID-requirement law, on the grounds that it violated equal protection provisions of the United States Constitution). This is so because it is the right to participate in elections on an *equal* basis that is substantial; accordingly, whether Plaintiffs could conceivably still participate in the elections—by jumping through the allegedly discriminatory hoops of S.B. 824—is, in and of itself, not determinative of whether or not S.B. 824 negatively affects the substantial right claimed by Plaintiffs in this case.[4]

Lastly, on 31 December 2019, a federal district court granted a preliminary injunction enjoining, *inter alia*, S.B. 824's voter-ID provisions, concluding the plaintiffs in that case had satisfied their burden of showing a likelihood of success on their claim that these provisions were impermissibly motivated, at least in part, by discriminatory intent in violation of the Equal Protection Clause of the United States Constitution. *See N.C. State Conference of the NAACP v. Cooper*, ___ F. Supp. 3d ___, ___ (M.D.N.C. 2019). At oral arguments in the present case, Legislative Defendants argued the federal district court's granting of a preliminary injunction divests this Court of jurisdiction because Plaintiffs can no

4. In a similar vein, Legislative Defendants assert for these same reasons—*i.e.*, Plaintiffs *could* still vote under S.B. 824—that Plaintiffs necessarily lack standing to challenge S.B. 824 because they have "shown no likelihood of harm." However, just as with the substantial-right analysis, Legislative Defendants again miss the mark regarding Plaintiffs' alleged actual injury, which is the discriminatory burdens S.B. 824 imposes on Plaintiffs' right to participate in elections on an equal basis. *See, e.g.*, *Fla. Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 597 (1993) (explaining in the context of an equal protection claim, the "injury in fact" was the "denial of equal treatment . . . not the ultimate inability to obtain the benefit" (citation omitted)). Here, Plaintiffs' alleged injury in fact is the denial of equal treatment regarding Plaintiffs' ability to comply with S.B. 824's requirements, which Plaintiffs' have sufficiently alleged were enacted with discriminatory intent and disproportionately impact African Americans. That Plaintiffs may ultimately be able to vote in accordance with S.B. 824's requirements is not determinative of whether compliance with S.B. 824's commands results in an injury to Plaintiffs.

longer show a substantial right that will be lost given the fact that an injunction will remain in place at least through the March primaries.

However, the federal district court's injunction is merely temporary, and the timing of any trial and decision on the merits in either the state or federal litigation is uncertain. Moreover, Plaintiffs' Discriminatory-Intent Claim here solely invokes protections under our state Constitution. *See Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577 (requiring our state courts to make an "independent determination" of a plaintiff's claims under the North Carolina Constitution (citations omitted)), *aff'd per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996). Therefore, we conclude this Court has jurisdiction to address the merits of Plaintiffs' appeal from the denial of the Preliminary-Injunction Motion.

## Issue

**[2]** The sole issue on appeal is therefore whether the trial court erred in denying Plaintiffs' Motion to preliminarily enjoin S.B. 824's voter-ID requirements.

## Analysis

### I. Standard of Review

In reviewing a trial court's order denying a preliminary injunction, our Court has explained our standard of review:

> A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. In reviewing the denial of a preliminary injunction, an appellate court is not bound by the trial court's findings of fact, but may weigh the evidence anew and enter its own findings of fact and conclusions of law; our review is *de novo*. *De novo* review requires us to consider the question anew, as if not previously considered or decided, and such a review of the denial of a preliminary injunction is based upon the facts and circumstances of the particular case.

*Kennedy v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333 (2003) (citations and quotation marks omitted).

II. Discriminatory-Intent Claim

Plaintiffs allege S.B. 824 violates the Equal Protection Clause of the North Carolina Constitution because it intentionally discriminates against African American voters. *See* N.C. Const. art. I, § 19 (guaranteeing "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin").[5] Specifically, Plaintiffs assert S.B. 824 "is unconstitutional because it was enacted with the discriminatory intent to exclude voters of color from the electoral process."

The parties generally agree the United States Supreme Court's decision in *Arlington Heights v. Metropolitan Housing Corp.* and its progeny control the question of whether Plaintiffs are entitled to a preliminary injunction based on their Discriminatory-Intent Claim. *See* 429 U.S. 252, 50 L. Ed. 2d 450 (1977).

> In [*Arlington Heights*], the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination. *Id.* at 264-66[, 50 L. Ed. 2d at 464-65]. If discriminatorily motivated, such laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race. *Id.*
>
> When considering whether discriminatory intent motivates a facially neutral law, a court must undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." [*Id.* at 266, 50 L. Ed. 2d at 465.] Challengers need not show that discriminatory purpose was the "sole[ ]" or even a "primary" motive for the legislation, just that it was "*a* motivating factor." *Id.* at 265-66[, 50 L. Ed. 2d at 465] (emphasis added).

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5. Although Plaintiffs only allege violations of our state Constitution and not the federal Constitution, our Supreme Court has recognized the "Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983) (citation omitted). Accordingly, we utilize decisions under both Constitutions to analyze the validity of Plaintiffs' Discriminatory-Intent Claim. *See, e.g.*, *Libertarian Party of N.C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200-01 (2011) ("adopt[ing] the United States Supreme Court's analysis for determining the constitutionality of ballot access provisions").

Discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." [*Washington v. Davis*, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 608-09 (1976).] But the ultimate question remains: did the legislature enact a law "because of," and not "in spite of," its discriminatory effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, [60 L. Ed. 2d 870, 888] (1979) [(footnote omitted)].

In *Arlington Heights*, the Court set forth a nonexhaustive list of factors to consider in making this sensitive inquiry. These include: "[t]he historical background of the [challenged] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from normal procedural sequence"; the legislative history of the decision; and of course, the disproportionate "impact of the official action—whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266-67[, 50 L. Ed. 2d at 465-66] (internal quotation marks omitted).

In instructing courts to consider the broader context surrounding the passage of legislation, the Court has recognized that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for "[d]iscrimination today is more subtle than the visible methods used in 1965." Even "second-generation barriers" to voting, while facially race neutral, may nevertheless be motivated by impermissible racial discrimination. [*Shelby County v. Holder*, 570 U.S. 529, 563-64, 186 L. Ed. 2d 651, 677 (2013)] (Ginsberg, J., dissenting) (cataloguing ways in which facially neutral voting laws continued to discriminate against minorities even after passage of Voting Rights Act).

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." [*Hunter v. Underwood*, 471 U.S. 222, 228, 85

> L. Ed. 2d 222, 228 (1985) (citation omitted).] When determining if this burden has been met, courts must be mindful that "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265-66[, 50 L. Ed. 2d at 465]. For this reason, the judicial deference accorded to legislators when "balancing numerous competing considerations" is "no longer justified." *Id.* Instead, courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices. If a court finds that a statute is unconstitutional, it can enjoin the law.

*N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016) (alterations in original) (citations omitted).

Both Defendants, however, take issue with several parts of this analysis and suggest differing standards should apply. First, Legislative Defendants, citing *Arlington Heights*, argue that for Plaintiffs to carry their burden of proving S.B. 824 is racially discriminatory, "Plaintiffs must prove *both* racially discriminatory impact *and* 'racially discriminatory intent or purpose.' " Whereas, State Defendants contend that because Plaintiffs raise a facial challenge to S.B. 824, which generally requires a showing that "there are no circumstances under which the statute might be constitutional" to prevail, quoting *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018) (citation and quotation marks omitted), and because we must presume S.B. 824, a North Carolina statute, is constitutional and therefore afford it "great deference," quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (citation and quotation marks omitted), "Plaintiffs must show that it is impossible to enforce [S.B.] 824 in a way that does *not* discriminate against voters based on race" in order to succeed on the merits. However, both Defendants misinterpret Plaintiffs', and their own, burden under a challenge, such as this, to a facially neutral law allegedly motivated by a discriminatory purpose.

First, Legislative Defendants misconstrue the initial burden under the burden-shifting framework established by *Arlington Heights*, which first requires "[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause." 429 U.S. at 265, 50 L. Ed. 2d at 464. To aid in this task, *Arlington Heights* provides a list of nonexhaustive factors for courts to consider, and one of those factors is the disproportionate "impact of the official action—whether it bears more heavily on one race than another[, *i.e.*, discriminatory impact.]" *Id.* at 266, 50 L. Ed. 2d at 465 (citation and quotation marks omitted). Stated

another way, discriminatory *impact* can support an inference of discriminatory *intent or purpose*; however, only "discriminatory *intent or purpose is required* to show a violation of the Equal Protection Clause." *Id.* at 265, 50 L. Ed. 2d at 464 (emphasis added); *see also Davis*, 426 U.S. at 242, 48 L. Ed. 2d at 608-09 (holding discriminatory intent or purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that *the law bears more heavily on one race than another*" (emphasis added)).[6]

Second, State Defendants misunderstand the presumptions, or lack thereof, afforded to the law's defenders at the second stage of the *Arlington Heights* analysis. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228, 85 L. Ed. 2d at 228 (citation omitted). Although State Defendants correctly point out North Carolina caselaw generally "gives acts of the General Assembly great deference," *Rhyne*, 358 N.C. at 167, 594 S.E.2d at 7 (citation and quotation marks omitted), such deference is not warranted when the burden shifts to a law's defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent. *See Arlington Heights*, 429 U.S. at 265-66, 50 L. Ed. 2d at 465 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . *judicial deference is no longer justified*." (emphasis added) (footnote omitted)).[7] Accordingly, the general standard applied

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6. Legislative Defendants' argument rests almost entirely on the United States Supreme Court's pronouncement in *Palmer v. Thompson*—"[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224, 29 L. Ed. 2d 438, 444 (1971). We first note *Palmer* was decided before both *Davis* and *Arlington Heights* and that both decisions seem to nullify *Palmer*'s pronouncement. Furthermore, although the Supreme Court has never expressly overturned *Palmer*, the Eleventh Circuit has previously noted the decision's "holding simply has not withstood the test of time, even in the Fourteenth Amendment equal protection context." *Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993) (citations omitted). In any event and as discussed *infra*, Plaintiffs have sufficiently alleged *some* disproportionate impact caused by S.B. 824, which is sufficient, along with the presence of the other *Arlington Heights* factors, to support a showing of discriminatory intent under *Arlington Heights*'s totality-of-the-circumstances test. *See McCrory*, 831 F.3d at 231 ("Showing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent." (footnote omitted)).

7. In this sense, *Arlington Heights*'s burden-shifting framework is congruent with our Supreme Court's "strong presumption that acts of the General Assembly are constitutional[.]" *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) (citations omitted). Under an *Arlington Heights* analysis, a plaintiff must *first* show discriminatory

to facial constitutional challenges is also inapplicable because the *Arlington Heights* framework dictates the law's defenders must instead "demonstrate that the law would have been enacted without" the alleged discriminatory intent. *Hunter*, 471 U.S. at 228, 85 L. Ed. 2d at 228 (citation omitted).

Therefore, we apply the framework created by *Arlington Heights* and succinctly summarized by *McCrory*. Accordingly, we turn to the *Arlington Heights* factors to determine whether Plaintiffs have shown—at this preliminary stage on the current Record—a likelihood of prevailing on the merits of their Discriminatory-Intent Claim.

*A. Historical Background*

Under *Arlington Heights*, a court reviewing a discriminatory-intent claim should consider "[t]he historical background of the decision" challenged as racially discriminatory. 429 U.S. at 267, 50 L. Ed. 2d at 465 (citations omitted). "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223-24 (citation omitted). As the *McCrory* Court stated: "Examination of North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state, seems particularly relevant in this inquiry." *Id.* at 223.

Both the United States Supreme Court and the Fourth Circuit have recently summarized the historical context in which this case arises. *See Shelby Cty.*, 570 U.S. at 552, 186 L. Ed. 2d at 670; *McCrory*, 831 F.3d at 223-25. As *Shelby County* recognized, "[i]t was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race." 570 U.S. at 552, 186 L. Ed. 2d at 670. Just as with other states in the South, "North Carolina has a long history of race

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intent motivated the challenged act, and once this initial burden has been overcome, "judicial deference is no longer justified." 429 U.S. at 265-66, 50 L. Ed. 2d at 465 (footnote omitted). Similarly, although under our caselaw we initially afford a "strong presumption" in favor of a law's constitutionality, this presumption nevertheless can be overcome, at which point deference is likewise not warranted. *See Stephenson*, 355 N.C. at 362, 562 S.E.2d at 384 ("Although there is a strong presumption that acts of the General Assembly are constitutional, *it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional*." (emphasis added) (citations omitted)).

discrimination generally and race-based vote suppression in particular." *McCrory*, 831 F.3d at 223.

To help combat this "extraordinary problem" and ensure African Americans and other minorities the right to vote, Congress enacted the Voting Rights Act of 1965 (VRA). *Shelby Cty.*, 570 U.S. at 534, 186 L. Ed. 2d at 659. Under the VRA, Congress "required [certain] States to obtain federal permission before enacting any law related to voting[.]" *Id.* at 535, 186 L. Ed. 2d at 659. In order to obtain "preclearance," the State had to demonstrate that their proposed legislation "had neither the purpose nor effect of diminishing the ability of any citizens to vote on account of race or color." *McCrory*, 831 F.3d at 215 (citation and quotation marks omitted). "Forty North Carolina jurisdictions were covered under" this preclearance regime. *Id.* (citation omitted). "During the period in which North Carolina jurisdictions were [subjected to preclearance], African American electoral participation dramatically improved." *Id.*[8] "After years of preclearance and expansion of voting access, by 2013 African American registration and turnout rates had finally reached near-parity with white registration and turnout rates." *Id.* at 214.

The General Assembly's first attempt at a photo-ID law began in 2011. While still subject to preclearance, the General Assembly passed a photo-ID law along strict party lines; however, then-Governor Beverly Perdue vetoed the proposed bill. In her statement accompanying her veto, then-Governor Perdue expressed concern that the "bill, as written, will unnecessarily and unfairly disenfranchise many eligible and legitimate voters." Approximately two years later, the General Assembly again began discussions of another photo-ID law—House Bill 589 (H.B. 589). *See id.* at 227. In its initial form, H.B. 589's photo-ID requirements were "much less restrictive" than a later version passed after the United States Supreme Court's decision in *Shelby County*. *Id.*; *see also Shelby Cty.*, 570 U.S. at 529, 186 L. Ed. 2d at 651. Indeed, the pre-*Shelby County* version of H.B. 589 included several types of acceptable IDs—such as community college IDs; public-assistance IDs; and federal, state, and

8. In addition to preclearance, challenges to various election laws in North Carolina have also aided in creating more favorable voting conditions for African Americans. For instance, from 1980 to 2013, the Department of Justice "issued over fifty objection letters to proposed election law changes in North Carolina . . . because the State had failed to prove the proposed changes would have no discriminatory purpose or effect." *Id.* at 224 (citations omitted). "During the same period, private plaintiffs brought fifty-five successful cases under [the VRA, resulting in t]en cases end[ing] in judicial decisions finding that electoral schemes . . . across the state had the effect of discriminating against minority voters." *Id.* (citations omitted). "Forty-five cases were settled favorably for plaintiffs out of court or through consent [decrees] that altered the challenged voting laws." *Id.* (citations omitted).

local government IDs—that were either removed or limited in the final versions of both H.B. 589 and S.B. 824. *Compare* H.B. 589 (5th ed.), § 4 (N.C. 2013), *with* 2013 N.C. Sess. Law 381, § 2.1 (N.C. 2013), *and* 2018 N.C. Sess. Law 144, § 1.2(a).

On 25 June 2013, the United States Supreme Court issued its opinion in *Shelby County*, which invalidated the preclearance coverage formula and meant "North Carolina no longer needed to preclear changes in its election laws." *McCrory*, 831 F.3d at 216. In response, the General Assembly "requested and received racial data" on the various voting practices within the state and on the types of IDs commonly possessed by its citizenry. *Id.* at 216 (citation omitted). With this racial data in hand, the General Assembly "swiftly expanded an essentially single-issue bill into omnibus legislation[.]" *Id.* (footnote omitted). The result, as described by the Fourth Circuit, was a bill that, *inter alia*, "exclude[d] many of the alternative photo IDs used by African Americans" and "eliminated or reduced registration and voting access tools that African Americans disproportionately used." *Id.* (citations omitted). H.B. 589 was "quickly ratified . . . by strict party-line votes . . . [, and t]he Governor, who was of the same political party as the party that controlled the General Assembly, promptly signed the bill into law on August 12, 2013." *Id.* at 218 (citations omitted).

Legal challenges to H.B. 589 quickly ensued, alleging the law was "motivated by discriminatory intent" in violation of, *inter alia*, the Fourteenth Amendment's Equal Protection Clause. *Id.* (citation omitted). In *McCrory*, the Fourth Circuit recognized that voting in North Carolina, both historically and currently, is "racially polarized"—*i.e.*, "the race of voters correlates with the selection of a certain candidate or candidates." *Id.* at 214 (citation and quotation marks omitted) (noting African American voters overwhelmingly support Democratic candidates). Such polarization offers a "political payoff for legislators who seek to dilute or limit the minority vote." *Id.* at 222. *McCrory* noted the historical background evidence of H.B. 589 suggested racial polarization played an important role in the enactment of H.B. 589, which "target[ed] African Americans with almost surgical precision[.]" *Id.* at 214, 226.

In light of the historical background of the law, the "hurried pace" with which H.B. 589 was enacted after being relieved of preclearance requirements, the legislature's use of racial data in crafting H.B. 589, and the recent surge in African American voting power, the *McCrory* Court concluded, in enacting H.B. 589, the Republican-controlled General Assembly "unmistakably" sought to "entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party."

*Id.* at 223-33. Accordingly, the Fourth Circuit struck down H.B. 589 as unconstitutional, recognizing the "General Assembly enacted the challenged provisions of [H.B. 589] with discriminatory intent." *Id.* at 215.

In accordance with *McCrory*, the "important takeaway" from this historical background is "that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." *Id.* at 225. Further, these cases "highlight the manner in which race and party are inexorably linked in North Carolina[,]" which, according to the Fourth Circuit, "constitutes a critical—perhaps the most critical—piece of historical evidence here." *Id.* As *McCrory* recognized, racial polarization—which creates an "incentive for intentional discrimination in the regulations of elections"—existed in 2013 and played a key role in the General Assembly's decision to enact H.B. 589. *Id.* at 222. The proposed constitutional Amendment, and subsequently S.B. 824, followed on the heels of the *McCrory* decision with little or no evidence on this Record of any change in this racial polarization.[9] More to the point, Plaintiffs' evidence tends to show legislators relied on the same data in enacting S.B. 824 as they did in enacting H.B. 589. Accordingly, the historical context in which S.B. 824 was enacted provides support for Plaintiffs' Discriminatory-Intent Claim and warrants further scrutiny of the intent behind S.B. 824.

*B. Sequence of Events*

*Arlington Heights* also directs a court reviewing a discriminatory-intent challenge to consider the "specific sequence of events leading up to the challenged decision[.]" 429 U.S. at 267, 50 L. Ed. 2d at 466 (citations omitted). "In doing so, a court must consider departures from the normal procedural sequence, which may demonstrate that improper purposes are playing a role." *McCrory*, 831 F.3d at 227 (alteration, citation, and quotation marks omitted). These considerations "may shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267, 50 L. Ed. 2d at 466 (citation omitted).

Here, Plaintiffs contend the "unusual sequence of events leading to the passage [of S.B.] 824 support the inference that it was motivated by an improper discriminatory intent." In support of this contention, Plaintiffs point to the testimony in an affidavit of Representative Mary

9. The Middle District of North Carolina, in its order preliminarily enjoining S.B. 824, actually found "the evidence still shows that the state's electorate was extremely polarized at the time S.B. 824 was enacted and will predictably remain so in the near future[.]" *Cooper*, ___ F. Supp. 3d at ___ (citation omitted).

Price "Pricey" Harrison (Representative Harrison) summarizing the legislative process of S.B. 824:

> 8. I also believe that the legislative process leading to the enactment of [S.B.] 824 deviated significantly from proper substantive and procedural legislative practices. The legislative process for [S.B.] 824 followed an abbreviated and inadequately-deliberative pattern that the General Assembly has only in recent years seemed to have adopted for controversial legislation. Instead of allowing for a proper and thorough debate, the legislative process was truncated.
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> 9. Though North Carolinians approved the ID constitutional amendment in November 2018, mandating voters to show identification upon voting, voters also expressed a desire to see significant changes in the General Assembly. Republicans lost their veto-proof supermajorities in both the State House and Senate during the 2018 midterm.
>
> 10. Yet, instead of allowing newly elected officials to craft enabling legislation in accordance with the approved ID constitutional amendment once they took office, the lame-duck legislature reconvened the 2017-2018 Session in late November of 2018 to take up the task. Legislative leaders expedited the passage of [S.B.] 824 rather than taking the time to ensure the protections of voters' constitutional rights. Consequently, the General Assembly enacted enabling legislation affecting over 7 million registered North Carolina voters—overrode a gubernatorial veto of that legislation—in just over 21 days.
>
> 11. Consideration of the enabling legislation for the constitutional amendment began on November 27, 2018 and [S.B.] 824 passed the North Carolina House by a vote of 67-40 on December 5, 2018. Over a span of only 8 days—with only limited debate and outdated data to inform legislative decisions—the General Assembly enacted enabling legislation impacting millions of North Carolinians for years to come.
>
> 12. Because of the legislature's failure to consider public input, failure to use updated data, failure to allow

a thorough debate, and failure to take into account all implications of the bill's potential impacts on voters, it is my belief that [S.B.] 824 as passed fails to sufficiently balance the need to legislatively implement the ID constitutional amendment with the need to preserve all other rights that the North Carolina Constitution affords.

13. Specifically, the House failed to give adequate notice of the meeting to discuss the proposed language for [S.B.] 824, and circulated the proposed language only the night before its consideration. Several House members, including myself, had to arrange last minute travel back to Raleigh and cancel other scheduled events and meetings in order to attend the Session.

14. Further, public comment was limited to allow only 30 individuals to speak on the proposed bill. Such a limitation deviates from typical procedure for a bill of this magnitude that relates to fundamental constitutional rights. In my experience, with regard to bills of this magnitude that affect issues such as voting rights or redistricting, the legislature has provided much more opportunity for lengthy and balanced public comment. In this instance, only a few individuals had the opportunity to speak in opposition to the proposed bill. Again, this is a deviation from standard procedure.

15. In my experience, it is a deviation from normal procedure to limit discussion of a bill of this magnitude to just a few hours. The scope of [S.B.] 824 necessitated a significantly extended timeline in order to properly understand its far-reaching implications on the ability of North Carolina citizens to vote.

16. Given the expedited timeline that the General Assembly pursued in passing [S.B.] 824, there was no opportunity—as would be available during a normal legislative process—to access relevant and critical data regarding voter information. It is my understanding that much of the data available to us was outdated. As such, the particulars of [S.B.] 824 fail to accurately reflect the current state of voter specific information in North Carolina.

17. Legislators were presented with data from 2015 for their consideration when enacting [S.B.] 824, rather than more appropriate, up-to-date figures. For example, the General Assembly was presented with significantly outdated "no-match" data demonstrating how many North Carolina voters lacked photo ID as of 2015, and to my knowledge did not even attempt to ascertain how many voters lacked such ID at the time [S.B.] 824 was on the floor for discussion.

18. By contrast, the General Assembly was made aware of data—through a presentation delivered to the Joint Legislative Elections Oversight Committee—that showed [S.B.] 824 would disenfranchise thousands of voters. Nevertheless, the General Assembly enacted [S.B.] 824.

In response, Defendants assert there was nothing unusual about this process because the General Assembly followed its normal protocol in passing S.B. 824. For instance, Senator Joel Ford (Senator Ford) countered it was "not unusual or a departure from the normal political process for the General Assembly to reconvene its 2017-2018 Regular Session to consider" S.B. 824. Senator Ford further iterated the enactment of "S.B. 824 followed a normal legislative process" and that the General Assembly "followed all of its normal rules and procedures in considering and enacting S.B. 824." He also stated the timeframe of its passage and the fact that a "lame-duck legislature" passed the legislation were both "not unusual[.]" However, "a legislature need not break its own rules to engage in unusual procedures." *McCrory*, 831 F.3d at 228.

Specifically, here, as Plaintiffs point out, sixty-one of the legislators who voted in favor of S.B. 824 had previously voted to enact H.B. 589, which was struck down by the Fourth Circuit as motivated by a discriminatory intent. We acknowledge individual legislator's views and motivations can change. However, "discriminatory intent does tend to persist through time[.]" *United States v. Fordice*, 505 U.S. 717, 747, 120 L. Ed. 2d 575, 604 (1992) (Thomas, J., concurring) (citation omitted). Therefore, given the "initially tainted policy of [H.B. 589], it is eminently reasonable to make the [General Assembly] bear the risk of nonpersuasion with respect to intent at some future time[.]" *Id.* at 746, 120 L. Ed. 2d at 604 (citation omitted).

Also persuasive is the fact S.B. 824 was passed in a short timeframe by a lame-duck-Republican supermajority, especially given Republicans

would lose their supermajority in 2019 because of seats lost during the 2018 midterm election. At a minimum, this shows an intent to push through legislation prior to losing supermajority status and over the governor's veto. Moreover, the quick passage of S.B. 824 was undertaken with limited debate and public input and without further study of the law's effects on minority voters—notwithstanding the fact H.B. 589 had been recently struck down. Plaintiffs' forecasted evidence demonstrates a number of amendments seeking to ameliorate the impacts of S.B. 824 were also summarily rejected. Thus, Plaintiffs have made a sufficient preliminary showing that even if the General Assembly followed its rules, the process employed in enacting S.B. 824 was nevertheless unusual. *See McCrory*, 831 F.3d at 229.

*C. Legislative History*

Indeed, *Arlington Heights* specifically recognizes that legislative history leading to a challenged law "may be highly relevant [to the question of discriminatory intent], especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268, 50 L. Ed. 2d at 466. Here, given the lack of a fully developed record at this preliminary-injunction stage, our review of the legislative history is somewhat limited. However, a few observations about S.B. 824's legislative history provide important context to our analysis, further supporting Plaintiffs' claim that discriminatory intent was a motivating factor behind the passage of S.B. 824.

When debating and enacting S.B. 824, the General Assembly neither requested nor received any new, updated data showing the percentages of likely voters who possessed qualifying IDs under S.B. 824. Instead, Plaintiffs have presented evidence showing the General Assembly relied on outdated data from 2015 "rather than seeking out more recent information so as to better understand the implications of [S.B.] 824." In addition, Senator Mike Woodard (Senator Woodard) alleged "the expedited timeline that the General Assembly pursued in passing [S.B.] 824 failed to provide the opportunity—as would be available during a normal legislative process—to access relevant and critical data regarding voter information." Senator Woodard suggested because of "this unnecessarily rushed legislative process that failed to account for the full scope of relevant information[,]" S.B. 824 will likely disenfranchise North Carolina voters.

Further, *McCrory* recognized, as particularly relevant to its discriminatory-intent analysis, "the removal of public assistance IDs in particular was suspect, because a reasonable legislator . . . could have surmised

that African Americans would be more likely to possess this form of ID." 831 F.3d at 227-28 (citation and quotation marks omitted). According to Representative Harrison's affidavit, an amendment to S.B. 824 that "would have enabled the recipients of federal and state public assistance to use their public assistance IDs for voting purposes . . . [was] also rejected." Representative Harrison's affidavit states Representative David Lewis (Representative Lewis) rejected this amendment on the basis "the General Assembly does not have the ability to impose its standards on the federal government[.]" However, "Representative Lewis [also] acknowledged that the same is true for military IDs, [which were] nonetheless included as an acceptable form of photo ID." Defendants counter their proffered reason for not including public-assistance IDs was because they do not always include photographs. However, in light of the express language in *McCrory* and at this stage of the proceeding, the inference remains the failure to include public-assistance IDs was motivated in part by the fact that these types of IDs were disproportionately possessed by African American voters.

Accordingly, at this stage of the proceeding, Plaintiffs have presented some evidence suggesting the General Assembly refused to obtain updated data on the effects of S.B. 824's voter-ID provisions, instead relying on outdated data from 2015, and chose not to include certain types of ID disproportionately held by African Americans. When viewed in context, this legislative history supports Plaintiffs' claim of an underlying motive of discriminatory intent in the enactment of S.B. 824. *See id.* at 230 (recognizing "the choices the General Assembly made with this [racial] data in hand" suggested a discriminatory intent where the General Assembly excluded types of IDs disproportionately possessed by African Americans).

*D. Impact of the Official Action*

Further, "*Arlington Heights* instructs that courts also consider the 'impact of the official action'—that is, whether 'it bears more heavily on one race than another.' " *Id.* (quoting *Arlington Heights*, 429 U.S. at 266, 50 L. Ed. 2d at 465). On this fourth *Arlington Heights* factor, the *McCrory* Court stated:

> When plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not the sole touchstone of the claim. Rather, plaintiffs asserting such claims must offer other evidence that establishes discriminatory intent in the totality of the circumstances. Showing disproportionate impact, even if not

> overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent.

*Id.* at 231 (footnote, citations, and quotation marks omitted).

Here, in support of a showing of disparate impact, Plaintiffs point to the affidavit of their expert witness, Professor Kevin Quinn (Professor Quinn). In his affidavit, Professor Quinn explained his task was "to examine North Carolinians' possession rates of forms of photo identification that comply with the requirements of [S.B.] 824 ("acceptable ID") and to determine whether changes in the voter ID requirement disproportionately impact certain types of North Carolina voters." To aid in this task, Professor Quinn analyzed data from 2014 used in crafting H.B. 589—contained in a report he created in 2015—because no data on all 2019 ID-possession rates existed, although he did have some data on voter registration in 2019. Professor Quinn averred: "Given the data available to me now, my expert opinion is that the rates of photo ID possession by race and active/inactive status that I documented in my 2015 report remain accurate estimates of the corresponding rates of photo ID possession in 2019." "In 2015, African Americans were more than twice as likely as whites to lack identification required to vote under [H.B.] 589." After looking at the changes between acceptable IDs under H.B. 589 and S.B. 824, Professor Quinn opined, "given the information available at this time, that the differences that do exist are unlikely to have an appreciable effect on the racial disparities in ID possession that I found in my 2015 analysis." Accordingly, Professor Quinn stated S.B. 824 would still have a disproportional impact on African Americans because this class lacks acceptable IDs at a greater rate than white voters. As *McCrory* explained, such a "[s]howing of disproportionate impact, *even if not overwhelming impact*, suffices to establish *one* of the circumstances evidencing discriminatory intent." 831 F.3d at 231 (emphasis added) (footnote omitted). We also note, as the dissenting judge below recognized, the General Assembly's decision to exclude public-assistance and federal-government-issued IDs will likely have a negative effect on African Americans because such types of IDs are "disproportionately held by African Americans." *Id.* at 236 (citation omitted).

Defendants, however, counter by pointing to the fact that under S.B. 824 all voters can obtain a photo ID free of charge or alternatively cast a provisional ballot under the reasonable-impediment provision, contending these ameliorating provisions remedy any disproportionate impact caused by the photo-ID requirements. It is true that S.B. 824 allows a registered voter to visit their county board of elections and receive an ID "without charge" so long as the voter provides their name, date of birth,

and the last four digits of their social security number. 2018 N.C. Sess. Law 144, § 1.1(a).

Plaintiffs, however, presented evidence showing the burdens of obtaining a free ID are "significant . . . [and] fall disproportionately on voters of color." For instance, Noah Read (Read), a member of the Alamance County Board of Elections, stated in his affidavit: "Because of the location and lack of transportation to the [County Board of Elections] office, I think that providing free Voter IDs . . . will do little to make it easier for Alamance County citizens who do not have ID from the DMV to obtain a free ID for voting." The Chair of the Lenoir County Board of Elections expressed similar concerns that those without access to public transportation could not obtain a free ID in Lenoir County. As Plaintiffs allege, those who lack public transportation or the means to travel are generally working class and poor voters. Plaintiffs also presented evidence showing African Americans in North Carolina are disproportionately more likely to live in poverty than white citizens. Accordingly, Plaintiffs' evidence at this stage shows the availability of free IDs does little to alleviate the additional burdens of S.B. 824 where African Americans disproportionately lack the resources to travel and acquire such IDs in comparison to white voters.

As for the reasonable-impediment provision, S.B. 824 allows a voter who lacks qualifying ID to cast a provisional ballot if the voter completes an affidavit under penalty of perjury affirming their identity and identifying their reasonable impediment. 2018 N.C. Sess. Law 144, § 1.2(a). S.B. 824 provides the following types of reasonable impediments:

(1) Inability to obtain photo identification due to:

   a. Lack of transportation.

   b. Disability or illness.

   c. Lack of birth certificate or other underlying documents required.

   d. Work schedule.

   e. Family responsibilities.

(2) Lost or stolen photo identification.

(3) Photo identification applied for but not yet received by the registered voter voting in person.

(4) Other reasonable impediment. If the registered voter checks the "other reasonable impediment" box, a

> further brief written identification of the reasonable impediment shall be required, including the option to indicate that State or federal law prohibits listing the impediment.

*Id.* Once submitted, the voter may cast a provisional ballot that the county board of elections "shall find . . . is valid unless the [five-member, bipartisan] county board has grounds to believe the affidavit is false." *Id.* Defendants allege this reasonable-impediment provision renders S.B. 824 constitutional because it allows all voters to vote.

While it may be true that African American voters without a qualifying ID could still be able to vote by using the reasonable-impediment provision, this fact does not necessarily fully eliminate the disproportionate impact on African American voters resulting from both S.B. 824's voter-ID provisions and the reasonable-impediment provision. As Plaintiffs have shown, the voter-ID provisions likely will have a negative impact on African Americans because they lack acceptable IDs at a greater rate than white voters. Accordingly, it follows African American voters will also then have to rely on the reasonable-impediment provision more frequently than white voters. Although the reasonable-impediment provision casts a wide net in defining the types of reasonable impediments that qualify under the law, which Defendants contend will result in almost every reason for lacking an acceptable ID to constitute a reasonable impediment, a voter using this provision must still undertake the additional task of filling out the reasonable-impediment form and submitting an affidavit verifying its veracity to cast a *provisional* ballot, which is subject to rejection if the county board believes the voter's affidavit and reasonable impediment are false. *See id.* Although Defendants assert these additional steps to vote are not overly burdensome, the use of the reasonable-impediment provision is still one more obstacle to voting, which Plaintiffs have shown will be an obstacle that African Americans will have to overcome at a rate higher than white voters, given their disproportionately lower rates of possessing qualifying IDs. Accordingly, even though at this stage the evidence shows it is "not [an] overwhelming impact," the reasonable-impediment provision nevertheless suffices as a "[s]howing [of] disproportionate impact," establishing another circumstance evidencing discriminatory intent. *McCrory*, 831 F.3d at 231 (footnote omitted).

Defendants also cite to several federal court decisions upholding similar voter-ID laws, some of which contain comparable reasonable-impediment provisions. *See*, *e.g.*, *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016) (upholding Virginia's voter-ID law against

both discriminatory-results and discriminatory-intent challenges); *South Carolina v. U.S.*, 898 F. Supp. 2d 30 (D.D.C. 2012) (preclearing South Carolina's updated voter-ID law, which contained a similar reasonable-impediment provision, concluding there was no discriminatory retrogressive effect or discriminatory purpose). However, these decisions are distinguishable from the present case and in many ways inapplicable given the different claims brought by Plaintiffs in this case.

For instance, the fact that a three-judge panel precleared South Carolina's voter-ID law is inapplicable to Plaintiffs' claim here because the standard for obtaining preclearance under Section Five of the VRA requires the state to prove the proposed changes neither have the purpose nor effect of denying or abridging the right to vote on account of race. *See South Carolina*, 898 F. Supp. 2d at 33 (citation omitted). In this regard, the analysis under the effects test of Section Five is similar to a discriminatory-results analysis under Section Two of the VRA, which requires a greater showing of disproportionate impact than a discriminatory-intent claim. *See McCrory*, 831 F.3d at 231 n.8.[10] Accordingly, *South Carolina*'s analysis is inapplicable to our discriminatory-intent analysis of S.B. 824.

In addition, the facts of *Lee* are markedly different than the present. When analyzing the plaintiffs' discriminatory-intent claim against Virginia's voter-ID law, the Fourth Circuit contrasted the passage of Virginia's law against the facts in McCrory and observed "the legislative process contained no events that would 'spark suspicion[,]' " the Virginia legislature did not depart from the normal legislative process and allowed "full and open debate[,]" the legislature did not use racial data in crafting its legislation, and the provisions of its voter-ID law did not target any group of voters. 843 F.3d at 604 (citations omitted). Accordingly, the *Lee* Court held the plaintiffs had not shown any discriminatory intent under *Arlington Heights*. *Id.* As previously discussed, however, an analysis of S.B. 824 utilizing the *Arlington Heights* factors

10. Under the legislative-purpose prong of Section Five, the *South Carolina* Court utilized a limited *Arlington Heights* analysis and determined South Carolina's voter-ID law was not enacted with a discriminatory purpose. 898 F. Supp. 2d at 46. When drafting and enacting this law, the South Carolina legislature "no doubt knew . . . that photo ID possession rates varied by race in South Carolina." *Id.* at 44. Importantly, and what distinguishes *South Carolina* from the present case, the *South Carolina* Court noted, "critically, South Carolina legislators did not just plow ahead in the face of the data showing a racial gap." *Id.* Instead, the South Carolina legislature slowed down the process and sought out input from both political parties to alleviate any potential discriminatory impact the new law might create. *Id.* at 44-46.

and in light of *McCrory* suggests there is evidence here that discriminatory intent was a motivating factor behind the passage of this act.

After analyzing S.B. 824 under the *Arlington Heights* factors and the Record before us, we conclude, based on the totality of the circumstances, Plaintiffs have shown a likelihood of success on the merits in demonstrating that discriminatory intent was a motivating factor behind enacting S.B. 824. Plaintiffs' evidence at this point supports this conclusion. For instance, Plaintiffs have sufficiently shown the historical background of S.B. 824, the unusual sequence of events leading up to the passage of S.B. 824, the legislative history of this act, and some evidence of disproportionate impact of S.B. 824 all suggest an underlying motive of discriminatory intent in the passage of S.B. 824. *See Arlington Heights*, 429 U.S. at 265-68, 50 L. Ed. 2d at 464-66.

*E. Defendants' Proffered Nonracial Motivations*

Because Plaintiffs have adequately met their initial burden of showing S.B. 824 was likely motivated by discriminatory intent, the burden shifts to Defendants "to demonstrate that the law would have been enacted without this factor." *McCrory*, 831 F.3d at 221 (citation and quotation marks omitted). Because "racial discrimination is not just another competing consideration[,]" judicial deference is "no longer justified." *Id.* (citations and quotation marks omitted). We must instead "scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *Id.* (citations omitted). Defendants' only proffered justification for S.B. 824 is that this act was crafted and enacted to fulfill our Constitution's newly added mandate that North Carolinians must present ID before voting.[11] *See* N.C. Const. art. VI, §§ 2(4), 3(2).

We recognize that in 2018 a majority of North Carolina voters voted in favor of amending Article VI of the North Carolina Constitution, requiring voters in North Carolina to present ID before voting. Indeed, this Amendment dictates the "General Assembly shall enact general laws governing the requirements of such photographic identification[.]" *Id.* Importantly, however, this same Amendment grants the General

11. We are cognizant of the fact neither party briefed this issue extensively and that additional justifications for S.B. 824, such as prevention of voter fraud and inspiring confidence in elections, were presented by the defendants in the federal district court case. *See Cooper*, ___ F. Supp. 3d at ___. However, because these justifications have not been raised on appeal, we decline to consider them in our analysis on this point. *See* N.C.R. App. P. 28(b)(6). We also acknowledge additional justifications may be brought out in a subsequent trial on the merits in this case.

Assembly the authority to "include exceptions" when enacting a voter-ID law. *Id.*

Although the General Assembly certainly had a duty, and thus a proper justification, to enact some form of a voter-ID law, we do not believe this mandate "*alone* can justify the legislature's choices" when it drafted and enacted S.B. 824 specifically. *McCrory*, 831 F.3d at 221 (citations omitted). As detailed above, the General Assembly's history with voter-ID laws, the legislative history of the act, the unusual sequence of events leading to its passage, and the disproportional impact on African American voters likely created by S.B. 824 all point to the conclusion that discriminatory intent remained a primary motivating factor behind S.B. 824, not the Amendment's directive to create a voter-ID law. This is especially true where the Amendment itself allows for exceptions to any voter-ID law, yet the evidence shows the General Assembly specifically included types of IDs that African Americans disproportionately lack. Such a choice speaks more of an intention to target African American voters rather than a desire to comply with the newly created Amendment in a fair and balanced manner. Accordingly, we conclude, on this Record, Defendants have yet to show S.B. 824 would have been enacted in its current form irrespective of any alleged underlying discriminatory intent. *See id.* (citation omitted). At this stage of the proceedings, Plaintiffs have thus shown a clear likelihood of success on the merits of their Discriminatory-Intent Claim for the voter-ID provisions of S.B. 824. Therefore, the majority of the three-judge panel below erred by finding Plaintiffs failed to prove a likelihood of success on the merits.

## III. Preliminary Injunction

Having concluded Plaintiffs have shown a likelihood of success on the merits of their Discriminatory-Intent Claim, we now turn to the question of whether Plaintiffs are "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiffs'] rights during the course of litigation." *Kennedy*, 160 N.C. App. at 8, 584 S.E.2d at 333 (citation and quotation marks omitted). In undertaking this analysis, we "weigh the equities" for and against a preliminary injunction. *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 427, 571 S.E.2d 8, 13 (2002).

Plaintiffs contend they are likely to sustain irreparable harm because, *inter alia*, S.B. 824 violates Plaintiffs' constitutional right to vote on equal terms. As discussed previously, Plaintiffs have a fundament right to participate in elections on an equal basis. *See Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762 ("The right to vote is one of the most

cherished rights in our system of government, enshrined in both our Federal and State Constitutions." (citations omitted)); *see also Dunn*, 405 U.S. at 336, 31 L. Ed. 2d at 280 (citations omitted). The Fourth Circuit has recognized: "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C.*, 769 F.3d at 247 (citations omitted). Further, "discriminatory voting procedures in particular are the kind of serious violation of the Constitution . . . for which courts have granted immediate relief." *Id.* (citation and quotation marks omitted). The need for immediate relief is especially important in this context given the fact that "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [the] law." *Id.* (footnote omitted).

With these principles in mind, we agree with Plaintiffs that absent an injunction, Plaintiffs have shown they are likely to suffer irreparable harm. As demonstrated *supra*, S.B. 824's voter-ID requirements are likely to disproportionately impact African American voters to their detriment. Although Plaintiffs may still have their vote counted by utilizing the reasonable-impediment provision, such a fact does not automatically negate the injury Plaintiffs still will have suffered—the denial of equal treatment in voting—based on a law allegedly motivated by discriminatory intent. *See id.* (citation omitted).

In addition, enjoining the voter-ID provisions furthers "the public interest[, which] favors permitting as many qualified voters to vote as possible." *Id.* (alterations, citation, and quotation marks omitted). Furthermore, S.B. 824 has already been enjoined at least for the March primaries by the federal district court. While the future of that injunction and litigation is uncertain, enjoining the law during the litigation of this action, which the parties acknowledged would still be ongoing after these primaries, further helps prevent voter confusion leading up to the general election this fall and during the pendency of this litigation, which voter confusion has a strong potential to negatively impact voter turnout. Balancing the equities in this case, Plaintiffs have adequately shown they are "likely to sustain irreparable loss unless the injunction is issued[.]" *Kennedy*, 160 N.C. App. at 8, 584 S.E.2d at 333 (citation and quotation marks omitted). Therefore, Plaintiffs have shown they are entitled to a preliminary injunction enjoining the voter-ID provisions of S.B. 824. *See id.* (citation omitted).

As for the scope of this injunction, Legislative Defendants assert the injunction should be limited solely to the individual Plaintiffs, and not statewide, because "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."

*Califano v. Yamasaki*, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 193 (1979). However, *Califano* also noted one of the "principles of equity jurisprudence" is that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* (citation omitted). Accordingly, *Califano* supports the proposition that injunctive relief should extend statewide because the alleged violation—the alleged facial unconstitutionality of S.B. 824—impacts the entire state of North Carolina. *See id.*; *see also Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (upholding a district court's grant of a statewide preliminary injunction of an Arkansas anti-loitering statute where only two individual plaintiffs brought a facial challenge to the statute under the First Amendment). Thus, Plaintiffs have shown the need for a statewide preliminary injunction barring Defendants from implementing or enforcing the voter-ID provisions of S.B. 824 as to all North Carolina voters pending a ruling on the merits of Plaintiffs' facial challenge under the North Carolina Constitution. Consequently, we reverse the trial court's denial of Plaintiffs' Preliminary-Injunction Motion.

## Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's decision to deny Plaintiffs' Preliminary-Injunction Motion and remand to the trial court with instructions to grant Plaintiff's Motion and preliminarily enjoin Defendants from implementing or enforcing the voter-ID provisions of S.B. 824—including, specifically, Parts I and IV of 2018 N.C. Sess. Law 144—until this case is decided on the merits.

REVERSED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

PAUL KIPLAND MACE, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF INSURANCE, RESPONDENT

No. COA19-710

Filed 18 February 2020

**Insurance—insurance agent—duty to report criminal convictions—meaning of "conviction"—guilty verdict followed by prayer for judgment continued**

Where an insurance agent was found guilty of simple assault in district court after pleading not guilty, his guilty verdict—regardless of the district court's subsequent entry of a prayer for judgment continued—was "an adjudication of guilt" and therefore a "conviction" for purposes of N.C.G.S. § 58-2-69(c). Thus, the insurance agent violated section 58-2-69(c) by failing to report the conviction to the Department of Insurance.

Appeal by Petitioner from order and judgment entered 4 April 2019 by Judge David A. Phillips in Alexander County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Wyatt Early Harris Wheeler LLP, by Donavan J. Hylarides, for Petitioner-Appellant.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford and Assistant Attorney General LaShawn S. Piquant, for Respondent-Appellee.*

COLLINS, Judge.

Paul Kipland Mace appeals from the trial court's order affirming an order and final agency decision of the North Carolina Department of Insurance. The issue before this Court is whether a verdict of guilty of simple assault after a plea of not guilty, and the district court's subsequent entry of a prayer for judgment continued, is an "adjudication of guilt" and thus a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c).Because we answer this question in the affirmative, we discern no legal error in the agency's decision. Accordingly, we affirm the trial court's order.

## I. Procedural and Factual History

Paul Kipland Mace ("Petitioner") is an insurance agent who has been licensed by Respondent North Carolina Department of Insurance ("DOI") since 1993. In May 2013, Petitioner was charged with simple assault, a class 2 misdemeanor offense. Petitioner pled not guilty.

After a bench trial in district court on 17 January 2017, Petitioner was found guilty of simple assault. Judgment was continued upon payment of court costs ("prayer for judgment continued" or "PJC"). Petitioner did not report the case to the DOI.

Soon after the guilty verdict and PJC were entered, the DOI received an anonymous communication stating that Petitioner had been convicted of assault. The DOI contacted Petitioner to ask why he had not reported the conviction under N.C. Gen. Stat. § 58-2-69(c) ("the reporting statute"), which requires a licensee to notify the Commissioner of Insurance in writing of a conviction within 10 days after the date of the conviction. Petitioner replied, "I never knew I was supposed to report this prayer for judgment of simple assault or I would have right away."

Petitioner's attorney advised him that he did not need to notify the DOI because the district court had entered a PJC, and "there had been no adjudication of guilt, plea of guilty, or plea of no contest." After further communication with the DOI, Petitioner requested an administrative hearing.

An administrative hearing was conducted by the DOI on 23 May 2018 and an Order and Final Agency Decision ("Decision") was issued on 23 July 2018. The hearing officer found that Petitioner had been charged with simple assault, pled not guilty, was found guilty in district court, was required but failed to report the conviction to the DOI, and relied on the advice of his attorney that he was not required to report the case to the DOI. The hearing officer concluded that "the judge's rendering of a guilty verdict . . . is a 'conviction' under N.C. Gen. Stat. § 58-2-69(c)"; "judgment on the conviction was continued upon the payment of court costs"; Petitioner was required to report the conviction regardless of the judgment issued; and Petitioner violated the reporting statute by not reporting the conviction. Based in part on the fact that Petitioner had relied on the advice of counsel in not reporting the conviction, Petitioner was ordered to pay a $100 civil penalty instead of having his license revoked or suspended.

On 31 July 2018, Petitioner filed in superior court a petition for judicial review of the Decision, seeking, inter alia, a stay of the Decision

and an order setting aside the Decision. The superior court stayed the Decision pending judicial review. After a hearing on 4 March 2019, the superior court entered an Order and Judgment ("Order") on 4 April 2019, affirming the Decision.

Petitioner filed timely notice of appeal to this Court.

## II. Discussion

Petitioner argues that the trial court erred when it held that a PJC following a plea of not guilty is a conviction under the reporting statute. Petitioner's argument is misguided.

In reviewing a trial court's order concerning an agency decision, this Court must (1) "determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal quotation marks and citation omitted). A trial court should apply a de novo standard of review when the nature of the petitioner's challenge to the agency decision is that it was based on an error of law. *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 677, 443 S.E.2d 114, 119 (1994). "[W]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may substitute its own judgment for that of the agency and employ de novo review." *Id.* at 678, 443 S.E.2d at 120 (internal quotation marks, brackets, emphasis, and citation omitted). Accordingly, we consider de novo whether the DOI erred in concluding that "the judge's rendering of a guilty verdict . . . is a 'conviction' under N.C. Gen. Stat. § 58-2-69(c)" such that Petitioner violated the reporting statute by not reporting the conviction.

Under N.C. Gen. Stat. § 58-2-69(c),

> If a licensee is convicted in any court of competent jurisdiction for any crime or offense other than a motor vehicle infraction, the licensee shall notify the Commissioner in writing of the conviction within 10 days after the date of the conviction. As used in this subsection, "conviction" includes an adjudication of guilt, a plea of guilty, or a plea of nolo contendere.

N.C. Gen. Stat. § 58-2-69(c) (2017). Accordingly, "an adjudication of guilt" is a "conviction" for purposes of this statute. *Id.* "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and

limitations not contained therein." *Walters v. Cooper*, 226 N.C. App. 166, 169, 739 S.E.2d 185, 187, *aff'd*, 367 N.C. 117, 748 S.E.2d 144 (2013) (internal quotation marks and citation omitted).

"Adjudication" is defined as "the process of judicially deciding a case." *Adjudication*, *Black's Law Dictionary* (11th ed. 2019); *see also Adjudication*, *Ballentine's Law Dictionary* (3d ed. 2010) (defining "adjudication" as "[t]he determination of the issues in an action according to which judgment is rendered; a solemn, final, and deliberate determination of an issue by the judicial power, after a hearing in respect to the matters determined"). "Guilt" is defined as "[t]he fact, state, or condition of having committed a . . . crime." *Guilt*, *Black's Law Dictionary* (11th ed. 2019); *see also Guilt*, *Ballentine's Law Dictionary* (3d ed. 2010) (defining "guilt" as "[c]riminality; culpability; guiltiness; the antithesis of innocence"). Based on this plain meaning of the phrase "adjudication of guilt," the language of the statute is clear and unambiguous that a finding of guilty by verdict of a judge is an adjudication of guilt, and thus a conviction, under N.C. Gen. Stat. § 58-2-69(c).

Here, the fact that the trial court issued a prayer for judgment continued does not alter the plain language of this statute; nothing in the statute suggests that "conviction" means and includes a guilty verdict only in those instances in which the trial court does not enter a prayer for judgment continued. *See Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 577, 501 S.E.2d 75, 77 (1998) (holding that an agency properly interpreted "conviction" as defined by the relevant administrative regulation to include a plea of no contest, despite the fact that defendant's plea of no contest was followed by a prayer for judgment continued). "A judgment of conviction is one step beyond conviction. A judgment of conviction involves not only conviction but also the imposition of a sentence. This distinction has been recognized in both North Carolina statutes and case law." *N.C. State Bar v. Wood*, 209 N.C. App. 454, 456-57, 705 S.E.2d 782, 784 (2011).

"For the purpose of imposing sentence" under the North Carolina Criminal Procedure Act, "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2019). "This Court has interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction." *Wood*, 209 N.C. App. at 457, 705 S.E.2d at 784 (internal quotation marks and citation omitted).

In *Wood*, this Court held that the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") properly entered an order of

discipline disbarring defendant based upon his criminal convictions, despite the fact that no judgment of conviction had been entered. *Id.* at 455, 705 S.E.2d at 783. Defendant was convicted in federal district court of several crimes. *Id.* at 455, 705 S.E.2d at 784. The DHC disbarred defendant based upon his violations of N.C. Gen. Stat. § 84-28(b)(1) and (2), which read, in pertinent part, as follows:

> (b) The following acts or omissions by a member of the North Carolina State Bar . . . shall constitute misconduct and shall be grounds for discipline . . . :
>
> (1) *Conviction* of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;
>
> (2) The violation of the Rules of Professional Conduct . . . .

*Id.* at 457, 705 S.E.2d at 785 (quoting N.C. Gen. Stat. § 84-28(b)(1) and (2) (2006)).

Following the return of the verdict, the district court granted defendant's motion for judgment of acquittal and conditionally granted defendant's motion for a new trial, should the judgment of acquittal be reversed or vacated. *Id.* at 456, 705 S.E.2d at 784. Based upon this order, the DHC conditionally vacated defendant's disbarment. The appellate court reversed the district court's judgment of acquittal and conditional grant of a new trial, and remanded the matter to the district court for further proceedings consistent with its opinion. Based upon the appellate court's reversal, the DHC reinstated the order of disbarment. *Id.*

On appeal to this Court, defendant argued that the DHC erred in disbarring him and reinstating this disbarment based upon his conviction of criminal offenses when no judgment of conviction had been entered. This Court noted, "[d]efendant's argument conflates a conviction and a judgment of conviction." *Id.* This Court held that the DHC properly disciplined defendant because "[t]he plain language of this statute requires that an attorney be '*convicted of* . . . a criminal offense showing professional unfitness,' not that a judgment of conviction be entered." *Id.* at 457, 705 S.E.2d at 785.

Here, as in *Wood*, Petitioner's "argument conflates a conviction and a judgment of conviction." *Id.* at 456, 705 S.E.2d at 784. Petitioner was found guilty of simple assault by verdict of a judge in district court. This judicial verdict of guilt was an "adjudication of guilt" under N.C. Gen. Stat. § 58-2-69(c). This adjudication of guilt was, in turn, a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c). The plain language of the

reporting statute requires that a licensee be "convicted in any court of competent jurisdiction for any crime or offense other than a motor vehicle infraction[,]" N.C. Gen. Stat. § 58-2-69(c), "not that a judgment of conviction be entered," *Wood*, 209 N.C. App. at 457, 705 S.E.2d at 785. Thus, Petitioner was required to notify the Commissioner in writing of his conviction of simple assault by 27 January 2017, 10 days after the date of the conviction.

Petitioner argues that,

> [b]ased on *expressio unius est exclusio alterius*, a "conviction" for purposes [N.C. Gen. Stat.] § 58-2-69(c) can mean only one of three things: 1) an adjudication of guilt; 2) a plea of guilty; or 3) a plea of nolo contendere (no contest). There is no dispute that [Petitioner] did not plead guilty or nolo contendere. He pled "not guilty". . . . Therefore, [Petitioner's] continued judgment, or prayer for judgment continued, can only be a "conviction" for purposes of [N.C. Gen. Stat.] § 58-2-69(c) if it is "an adjudication of guilt".

By this argument, Petitioner completely disregards the fact that he was *found guilty* by verdict of a judge in district court. It is this guilty verdict that is an adjudication of guilt and thus a conviction under the statute.

Petitioner further contends that a PJC upon payment of costs, without more, does not constitute an entry of judgment. Without a judgment, Petitioner's argument continues, there has been no adjudication of guilt. Petitioner relies on cases in which our appellate courts have held that a PJC is not a conviction for purposes of other statutes. Those cases are readily distinguishable from the present case.

In *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985), this Court held that, based on the statutory definition of "prior conviction" in the Fair Sentencing Act, a conviction with prayer for judgment continued cannot support a finding of prior convictions as an aggravating factor. We stated:

> The definition of "prior conviction" appears in [N.C. Gen. Stat. §] 15A-1340.2(4):
>
> > A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, *and judgment has been entered thereon and the time for appeal has expired*, or the conviction has been finally upheld on direct appeal. (Emphasis added.)

> Thus, an offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, and no appeal is possible (until judgment is entered). Such a conviction therefore may not support a finding of an aggravating circumstance under [N.C. Gen. Stat. §] 15A-1340.4(a)(1)(o).

*Id.* at 565-66, 322 S.E. 2d at 619 (internal citation omitted).

In contrast to N.C. Gen. Stat. § 15A-1340.2(4) at issue in *Southern*, which specifically required both an adjudication of guilt and entry of judgment thereupon, the reporting statute at issue in this case defines conviction solely as an adjudication of guilt, and does not require entry of judgment upon that adjudication.

In *Florence v. Hiatt*, 101 N.C. App. 539, 400 S.E.2d 118 (1991), this Court considered the meaning of "final conviction" in the context of our motor vehicle statutes. Defendant was convicted of operating a motor vehicle without a license. *Id.* at 540, 400 S.E.2d at 119. He received a PJC from the trial court, which included certain non-punitive conditions. The Department of Motor Vehicles ("DMV") subsequently revoked defendant's license pursuant to the then-applicable version of N.C. Gen. Stat. § 20-28.1, which mandated that the DMV revoke an individual's driver's license upon his conviction of a moving violation during a period of revocation. At that time, N.C. Gen. Stat. § 20-24(c) defined "conviction" as a "final conviction of a criminal offense." *Id.* at 540-41, 400 S.E.2d at 119-20; N.C. Gen. Stat. § 20-24(c) (1987).

Defendant obtained a permanent injunction against the DMV, enjoining it from suspending his license. *Florence*, 101 N.C. App. at 540, 400 S.E.2d at 119. The DMV appealed. "The issue on appeal [was] whether the conditional language in [the trial court's] order render[ed] the putative 'prayer for judgment continued' a final conviction." *Id.* This Court held that a true PJC does not operate as a "final conviction" for purposes of our motor vehicle statutes. *Id.* at 542, 400 S.E.2d at 121.

Similarly, in *Walters*, this Court confronted the question of whether a PJC entered on a conviction "makes that conviction a 'final conviction,' and thus a 'reportable conviction,' " for purposes of the sex offender registration statute. *Walters*, 226 N.C. App. at 168, 739 S.E.2d at 186-87. This Court noted that "the term 'final conviction' has no ordinary meaning, and is not otherwise defined by the [sex offender registration] statute."

*Id.* at 169, 739 S.E.2d at 187. This Court "assume[d] that the legislature enacted Section 14 208.6 with an awareness of *Florence*, and yet chose not to articulate whether PJCs are 'final convictions' for the purposes of the registration statute. This suggests that the legislature saw no need to do so, even in light of case law holding PJCs are not 'final convictions' in the context of another statutory scheme employing similar language." *Id.* at 170, 739 S.E.2d at 188. Accordingly, we held that "a true PJC does not operate as a 'final conviction' for the purposes of" the sex offender registration statute. *Id.* at 171, 739 S.E.2d at 188.

In contrast to the motor vehicle statutes at issue in *Florence* and the sex offender registration statute at issue in *Walters*, both of which required a "final conviction," the reporting statute at issue in this case requires only a "conviction," which is specifically defined as "an adjudication of guilt." Thus, Petitioner's reliance on these distinguishable cases to support his argument that there has been no conviction under the reporting statute due to the trial court's entry of a PJC is without merit.

## III. Conclusion

Because we conclude that a verdict of guilty of simple assault, regardless of the district court's subsequent entry of a PJC, is an "adjudication of guilt" and thus a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c), we affirm the trial court's Order affirming the Decision of the DOI.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

**POINDEXTER v. EVERHART**

[270 N.C. App. 45 (2020)]

KIMBERLY DAWN POINDEXTER, PLAINTIFF
v.
CARLTON D. EVERHART, II, DEFENDANT

No. COA19-646

Filed 18 February 2020

**1. Appeal and Error—notice of appeal—timeliness—no certificate of service in the record—no argument from appellee**

In an action between divorced spouses, where there was no certificate of service in the record on appeal showing when appellant was served with the trial court's judgment in the case, appellant's notice of appeal from that judgment was still deemed timely filed because appellee neither argued that the notice was untimely nor offered proof that appellant received actual notice of the judgment more than thirty days before filing notice of appeal (which would have warranted dismissing the appeal).

**2. Divorce—subject matter jurisdiction—action to enforce separation agreement—division of military pension benefits**

In an action between spouses who divorced in Oklahoma, where the ex-wife sued in a North Carolina district court to enforce a separation agreement the parties entered into in North Carolina that provided for division of the ex-husband's military pension benefits, the district court improperly dismissed the action for lack of subject matter jurisdiction. The federal code provision governing division of military pension benefits (10 U.S.C. § 1408(c)(4)) did not dictate subject matter jurisdiction over the case, but rather it contained requirements for personal jurisdiction over the ex-husband, which were satisfied where he consented to personal jurisdiction in North Carolina by entering the agreement (designating the district court as the forum for any related litigation). Further, subject matter jurisdiction was proper in the district court under N.C.G.S. § 7A-244.

Appeal by plaintiff from order entered 12 April 2019 by Judge Thomas B. Langan in Surry County District Court. Heard in the Court of Appeals 21 January 2020.

*Law Offices of Mark E. Sullivan, P.A., by Mark E. Sullivan and Kristopher J. Hilscher, for plaintiff-appellant.*

*Lewis, Deese, Nance & Ditmore, LLP, by Renny W. Deese, for defendant-appellee.*

TYSON, Judge.

Kimberly Dawn Poindexter ("Plaintiff") appeals from an order entered granting Carlton D. Everhart, II's ("Defendant") motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. We reverse and remand.

## I. Background

Plaintiff and Defendant were married on 14 May 1983 and separated on 9 August 2004. The parties entered into a Separation Agreement and Property Settlement ("Agreement") in Surry County on 17 November 2005.

Plaintiff and Defendant agreed to divide their marital property per the provisions in the Agreement. The Agreement designates the court in Surry County as the forum for issues arising out of the Agreement, North Carolina law as the choice of law, and provides under "Situs and Jurisdiction":

> This Agreement shall be construed and governed in accordance with the laws of the State of North Carolina and each party agrees and does hereby consent and submit himself/herself to the jurisdiction of the General Court of Justice of Surry County of the State of North Carolina for any suits or any other legal action based upon or arising out of or in connection with this Agreement.

The Agreement also provides Plaintiff is to obtain a spousal share of Defendant's military pension. The Agreement under "Military Retirement" provides:

> The husband is currently a member of the United States Armed Forces. The parties agree and desire that his military retirement be divided using the following formula to determine the wife's entitlement. The former spouse (wife) is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 43.5% times a fraction, the numerator of which is 245 months of marriage during the member's creditable military serve (sic), divided by the member's total number of months of creditable military service.
>
> The husband shall be required to select the survivor benefit plan. In the event the wife remarries at any time prior to the husband's death or retirement, she shall lose the right to the survivor benefit plan and shall, immediately after

> becoming married, file a document with the appropriate authorities, waiving any future SBP claim. If the wife fails to file such document with the appropriate authority, then the husband may file a copy of her marriage certificate or any other document that is satisfactory proof to DFAS, at such time the Wife shall lose her survivor benefits.
>
> There will be no further claims of future retirements or no future monetary claims against husband.

The Agreement also provides under "Enforcement of Agreement":

> The parties agree that, in the event there is a non-compliance with any of the provisions of this Agreement, the complying party may initiate an action in any court where jurisdiction over the parties may be obtained, asking for specific performance of the terms and/or conditions so sought to be enforced. The non-complying party shall be responsible to the complying party for any and all expenses incurred by the complying party in the attempt to obtain specific performance, including attorney's fees. Any amount so awarded shall be in the sole discretion of the presiding judge and the award shall be made without regard to the financial ability of either party to pay, but rather shall be based upon the fees and expenses determined by the court to be reasonable and incurred by the complying party. It is the intent of this paragraph to induce both Husband and Wife to comply with the terms of this Agreement to the end that no litigation as between the parties is necessary in the areas dealt with by this Agreement. In the event of litigation, it is the further intent to specifically provide that the non-complying party shall pay all reasonable fees and costs that either party may incur. The right to specific performance of this Agreement shall be in addition to and not in substitution for all other rights and remedies either party may have at law or in equity arising by reason of any breach of the Agreement by the non-complying party.

After the Agreement was signed on 17 November 2005, Plaintiff and Defendant were divorced the following month on 22 December 2005 in Oklahoma. Defendant herein sought and was the plaintiff in the divorce action, and Plaintiff herein did not contest the divorce. The Oklahoma divorce decree states: "The property owned by the parties shall be

divided according to the orders issued in the State of North Carolina." Both parties signed and acknowledged the provisions contained within the divorce decree. Plaintiff is a resident of North Carolina. Defendant is a resident of Texas.

Defendant sued Plaintiff on 23 January 2006 for specific performance of the Agreement in Surry County, North Carolina. In Defendant's complaint, he asserted the "Enforcement of Agreement" provisions of the Agreement to support his claim for specific performance.

Plaintiff's attorney drafted a military pension division order for Defendant to execute. Defendant asserted it did not reflect the terms of the Agreement and refused to execute Plaintiff's proposed order.

Plaintiff initiated the present action by filing a complaint in the Surry County District Court on 30 August 2018. Without answering Plaintiff's complaint, Defendant filed a motion to dismiss for lack of subject matter jurisdiction pursuant to North Carolina Rules of Civil Procedure 12(b)(1) on 1 October 2018. The trial court granted Defendant's Rule 12(b)(1) motion and dismissed Plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff filed notice of appeal on 13 May 2019.

## II. Jurisdiction

**[1]** The timeliness of Plaintiff's 13 May 2019 notice of appeal requires analysis. No information in the record shows when Plaintiff was served with the trial court's judgment. Our Court has held: "where . . . there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, appellee must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *Brown v. Swarn*, 257 N.C. App. 418, 422, 810 S.E.2d 237, 240 (2018) (alteration in original).

Applying the reasoning in *Brown*, unless the appellee contests the notice of appeal as untimely and proffers actual proof of service, this Court may not dismiss the appeal. *Id.* Defendant has not argued Plaintiff's 13 May 2019 notice of appeal is untimely nor proffered proof of Plaintiff's receipt of actual notice of the 12 April 2019 order to dismiss her appeal.

Plaintiff's notice of appeal from that order is deemed timely filed. *See id.* This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(b)(2) (2019).

III. Issue

**[2]** Plaintiff argues the trial court erred in granting Defendant's Rule 12(b)(1) motion and dismissing Plaintiff's complaint for lack of subject matter jurisdiction.

IV. Defendant's Rule 12(b)(1) Motion

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Enforceability of Agreement

Plaintiff and Defendant entered into the Agreement on 17 November 2005. According to its express terms, the Agreement was not incorporated into the 22 December 2005 Oklahoma divorce decree. However, the Oklahoma decree specifically addressed the property division: "The property owned by the parties shall be divided according to the orders issued in the State of North Carolina."

> These agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs. A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding upon the parties.

*Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (citations omitted).

"A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract. The equitable remedy of specific enforcement of a contract is available only when the plaintiff can establish that an adequate remedy at law does not exist." *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979) (citations omitted).

Our Court has long held separation agreements are enforceable as contracts, even if the separation agreements create rights and duties not expressly provided for by statute. *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984). "Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 261 N.C. 764, 766, 136 S.E.2d 81, 83 (1964) (citations omitted).

Parties retain the right and ability, and are encouraged to resolve and privately settle their disputes, in a written agreement for payment and performance. The Agreement before us expresses: "It is the intent of this [Enforcement Section] to induce both Husband and Wife to comply with the terms of this Agreement to the end that no litigation as between the parties is necessary in the areas dealt with by this Agreement." While expressing the intent and hope that no further "litigation as between the parties is necessary," the Agreement is not self-executing. Plaintiff carries the burden to show an enforceable contract, breach thereof, and damages.

C. Military Pension

Division of a military service member's pension and payment thereof to a former spouse is allowed, subject to 10 U.S.C. § 1408(c):

> Authority for court to treat retired pay as property of the member and spouse.
>
> (1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.
>
> . . . .
>
> (4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) *unless the court has jurisdiction over the member by reason of* (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the

> territorial jurisdiction of the court, *or* (C) *his consent to the jurisdiction of the court.*

10 U.S.C. § 1408 (2017) (emphasis supplied).

Subject to the provisions of 10 U.S.C. § 1408, state courts may treat a military service member's pension as the property of the service member and their spouse, in accordance with the laws of the state. Defendant asserts 10 U.S.C. § 1408(c)(4) articulates requirements for subject matter jurisdiction.

In *Judkins v. Judkins*, this Court examined 10 U.S.C. § 1408(c)(4) to determine whether this federal code provision establishes and requires personal or subject matter jurisdiction over the claim. *Judkins v. Judkins*, 113 N.C. App. 734, 736-37, 441 S.E.2d 139, 140 (1994). The defendant in *Judkins*, who had made a general appearance in the courts of North Carolina, argued that the federal statute, 10 U.S.C. § 1408(c)(4), limited the state court's subject matter jurisdiction. *Id.* at 737, 441 S.E.2d at 140. We held: "We read this provision as establishing the requirements for personal jurisdiction and proceed to determine whether the trial court properly obtained *in personam* jurisdiction over defendant as required by § 1408(c)(4)." *Id.*

Both the Supreme Court of North Carolina and this Court have long recognized that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This Court recently discussed *In re Civil Penalty* in *State v. Gonzalez* and held:

> *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

*State v. Gonzalez*, __ N.C. App. __, __, 823 S.E.2d 886, 888-89 (2019).

We are without authority to overturn the ruling of a prior panel of this Court on the same issue. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Prior precedent of this Court has interpreted 10 U.S.C.

§ 1408(c)(4) as referencing requirements for *in personam* and not subject matter jurisdiction. *Judkins*, 113 N.C. App. at 736-37, 441 S.E.2d at 140.

Subject matter jurisdiction is conferred upon our state's courts by North Carolina's Constitution and by statute. N.C. Gen. Stat. § 7A-244 confers subject matter jurisdiction over domestic actions in the district court:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the *enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.*

N.C. Gen. Stat. § 7A-244 (2019) (emphasis supplied).

N.C. Gen. Stat. § 7A-244, not the federal code provision, provides the district court in North Carolina with subject matter jurisdiction over this Agreement. No supremacy nor preemption issue exists between the state statute and the federal code. Defendant's consent to personal jurisdiction in North Carolina is expressly contained in the Agreement and the divorce decree. Defendant also stipulated that North Carolina courts possess personal jurisdiction over him, which satisfies the personal jurisdictional consent requirements set forth in 10 U.S.C. § 1408(c)(4).

This action is not to determine whether there will be a division of "retired pay payable to a [service] member," which the parties' consented to in the Agreement. 10 U.S.C. § 1408. Plaintiff, a resident of North Carolina and a party to the Agreement, seeks enforcement for breach of an asserted prior mutually agreed-upon division, which N.C. Gen. Stat. § 7A-244 confers in the district court of North Carolina.

Defendant consented to *in personam* jurisdiction in North Carolina. The parties contest how, when, and to what extent the division of "retired pay payable to a [service] member" is to occur and whether the terms in the Agreement are ambiguous. *Id.* As such, the district court possesses subject matter jurisdiction over the Agreement, personal jurisdiction over the parties, and is a proper forum to adjudicate Plaintiff's and Defendant's disputed claims. N.C. Gen. Stat. § 7A-244. The trial court's grant of Defendant's Rule 12(b)(1) motion was error.

V. Conclusion

N.C. Gen. Stat. § 7A-244 confers subject matter jurisdiction over the Agreement in the North Carolina district court. 10 U.S.C. § 1408(c)(4) requires Defendant's consent and, based upon Defendant's consent in the Agreement and stipulation, confers personal jurisdiction in North Carolina to resolve disputes over the Agreement's allocation of Defendant's service member's retirement with Plaintiff, a former spouse. *See Judkins*, 113 N.C. App. at 736-37, 441 S.E.2d at 140.

The trial court's grant of Defendant's motion to dismiss Plaintiff's pleading for lack of subject matter jurisdiction is reversed. North Carolina's courts possess subject matter jurisdiction over the Agreement, possess personal jurisdiction over the parties by residence of the Plaintiff and by consent of the Defendant. North Carolina is a proper forum to resolve any disputed issues in the Agreement. The case is remanded for further proceedings, which are not inconsistent with this opinion. *It is so ordered*.

REVERSED AND REMANDED.

Judges DIETZ and INMAN concur.

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STARR LYNN SHEPARD, Plaintiff
v.
CATAWBA COLLEGE, Defendant

No. COA19-101

Filed 18 February 2020

**Negligence—notice of defective condition—proximate cause—forecast of evidence—fall from wooden bleachers**

In a negligence action arising from injuries sustained after plaintiff fell from old wooden bleachers at a baseball game, summary judgment for defendant college was inappropriate where plaintiff presented sufficient evidence from which a jury could infer that defendant had constructive notice that the bleachers were rotting and in disrepair and that defendant's failure to properly maintain the bleachers proximately caused plaintiff's injury.

Judge BERGER concurring in the result only.

Appeal by plaintiff from order entered 10 July 2018 by Judge Adam M. Conrad in Superior Court, Mecklenburg County. Heard in the Court of Appeals 16 October 2019.

*Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for plaintiff-appellant.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Luke P. Sbarra, and Leila W. Rogers, for defendant-appellee.*

STROUD, Judge.

Plaintiff appeals trial court order allowing defendant's motion for summary judgment and thus dismissing plaintiff's action. Because plaintiff has forecast evidence -- viewed in the light most favorable to her and giving her the benefit of any inferences from the evidence -- which presents a genuine issue of material fact as to defendant's negligence as the proximate cause of her injuries sustained in her fall on defendant's bleachers, we reverse and remand for further proceedings.

## I. Background

On 6 October 2017, plaintiff filed a complaint against defendant alleging that she was injured by defendant's negligence in maintaining its bleachers. Plaintiff alleged she was attending a baseball game, and when she stood up and began to move from her seat, a "wooden slat . . . moved in such a way that it allowed her foot to get caught under an adjacent wooden slat and caused her to be thrown off balance and she fell down the bleachers and was severely and permanently injured." Defendant answered plaintiff's complaint, denying the allegations of negligence and alleging plaintiff's contributory negligence as a defense.[1] On 18 May 2018, defendant filed a motion for summary judgment under North Carolina Civil Procedure Rule 56. On 10 July 2018, the trial court granted summary judgment in favor of defendant. Plaintiff appeals.

## II. Summary Judgment

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant.

1. The defense of contributory negligence is not at issue on appeal, and we will not address it.

A. Standard of Review

> The standard of review for a motion for summary judgment requires that all pleadings, affidavits, answers to interrogatories and other materials offered be viewed in the light most favorable to the party against whom summary judgment is sought. Summary judgment is properly granted where there is no genuine issue of material fact to be decided and the movant is entitled to a judgment as a matter of law.

*Harrington v. Perry*, 103 N.C. App. 376, 378, 406 S.E.2d 1, 2 (1991) (citation omitted).

> A defendant is entitled to summary judgment as to all or any part of a claim, N.C.G.S. § 1A–1, Rule 56(b) (1990), 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 defendant is entitled to judgment as a matter of law. Specifically, a premises owner is entitled to summary judgment in a slip and fall case if it can show either the non-existence of an essential element of the plaintiff's claim or that the plaintiff has no evidence of an essential element of her claim. Only if the movant-defendant makes its showing is the nonmovant-plaintiff required to present evidence. If the defendant makes its showing, the plaintiff is required to produce a forecast of evidence showing that there are genuine issues of material fact for trial. All inferences of fact must be drawn against the movant and in favor of the nonmovant.

*Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 239, 488 S.E.2d 608, 611 (1997) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998); *see Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002) ("Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case.").

B. Factual Background

Viewing the forecast of evidence in the light most favorable to plaintiff, *see Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611, the evidence tends to show that on 18 March 2016, plaintiff was a spectator at

a college baseball game at Newman Park. Plaintiff's son was the pitcher in his second season of playing for defendant, Catawba College. The spectators were seated on wooden bleachers which were constructed in 1934.

Plaintiff was seated in her "usual spot" near the press box, further up in the bleachers than her husband, who customarily sat closer to the field at their son's games, but he was close enough to plaintiff to have a "perfect view" of her. Plaintiff testified that she stood up from her seat when she suddenly fell, falling about 13 to 15 feet down the bleachers and landing on the pavement, breaking her back as her "head went into the fence." Plaintiff does not remember the fall itself as she suffered major injuries that caused memory loss.

Plaintiff did not recall what happened between her fall and regaining consciousness in the hospital, but she stated during her deposition that she remembered she felt an issue with her foot being "trapped" immediately before her fall occurred. Plaintiff stated in her deposition that "I was seated in the bleachers along the first base side three rows down from the press box. I stood up, stepped to the right; the board flexed, caught my toe and I fell down the bleachers to the ground below." Plaintiff recalled that her foot felt "heavy, trapped, heavy, something stuck, something not right about it, like something was hanging onto it or it couldn't -- it couldn't go anywhere."

Plaintiff's husband testified that he saw plaintiff stand up, then he turned his head toward the field, and in the next moment saw that his wife had fallen down the bleachers. Plaintiff's husband stated she told him "[t]hat her foot got caught, that she couldn't get her foot -- evidently a board gave way and her foot fell underneath and that propelled her down the steps." Due to the severity of plaintiff's injuries, she was immediately taken to the hospital by an ambulance and her husband went with her so neither she nor her husband examined or took photographs of the exact spot where she fell at the time. Although plaintiff could not identify a specific board she fell on, at her deposition, plaintiff identified the place where she had been sitting by marking the "[g]eneral area" with a green X on a photograph of the bleachers.

On 7 December 2016, plaintiff's expert witness, Mr. David Harlowe, examined the bleachers. Mr. Harlowe noted in his report that he had "been performing risk management work in the athletic and fitness industries for over 21 years." Mr. Harlowe stated in his deposition that his inspection was delayed until December 2016 because plaintiff's counsel had been unable to get permission from defendant for him to do an inspection.

Plaintiff's counsel had notified defendant of plaintiff's claim by certified mail on 11 May 2016, within two months after her fall, and specifically requested "access to the stadium so that our expert witness can inspect the stadium." Plaintiff's counsel also asked defendant to

> accept this letter as our formal request to inspect and notice, pursuant to the law prohibiting spoliation, to not alter, repair, destroy, change, modify or take any remedial measure to change the condition of the stadium as it existed on the date in question prior to our opportunity to conduct a full inspection of the facility.

Plaintiff's counsel sent another certified letter to defendant on 14 June 2016, again repeating his request for access to the stadium for inspection by plaintiff's expert witness.[2] The letter stated, "I again point out Catawba College is on notice to not alter, repair, destroy, change, modify or take any remedial measures to change the condition of Newsome Park as it existed on the date in question prior to our opportunity to conduct a full inspection and analysis of the facility." In August 2016, plaintiff's counsel repeated his request to defendant's insurance carrier.

Despite plaintiff's repeated requests for defendant to preserve the condition of the bleachers pending an inspection, on 7 December 2016, the day Mr. Harlowe went to do the inspection, the bleachers in the area noted by plaintiff as where she fell were being disassembled. Mr. Harlowe saw workers and equipment in the area where they were disassembling "where the incident happened." Because several rows of boards in the area had already been removed, Mr. Hawlowe had to do the inspection of that area "from the sidewalk at the bottom." Mr. Harlowe stated in his deposition that the bleachers in that area were disassembled either that day or the day before his arrival. "Only the metal frame" was left in the area where plaintiff had fallen.

In his inspection of the rest of the stadium, Mr. Harlowe "discovered multiple examples of rot and decay in other sections of the stadium where spectators were exposed to dangerous conditions." Mr. Harlowe's report noted that "[o]n initial viewing, the stadium looked like a relic from the World War II era in which it was constructed. My first impression was that it was a stadium in disrepair that had been neglected for many years." "According to the Catawba College athletic website, the Newman Park grandstand was erected in 1934. The site also states

2. The record indicates that defendant received both certified letters.

the 'recent' improvements were completed in 1996 and 2004, but does not state that the bleachers were updated in either of those projects."

Because the bleachers in the area where plaintiff fell had been disassembled just prior to his arrival, Mr. Harlowe was unable to take photographs of that area of the bleachers as it had existed when plaintiff fell, but he had access to photographs of the area taken prior to December 2016. The photos attached to the report show discolored wooden boards on a metal frame. "[T]he boards that made up the walkways and stairs for the stadium were old and rotting. Make-shift steps had been created by someone over the years to fill the large gap between seatboards and footboards." "[T]he wood used for stairs, footboards and seatboards was in poor condition throughout the stadium and particularly in the section where the plaintiff fell." "The gap between seatboards and footboards in the stadium averaged approximately 13 1/2". This is three times larger than the recommended 4" gap stated by the [Consumer Product Safety Commission]." Mr. Harlowe opined "that the bleachers in Newman Park have never been inspected by a qualified person." "When viewing the wood used it is my opinion that the wood was either untreated or had surpassed its life-expectancy for safe use because of the visible rotting viewed at the time of the inspection." Mr. Harlowe concluded from his inspection

> that Catawba College has severely neglected the bleachers in the Newman Park baseball stadium which directly led to the plaintiff being injured. The inspection showed that most of the footboards, seatboards, and make-shift steps have been present for many years and show advanced signs of rot and lost rigidity when stepped on. It is evident from the condition of the bleachers that no safety inspections have ever occurred or if they have then the school has never taken any actions to correct the hazards. It is my opinion that the bleachers should have been condemned many years ago and replaced with aluminum bleachers.
>
> Additionally, the fact that a work crew was in the process of dismantling the bleachers while I was inspecting the stadium, and without any visible permit, shows that the school was trying to fix the problem under the radar to potentially reduce their liability in this case. In my opinion this was a direct admission of guilt on their part for their negligence in taking care of the stadium bleachers.

Defendant's forecast of evidence contradicts some of plaintiff's evidence regarding her location and actions at the time of the fall. For

example, Mr. Jeffrey Childress, defendant's assistant athletic director and director of tennis at the time of plaintiff's fall, testified that plaintiff was standing on the steps and holding the railing when she turned to look back, perhaps watching a foul ball, and missed a step and fell. Mr. Childress did not believe the condition of the steps contributed to her fall. Two other witnesses, both Catawba College students who were working at the game, also testified plaintiff was quickly descending the steps when she fell and that they had attended other games at this stadium and had never had any issues nor known of any issues with the bleachers. But no matter which witnesses a jury finds most credible, for purposes of summary judgment, we must view the evidence in the light most favorable to plaintiff. *See id.*

C. Negligence Claim

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant because she established a *prima facie* case of negligence.

> In order for a negligence claim to survive summary judgment, the plaintiff must forecast evidence tending to show (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances. . . .
>
> The ultimate issue which must be decided in evaluating the merits of a premises liability claim is determining whether Defendants breached the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. In order to prove a defendant's negligence, a plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered and need not warn of any apparent hazards or circumstances of which the invitee has equal or superior knowledge. However, if a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor's knowledge

> of the danger or the obvious nature of the danger, the landowner has a duty to take precautions to protect the lawful visitor.

*Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 339–40, 749 S.E.2d 75, 79–80 (2013) (citations, quotation marks, ellipses, and brackets omitted). Further,

> [w]hile not an insurer of its customers' safety, defendant is charged with knowledge of unsafe conditions of which it has notice and is under a duty of ordinary care to give warning of hidden dangers. Evidence that the condition (causing the fall) on the premises existed for some period of time prior to the fall can support a finding of constructive notice.

*Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620 (1997).

> The owner or proprietor of premises is not an insurer of the safety of his invitees. But he is under a duty to exercise ordinary care to keep that portion of his premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, (but not that portion reserved for himself and his employees), and to give warning of hidden dangers or unsafe conditions of which he has knowledge, express or implied.

*McElduff v. McCord*, 10 N.C. App. 80, 82, 178 S.E.2d 15, 17 (1970) (citation and quotation marks omitted).

Defendant contends plaintiff failed to establish two key requirements for her claim: proximate cause and notice of the alleged defective condition. Both of defendant's arguments focus on plaintiff's inability to identify the exact place where she fell and the condition of the exact board at issue. Defendant contends that since plaintiff cannot identify the exact place where her foot was trapped, she cannot show either defendant's notice of a defective condition in that spot or that a defective condition in that spot was the proximate cause of her fall. We turn first to notice of the alleged defective condition.

1. Notice of Defective Condition

Defendant argues plaintiff did not present any

> conclusive evidence demonstrating where she fell, or identified any specific condition of the bleachers that contributed to her fall. Since Mrs. Shepard and her expert did not

> identify the location and cause of her fall, it is impossible for Catawba to have had actual or constructive notice of an unknown and unidentified defective condition that allegedly caused Mrs. Shepard to fall. As such, Mrs. Shepard has failed to forecast any evidence of a *prima facie* case of negligence against Catawba.

Defendant primarily relies on *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992), *abrogated by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998),[3] in contending plaintiff failed to demonstrate it had constructive knowledge of the allegedly defective condition. In *Roumillat*, the plaintiff slipped and fell in a parking lot of a Bojangles restaurant. *Id.* at 61, 414 S.E.2d at 340-41. Plaintiff contended that there was slippery grease-like substance in the parking lot and this caused her to fall. *Id.* at 61, 414 S.E.2d at 341. The Supreme Court held that the plaintiff failed to forecast any evidence, other than her "bald assertion" that the "defendant knew or should have known of the greasy substance in its parking lot." *Id.* at 65, 414 S.E.2d at 343. The Court noted that the area was well-lit and plaintiff had "exited the restaurant within a few feet of the path she used to enter the restaurant, and her husband himself, less than an hour before, successfully traversed the very area on which plaintiff slipped." *Id.* at 66, 414 S.E.2d at 343-44.

As there was no indication of how long the substance had been there, how it got there, or that any of the defendant's employees had been notified of its presence, the Supreme Court noted that

> *[w]hen the unsafe condition is attributable to third parties or an independent agency*, plaintiff must show that the condition existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or to have given proper warning of its presence.

*Id.* at 64, 414 S.E.2d 343 (citation and quotation marks omitted) (emphasis modified).

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3. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), notes that the distinction in the level of care needed for invitees versus licensees, as noted in *Roumaillat,* is abolished, but *Roumillat's* discussion of the law regarding actual or constructive notice of a defective condition is still precedential.

The Court contrasted the plaintiff's fall on the substance to the fall of a grocery store customer on an alleged unsafe condition created by a third party in *Warren v. Rosso*:

> In *Warren*, a grocery store patron slipped and fell as a result of human excrement that was deposited on the floor of defendant's store. In support of its motion for summary judgment, defendant submitted affidavits of three employees, each stating that the excrement was deposited immediately before plaintiff stepped in it. Plaintiff submitted her own affidavit contradicting defendant's evidence that the excrement had fallen onto the floor immediately prior to her stepping in it. In her affidavit, plaintiff stated that the excrement was dried and had footprints in it. In her answers to defendant's interrogatories, plaintiff stated that she was at the checkout counter for approximately fifteen minutes and during that time she saw no one enter or leave the store. Moreover, in her affidavit, plaintiff stated that an employee of the store informed her that he knew the excrement was on the floor but that it was not his job to clean it up. On this basis, the Court of Appeals concluded that a dispute existed as to a material fact regarding the length of time the excrement was actually on the floor, making summary judgment for defendant inappropriate.

*Id.* at 65, 414 S.E.2d at 343.

The Supreme Court also noted *Southern Railway*, where the plaintiff "slipped and fell on some grain lying in a work area in which plaintiff regularly walked and had slipped time after time." *Id.* at 65-66, 414 S.E.2d at 343 (quotation marks omitted). The plaintiff in *Southern Railway* forecast evidence that

> [d]espite receiving complaints about the presence of the grain, defendant never took steps to remedy the situation. Because defendant was on notice of the dangerous condition and plaintiff had no choice but to encounter the condition in completing his job duties, the question of the reasonableness of defendant's failure to take additional precautions was for the jury to decide.

*Id.* at 66, 414 S.E.2d at 343 (citation omitted).

The primary difference between this case and *Roumillat* is that the unsafe condition in *Roumillat* was *created by a third party*, so

evidence of the time period the condition had existed was crucial to show the defendant's notice or constructive notice of the condition. As to the greasy spot in the Bojangle's parking lot, the Court quoted *Hinson v. Cato's, Inc*:

> Even if a negligent situation could be assumed here, had it existed a week, a day, an hour, or one minute? The record is silent; and since the plaintiff must prove her case, we cannot assume, which is just a guess, that the condition had existed long enough to give the defendant notice, either actual or implied.
>
> The plaintiff has failed to meet the requirements which permit the cause to be submitted to the jury.
>
> 271 N.C. 738, 739, 157 S.E.2d 537, 538.

*Id.* at 67, 414 S.E.2d at 344.

*Roumillat* and defendant's argument both address unsafe conditions created by a third party. But in this case, the alleged dangerous condition was not created by a third party; the bleachers were constructed by defendant in 1934 and defendant was responsible for maintenance of the bleachers since their construction. This situation cannot be compared to an ephemeral greasy spot of which the landowner had not been notified, which may have existed only for "a week, a day, an hour, or one minute[.]" *Id.*

Plaintiff must show "that the condition had existed long enough to give the defendant notice, either actual or implied." *Id.* Here, plaintiff did forecast evidence that the dilapidated condition of the bleachers had existed for a long time and defendant should have discovered the condition upon reasonable inspection. Plaintiff's evidence tends to show that defendant failed to maintain or inspect the wooden bleachers constructed over 80 years ago and used regularly for sporting events and that the wooden boards had deteriorated and weakened throughout the entire structure; this is evidence of at least constructive notice of the dangerous condition of the bleachers.

> The ultimate issue which must be decided in evaluating the merits of a premises liability claim, however, is whether the defendant breached the duty to exercise reasonable care in the maintenance of its premises for the protection of lawful visitors.

> Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regards to reasonably foreseeable injury by an animal. However, premises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

*Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 382, 756 S.E.2d 788, 795 (2014) (citations, quotation marks, ellipses, and brackets omitted).

Plaintiff's forecast of evidence was not based upon a claim of an individual weakened or broken board which may not have been discovered, even if defendant had regularly inspected and maintained the bleachers, but instead tends to show that the entire structure had been neglected for many years. The wooden boards were rotting and decaying such that even a cursory inspection, according to plaintiff's expert, would have revealed the defective condition. Plaintiff's evidence is sufficient to create a genuine issue of material fact that defendant knew, or should have known in the exercise of reasonable care, of the dangerous conditions created by the allegedly rotting and decaying boards in the bleachers.

2. Proximate Cause

Defendant also argues that plaintiff has failed to show that the defective condition of the bleacher was the proximate cause of her fall. Since plaintiff could not identify the exact place where her foot was caught, defendant contends she cannot show that a defective board caused her fall. Defendant focuses on two cases -- *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) and *Hedgepeth v. Rose's Stores*, 40 N.C. App. 11, 14, 251 S.E.2d 894, 896 (1979) -- in contending plaintiff failed to properly forecast evidence that the allegedly defective bleachers were the proximate cause of her injuries.

In *Gibson*, this Court affirmed the trial court's order granting a directed verdict for the defendant, 196 N.C. App.140, 146, 675 S.E.2d 666, 670 (2009), based upon the absence of any evidence that a defective condition of stairs caused plaintiff to fall:

> plaintiff presented evidence in the form of witness testimony that Cynthia fell forward on the staircase, and that she did not appear to trip on anything. Testimony also showed that she was one of several to descend the staircase, but the only one to fall; none of the witnesses noticed any problems with the condition of the staircase as they descended. One witness testified that she went back to inspect the stairs and found the third step from the bottom to wobble to and fro under her foot. *However, there was no testimony about which stair Cynthia fell on and no testimony that anyone observed what caused her to fall.*
>
> We agree with the trial court's conclusion that this evidence, taken in the light most favorable to plaintiff, does not permit a finding of all elements of a negligence claim against defendants. In evaluating the record, we look for evidence that takes the element of proximate cause out of the realm of suspicion. All of the testimony, taken in the light most favorable to plaintiff, provides no more than mere speculation that defendants' alleged negligence was the proximate cause of Cynthia's fall and the injuries that may have resulted from it. Doubtless Cynthia was injured in some manner as a result of her fall, but there is insufficient evidence to support a reasonable inference that the injury was the result of defendants' negligence.

*Id.*, at 144, 675 S.E.2d at 668–69 (emphasis added) (quotation marks omitted).

In *Hedgepeth*, the plaintiff contended that the defendant failed to maintain stairs in a reasonably safe condition based upon a slick, worn metal strip on the stairway and the presence of potted plants on the steps which prevented her from using the stairrail.

> The only evidence introduced by the plaintiff as to the condition of the step on which she fell was that it was worn and that it was very slick. *Plaintiff, however, does not know on which step she fell, or even which foot slipped and caused her to fall. There is no evidence in this record that the condition of the step upon which plaintiff slipped was any different from that of the entire flight of steps.* Plaintiff's evidence tending to show that the steps had a metal strip on them, and that the metal strip was worn and that the steps were very slick

> apparently refers to all the steps. This is not sufficient evidence to support a finding by the jury that the steps had become so worn that their use would be hazardous to the store's patrons. *The unsupported allegations by the plaintiff that the set of steps on which she fell were worn or slick, without evidence of the particular defective condition that caused the fall, is insufficient to overcome a motion for a directed verdict.*

40 N.C. App. 11, 14–15, 251 S.E.2d 894, 896 (emphases added) (quotation marks omitted).

This Court also rejected the plaintiff's argument that the obstruction of the stairrail by plants caused her fall, since she did not actually know what caused her to trip, and she could only speculate that she would have been able to avoid a fall by holding onto the rail.

> Plaintiff has the burden to show the cause of her fall. The evidence introduced by plaintiff leaves the cause of her fall a matter of conjecture. There is no presumption or inference of negligence from the mere fact that an invitee fell to his injury while on the premises, and the doctrine of res ipsa loquitur does not apply to a fall or injury of a patron or invitee on the premises, but the plaintiff has the burden of showing negligence and proximate cause. Plaintiff has failed to meet this burden.

*Id.* at 16, 251 S.E.2d 894, 897 (citations and quotation marks omitted).

This case is different from *Gibson* and *Hedgepeth* because plaintiff did clearly identify the place she was sitting in the bleachers, "along the first base side three rows down from the press box[,]" that she stood, stepped to the right, felt a board flex, catch her toe, and trap her foot, which resulted in her fall. *See Gibson* 196 N.C. App. at 144, 675 S.E.2d at 668–69; *Hedgepeth*, 40 N.C. App. at 14–16, 251 S.E.2d at 896–97. Plaintiff had marked the spot with an "X" on a photograph to illustrate her statements in her deposition. Further, plaintiff's husband witnessed her stand up in the area and saw where she fell.[4] Plaintiff's expert provided a detailed report as to the negligence of defendant in failing to weather-treat, repair, replace, or otherwise address outdoor

4. Defendant's witnesses contend that plaintiff did not fall at her seat but that she was walking down the steps when she fell. But for purposes of summary judgment, we must take the evidence in the light most favorable to plaintiff. *Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611. There is a genuine issue of material fact regarding where plaintiff fell.

rotten wooden bleachers with boards that were at least 75 years old, perhaps much older.

Defendant also argues that Mr. Harlowe did not inspect the area where plaintiff fell because she did not identify where she fell: "Even Mrs. Shepard's expert, David Harlowe, testified that he inspected and took photos on the opposite side of the stadium from where Mrs. Shepard was sitting. Again, *this was because Mr. Harlowe did not know where Mrs. Shepard fell* so his inspection was focused on the entire stadium." (Emphasis added.) But we agree with plaintiff that this argument misrepresents Mr. Harlowe's testimony:

> [Defendant] misrepresented Harlowe's deposition testimony by asserting that he inspected the entire stadium because he did not know where Mrs. Shepard fell. Harlowe *knew* where Shepard fell. In fact, when Harlowe visited Catawba he noticed at the outset that Catawba was in the process of reconstructing the bleachers in question: They were actually disassembling -- they had taken down the first three or four rows near the press box I don't know what they did, but those boards were gone. And when asked why he did not visit the grandstand sooner, Harlowe testified that he waiting for Catawba's permission to inspect the premises.

(Citations, quotation marks, ellipses, and brackets omitted.)

While defendant is correct that plaintiff was unable to identify the exact board she stepped on, she did identify the specific area where she was sitting and then fell. Plaintiff's evidence also shows that the boards in the bleachers were over 75 years old, rotting, decaying, and flexed easily. Plaintiff testified that the board flexed easily, trapping her foot, and causing her fall.

Although we have already noted the essential factual differences between *Gibson* and *Hedgepeth*, we find it imperative to note another distinguishing feature of this case -- the potential spoliation of the evidence by defendant. Here, where defendant was on notice of plaintiff's claim and her repeated requests to inspect the bleachers prior to any destruction or repair of the area, the evidence of defendant's removal of the boards in the exact area where plaintiff fell immediately prior to the inspection by Mr. Harlowe creates an "adverse inference" against defendant that evidence from an expert inspection of the area where plaintiff fell would be harmful to defendant:

> "Destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality." *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988). Although destruction of evidence in bad faith "or in anticipation of trial may strengthen the spoliation inference, such a showing is not essential to permitting the inference." *Rhode Island Hospital*, 674 A.2d at 1234 (citations omitted); *see Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (adverse inference proper where plaintiffs, although not acting in bad faith, permanently destroyed relevant evidence during investigative efforts), and *Henderson v. Hoke*, 21 N.C. 119, 146 (1835) ("[i]t is sufficient if [the evidence] be suppressed, without regard to the intent of that act"); *see also Hamann v. Ridge Tool Co.*, 213 Mich.App. 252, 539 N.W.2d 753, 756–57 (1995) ("[w]hether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice").

*McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 184, 527 S.E.2d 712, 716 (2000).

The timing of defendant's disassembly of the exact area of the bleachers where plaintiff had fallen immediately prior to Mr. Harlowe's inspection could have been an unfortunate and innocent coincidence, but taking the evidence in the light most favorable to plaintiff, *see Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611, the record not only allows an adverse inference as to the condition of the boards in the area against defendant, but would also allow an inference that defendant's destruction of the evidence was in bad faith.[5] *See generally McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716.

At the summary judgment hearing, defendant's counsel purported to address the spoliation argument as follows:

> Your Honor, typically in these cases what would happen is an engineer would go out. Mr. Chandler [,plaintiff's counsel,] through the deposition testimony, went out to the facility. *There's been some allegation in the brief of spoliation of evidence, and by answering your question*

5. Defendant's counsel before the trial court and on appeal stated to the trial court that his firm was not yet involved in the case between June 2016 and December 2016. Defendant's counsel appeared in the case when the answer was filed in December 2017. We are not suggesting any bad faith on the part of defendant's counsel.

> *I can also respond to spoliation. There is actually no spoliation.* Mr. Chambers [(sic)] was there, took video of the facility.[6] And typically in those circumstances an engineer would go out and would say, well these boards are in or not in tolerance, an accepted tolerance. And there would be weight, a load that would be put on them, and an engineer would be able to calculate the energy that's put on a board and the engineer would be able to say, well these are within or without of tolerance and accepted standards. Those standards are usually the ANSI standards or ASTM standards for bleacher safety or general engineering standards. An engineer would be able to say, based on this load and the amount of energy, these aren't safe stairs. We know video was taken by Mr. Chandler when he entered the facility, when he had access to the facility.

(Emphasis added.)

But in actuality defendant's counsel did *not* explain why the disassembly of the stadium was not spoliation. Instead, defendant's attorney explained the type of inspection typically done in "these cases" and although plaintiff's expert was *prevented* from doing that type of inspection where plaintiff had fallen, he proceeded to argue a video tape was sufficient and comparable to "an engineer . . . able to calculate the energy that's put on a board and . . . able to say, well these are within or without of tolerance and accepted standards." As plaintiff's counsel argued in response:

> Well, I think what our expert would say is that the stadium was full of rotten boards. I mean, in his report he says: It is in my opinion the bleachers should have been condemned many years ago and replaced. And that's what actually happened in this case after we requested to inspect the stadium. We sent three letters to the college, two to the college, one to the college's insurance company, asking to allow our expert to come inspect the stadium. We got no response to that. Now they want to take the position, well you can just go on down there and inspect the stadium any time you want to. Well, that wasn't what they said. They didn't call me up or send me a letter or send

6. It is unclear how an attorney's video of the bleachers could substitute for testing of the strength of the boards. The record before this Court did not explain why defendant never responded to plaintiff's counsel's requests for access to the facility for a formal inspection by the expert witness.

> me an e-mail and say, you can go inspect the stadium any time you want. They basically ignored us until they started tearing the stadium down. Coincidentally, our expert happened to show up unannounced because I eventually told him, look, they are not going to respond to us. You might as well try to go in and get in the stadium, see if you can do your inspection. The day he showed up, they are already dismantling the stadium. They didn't replace one or two boards, they are replacing all the boards, which supports our position that it wasn't just one board or two boards or three boards, the entire stadium had these boards that were rotten, that had shown advanced signs of weather and age and loss of rigidity.

Furthermore, even if defendant's alleged non-responsiveness to the request for inspection coupled with the timing of the disassembly was innocent, the prejudice to plaintiff is the same. *See id.*

Taking the evidence in the light most favorable to plaintiff, she has established the requisite forecast of evidence for a claim of negligence: defendant owed a duty to plaintiff to inspect and maintain the bleachers to ensure they were not in a dangerous state of disrepair; defendant's failure to properly exercise that duty and maintain the bleachers resulted in weakened and unstable boards which caught plaintiff's foot and caused her fall; plaintiff's serious injury was foreseeable in light of the fact that the bleachers were approximately 82 years old and composed of weakened and rotting wood; and due to the age and state of the wood defendant had at the very least, constructive notice of the defect. *See Burnham*, 229 N.C. App. at 339–40, 749 S.E.2d at 79–80. Plaintiff sufficiently identified the place she fell and the reason for her fall. To the extent plaintiff's evidence lacks detail as to the state of the boards in the exact area from which she fell, the jury could draw an adverse inference from defendant's removal of the boards after plaintiff's repeated requests to not change the area before inspection. *See McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716.

## III. Conclusion

The only question before this Court is whether plaintiff forecast enough evidence to survive summary judgment. Taking the evidence in the light most favorable to her and drawing all inferences in her favor, the evidence presents a genuine issue of material fact as to exactly where and how plaintiff fell. Based upon plaintiff's evidence, a jury could find that defendant failed to use reasonable care to inspect and maintain the wooden bleachers; that many of the boards were weakened

and unstable; and that plaintiff's foot was caught on a weakened board that flexed when she stood up, tripping her and causing her to fall. A jury could also infer from defendant's disassembly of the bleachers after plaintiff's repeated requests to allow inspection that the results of such an inspection of the area where plaintiff fell would have been harmful to defendant. We reverse the order of the trial court granting summary judgment in favor of defendant and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge BERGER concurs in the result only.

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STARLITES TECH CORP., PETITIONER
v.
ROCKINGHAM COUNTY, RESPONDENT

No. COA19-406

Filed 18 February 2020

**Zoning—permits—change in ownership—same use—amended ordinance**

Where an electronic gaming business was issued a zoning permit and subsequently underwent a change in ownership due to consolidation of the owner's companies, the county board of adjustments made an error of law in concluding that, under its amended ordinance (amended several months after issuance of the permit), the change in ownership constituted a change in use requiring the new company to amend its zoning permit to continue the same use of the property.

Appeal by petitioner from order[1] entered 1 October 2018 by Judge William A. Wood in Rockingham County Superior Court. Heard in the Court of Appeals 30 October 2019.

*Nelson Mullins Riley & Scarborough LLP, by Stuart H. Russell and Lorin J. Lapidus, for petitioner-appellant.*

1. We note that the judgment mistakenly refers to 17 CVS 1644.

*The Brough Law Firm, PLLC, by G. Nicholas Herman and John M. Morris, for respondent-appellee.*

ZACHARY, Judge.

Petitioner Starlites Tech Corp. ("Starlites") appeals from an order of the superior court affirming the Rockingham County Board of Adjustment's determination that the operation of Starlites' business violated the special use permit requirements set forth in Rockingham County's amended Unified Development Ordinance. After careful review, we reverse.

**Background**

Starlites Tech Corp. owner and president Maurice Raynor operated multiple electronic gaming businesses. Raynor served as the president of M, M & K Developments, Inc. ("MM&K"), and was the owner and president of Starlites Technology, Inc.

On 30 September 2011, Danny D. Fulp conveyed the property located at 11652 U.S. 220 Highway, Stoneville, North Carolina, (the "Property"), to MM&K. On 1 May 2014, Rockingham County issued a zoning permit to MM&K, enabling it to "operate a sweepstakes business" in accordance with the County's Unified Development Ordinance (the "Ordinance"). The permit designated MM&K as the owner of the property, and "Starlite Technologies" as the applicant and occupant. The permit's description noted a "change of use to sweepstakes business" and the "addition of [a] 28x45 shelter."

A few months later, on 2 September 2014, the County amended the Ordinance, setting forth permit requirements that "severely restricted the general operation of sweepstakes businesses in the county." Article II of the amended Ordinance defined "Electronic Gaming Operations," in pertinent part, as: "[a]ny for-profit business enterprise where persons utilize electronic machines or devices, including but not limited to, computers and gaming terminals, to conduct games of odds or chance, including sweepstakes[.]"

Article IX Section 9-11(ii) set forth new restrictions for electronic gaming operations and, by extension sweepstakes businesses. The restrictions included, in relevant part, a requirement that electronic gaming operations obtain a special use permit, which in turn, required that the facility be "setback[ ] 1500 feet from any protected facility." Protected facilities included, *inter alia*, single- and multi-family dwellings. The amended Ordinance posed a problem for MM&K and Starlites Technology, Inc. because the Property was "approximately 680 feet from the nearest single family dwelling unit."

On 21 January 2015, articles of incorporation were filed for Starlites in order to turn "the Starlites Technology, Inc. S Corp into a corporation under the advice of [Raynor's] attorney." On 30 January 2015—approximately nine months after the zoning permit was issued—MM&K conveyed the Property to Starlites. Soon thereafter, on 14 July 2015, articles of dissolution were filed for Starlites Technology, Inc. and MM&K. Following MM&K's dissolution, no application was filed to amend the original zoning permit issued to MM&K on 1 May 2014 to indicate that the Property had been conveyed to Starlites.

In November 2016, Officer Ben Curry of the Rockingham County Code Enforcement Division received a complaint about the Property and determined that the business constituted a development without a permit. Officer Curry issued notices of violation to Starlites on 21 November 2016, 9 December 2016, and 3 January 2017.

Starlites appealed the initial notice of violation to the Rockingham County Board of Adjustment ("the Board") on 21 December 2016. Starlites' appeal came on for hearing by the Board on 14 August 2017. Starlites argued that the notices of violation were defective, that Starlites had never ceased operation and was not subject to the special use permit requirement, and that Starlites ran a "Promotional Gaming Establishment" rather than an "Electronic Gaming Operation." Starlites presented Raynor's testimony along with invoices that Raynor paid in conjunction with the continued operation of his businesses.

On 11 September 2017, the Board entered an order denying Starlites' appeal. The Board concluded that Starlites' business operation violated the County's amended Ordinance, that Starlites failed to obtain a special use permit, and that Starlites was not exempt from the requirement to obtain a special use permit.

Starlites appealed by filing a petition for writ of certiorari with the Rockingham County Superior Court on 10 October 2017, seeking review of the order for factual and legal errors. Starlites argued, in part, that the Board's decision was erroneous, and that the order was:

> b. In excess of the statutory authority conferred upon the Board;
>
> . . . .
>
> d. Unsupported by substantial competent evidence in view of the entire record because there was no evidence contradicting Starlites' showing that its business operations on the Property had been continuously operated

> since prior to the 2014 adoption of the disputed amendment to the DSO;
>
> e. Unsupported by substantial competent evidence in view of the entire record because there was no evidence to suggest that Starlites was operating an "electronic gaming operation" as defined by the Rockingham County [Unified Development Ordinance];
>
> f. Affected by other error of law; and
>
> g. Arbitrary or capricious since the Board should not have heard the Appeal due to lack of proper service of a Notice of Violation, because the Board was not impartial, and because there was no legal basis for the Decision.

The case came on for hearing before the superior court on 25 September 2018. On 1 October 2018, the superior court entered an order affirming the Board's order and dismissing Starlites' appeal. The superior court concluded, in pertinent part:

> 2. On *de novo* review, upon dissolution of [MM&K] on July 10, 2015, the business ceased and was no longer a legally permitted nonconforming use because [Starlites] never applied for an amended or new zoning permit; and, even if the business resumed as a nonconforming use at some point after dissolution of [MM&K], there was competent evidence under the whole record test for the [Board] to conclude that the business was discontinued for more than one year from and after July 2015 such that [Starlites] was required after this discontinuance to obtain zoning approval under the requirements of the 2014 [Ordinance] amendment for "electronic gaming operations."

Starlites timely filed written notice of appeal to this Court.

**Standard of Review**

Our review "is limited to determining whether the superior court applied the correct standard of review, and to determin[ing] whether the superior court correctly applied that standard." *Overton v. Camden Cty.*, 155 N.C. App. 391, 394, 574 S.E.2d 157, 160 (2002). We review a superior court's interpretation of a zoning ordinance de novo, and "apply the same principles of construction used to interpret statutes." *Fort v. Cty. of Cumberland*, 235 N.C. App. 541, 548-49, 761 S.E.2d 744, 749, *disc. review denied*, 367 N.C. 798, 766 S.E.2d 688 (2014).

**Discussion**

On appeal, Starlites argues, in part, that the superior court applied the wrong standard of review in affirming the Board's decision. Specifically, Starlites maintains that the superior court erroneously concluded, under de novo review, that the Property's "change of ownership caused its use to discontinue, which prohibited Starlites from operating as a permissible prior non-conforming use under Rockingham County's Unified Development Ordinance[,]" and that "change of ownership is an impermissible factor to support a determination that the Stoneville property became a non-conforming use under the 2014 amended [Ordinance]." We agree that a change of ownership does not constitute a change of use.

A county board of adjustment sits in a quasi-judicial capacity. Its decisions must "be based upon competent, material, and substantial evidence in the record." N.C. Gen. Stat. § 160A-388(e2)(1) (2019). Every quasi-judicial decision is "subject to review by the superior court by proceedings in the nature of certiorari pursuant to [N.C. Gen. Stat. §] 160A-393." *Id.* § 160A-388(e2)(2).

In reviewing the decision of a board of adjustment, the superior court sits as an appellate court. Its review is limited to "determinations of whether 1) the board committed any errors in law; 2) the board followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the board's decision was supported by competent evidence in the whole record; and 5) . . . the board's decision was arbitrary and capricious." *Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159 (citation omitted). *See also* N.C. Gen. Stat. § 160A-393(k) (addressing the superior court's scope of review on appeal).

The standard of review applied by the superior court depends upon the substantive nature of each issue presented on appeal. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 870 (2011) (citation omitted). "When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted). On the other hand, de novo review is proper when the petitioner contends that the board's decision was based on an error of law. *Id.*

Under de novo review, an appellate "court considers the case anew and may freely substitute its own interpretation of an ordinance for a

[board's] conclusions of law." *Morris Commc'ns Corp.*, 365 N.C. at 156, 712 S.E.2d at 871; *see id.* (noting that this Court has previously determined that "the superior court, sitting as an appellate court, *could* freely substitute its judgment for that of [the board] and apply *de novo* review as *could* the Court of Appeals with respect to the judgment of the superior court" (citations omitted)). Thus, "reviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations," which, in turn, "emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards." *Id.* (citations and internal quotation marks omitted). We employ this approach for our de novo analysis below.

After a hearing, the Board entered an order denying Starlites' appeal, concluding that Starlites' business operation violated the Ordinance, that Starlites did not obtain a special use permit, and that Starlites was not exempt from the requirement to obtain a special use permit as a permissible nonconforming use. The Board also made the following relevant findings of fact:

> 14. At no time prior to submitting an appeal did [Raynor] file documentation establishing his business constituted a grandfathered, non-conforming use that has continuously operated since 2014 thereby exempted from the special use requirements of [the Ordinance], Chapter 2, Article IX, Section 9-11(ii).
>
> . . . .
>
> 18. At the hearing, [Starlites] presented invoices from White Sands Technology billed to NC-Starlites Technology Inc. from January 2014 to July 2015 and invoices from [R]edibids billed to NC-[Starlites] from July 2015 to September 2015.
>
> 19. At the hearing, [Starlites] presented Articles of Incorporation from the North Carolina Secretary of State indicating that [Starlites] was not created until January 21, 2015.
>
> 20. At the hearing, [Starlites] presented additional invoices from Baracuda [sic] Enterprises billed to [Raynor] [by] email . . . from January 2016 2015 [sic] to August 2017.
>
> 21. At no time prior to submitting an appeal did [Raynor] file to amend his zoning permit issued to [MM&K] on May 1, 2014.

On appeal to the superior court, Starlites, challenged, *inter alia*, the following of the Board's conclusions:

> 2. [Raynor's] electronic gaming operation has not continuously operated since 2014.
>
> 3. [Raynor's] electronic gaming operation is not an exempt non-conforming use.
>
> . . . .
>
> 6. [Raynor's] electronic gaming operation is in violation of the special use permit requirements as set forth in [the Ordinance], Chapter 2, Article IX, Section 9-11(ii) because he is operating without a special use permit.
>
> 7. Based on the foregoing Findings of fact and Conclusions of Law, the [Board] concludes that the applicant has not met his burden on appeal.

Starlites argued, *inter alia*:

> 15. The Decision erroneously contends that Starlites has not been continuously operating its business on the Property since 2014. However, Starlites produced uncontested evidence in the form of testimony and business receipts showing that its business on the Property had been continuously operating an electronic gaming business prior to 2014 and had not been closed for more than a year.
>
> 16. The Decision erroneously contends that Starlites' business on the Property is not an exempt non-conforming use. But since Starlites has been continuously operating an electronic gaming business on the Property since before 2014, its business on the Property is in fact an exempt non-conforming use under Chapter 2, Article XII of the [Ordinance].
>
> 17. The Decision erroneously contends that Starlites is in violation of the [Ordinance] because it has not obtained a special use permit for its business on the Property. But Starlites is not required to obtain a special use permit because its business is an exempt non-conforming use. Also, Starlites' business on the Property is not an Electronic Gaming Operation as defined by Chapter 1 Article II of the [Ordinance]. Thus, Starlites' business on the Property does not require a special use permit.

On review of the Board's interpretation of the amended Ordinance as it pertains to nonconforming use, we "apply the same principles of construction used to interpret statutes." *Fort*, 235 N.C. App. at 549, 761 S.E.2d at 749. "In interpreting a municipal ordinance the basic rule is to ascertain and effectuate the intent of the legislative body. Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance." *Capricorn Equity Corp. v. Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187-88 (1993) (internal citations and quotation marks omitted). Because "zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof." *Id.* at 139, 431 S.E.2d at 188.

Article II of the amended Ordinance defines "nonconformance" as "[a] lot, structure or land use that is inconsistent with current zoning requirements, but which was entirely lawful when it was originally established." Article XIII Section 13-4(f) addresses the impact on nonconforming uses of structures that were in existence when the amended Ordinance was enacted:

> When any nonconforming use of a structure is discontinued for a period of one year, any future use of the structure shall be limited to those uses permitted in that district under the provisions of this ordinance. Vacancy and/or non-use of the building, regardless of the intent of the owner or tenant, shall constitute discontinuance under this provision.

The amended Ordinance also provides that:

> No Special Use Permit shall be granted by the Planning Board unless each of the following findings is made concerning the proposed special use:
>
> (a) That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;
>
> (b) That the use or development complies with all required regulations and standards of this ordinance and with all other applicable regulations;
>
> (c) That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property or that the use or development is a public necessity; and

> (d) That the use or development conforms with the general plans for the land use and development of Rockingham County as embodied in this chapter and in the Rockingham County Development Guide.
>
> There shall be competent, material and substantial evidence in the record to support these conclusions and the Planning Board must find that all of the above exist or the application will be denied.

Approximately four months before the amended Ordinance was enacted, Rockingham County issued a zoning permit allowing MM&K to operate a sweepstakes business on the Property, in compliance with the County's then-existing Ordinance. The permit designated MM&K as the Property's owner, and "Starlite Technologies" as the applicant and occupant. The County's approval of MM&K's permit application indicates that, at the time the permit was issued, the Property met and complied with the requirements for such a permit. The Property's subsequent change of ownership had no impact on the *use* of the Property.

Starlites maintains that section 13-4(f) of the amended Ordinance essentially constitutes a "grandfather clause," allowing a prior permissible nonconforming use to continue so long as such use was not discontinued for a period of one year. We agree. We base our decision, first and foremost, upon the plain language of section 13-4(f) of the amended Ordinance. Moreover, we note that the amended Ordinance contains no provision that a change in ownership will constitute a "new" use or otherwise invalidate a prior permissible nonconforming use.

This Court previously addressed a similar issue in *Graham Court Associates v. Town Council of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981). In *Graham Court*, we examined "whether the power to control the *uses* of property through zoning extends to control of the manner in which the property is owned." 53 N.C. App. at 544, 281 S.E.2d at 419. Specifically, we considered whether a "change in ownership . . . constitutes a change in use which the town can regulate by its zoning ordinance[,]" and ultimately held that it does not. *Id.* at 547, 281 S.E.2d at 420.

As our Court explained, "zoning is the regulation by a municipality of the *use* of land within that municipality, and of the buildings and structures thereon – not regulation of the *ownership* of the land or structures." *Id.* at 546, 281 S.E.2d at 420 (citation omitted). "The test of nonconforming use is 'use' and not ownership or tenancy." *Id.* at 547, 281 S.E.2d at 420 (citation omitted). Consequently, "[c]hanging the type of ownership of real estate upon which a nonconforming use is located will

not destroy a valid existing nonconforming use." *Id.* at 550, 281 S.E.2d at 422 (citation omitted). "[W]e do not regard a mere change from tenant occupancy to owner occupancy as an extension or alteration of the previous non-conforming use of the dwellings. And there is no question as to the right of [alienability] of property along with its attendant valid non-conforming use." *Id.* at 548, 281 S.E.2d at 421 (citation omitted).

MM&K conveyed the Property to Starlites on 30 January 2015—nine days after Starlites was incorporated on 21 January 2015, and approximately nine months after the zoning permit was issued. A few months later, on 14 July 2015, articles of dissolution were filed for both Starlites Technology, Inc. and MM&K.

At the hearing before the Board, Raynor testified that he dissolved both entities "when the sweepstakes was officially . . . not allowed to operate anymore according to the State." Raynor further testified that the decision to dissolve Starlites Technology, Inc. and MM&K was also based, in part, on "consolidat[ion]" because he determined that he "had too many companies[.]" According to Raynor, "Watts Group was a separate company that had stores of its own as well as Starlites Technology, Inc., has stores of its own. MM&K was just a development company. It only owns the property. That's all—that's all it ever has."

In addition, Raynor testified about the use of certain software at the Property, and proffered invoices to evidence the resulting expenses incurred during the disputed "continuous use" of the Property. When a member of the Board asked Raynor whether Raynor had "change[d] . . . the type of business" conducted, Raynor replied that the business was "still underneath the same promotional—getting promotional items. Still using the desktop computers. Everything was still the same. It's just a different kind of format they made." In sum, Raynor testified that the use of the Property remained the same, and that there had merely been a change in ownership due to the consolidation of his companies.

In his closing argument, Starlites' defense counsel summarized the evidence as follows:

> [Raynor] has been operating his business at this location well before the ordinance at issue was passed. The ordinance that the County maintains he's got to comply with was passed, again, in September 2014. It's an electronic gaming ordinance. Well before September 2014 and on a continuous basis, he was offering his customers promotional games.

> The software changed. When the sweepstakes laws changed, he adopted a skill test, but all throughout, he's been operating a business there and he's been offering his customers promotional games. So he is a prior nonconforming use. He's grandfathered in. This ordinance doesn't apply to him, and that's why he hasn't applied for it[.]

In addition, to demonstrate "continuous use" of the Property, Raynor submitted invoices showing his payment of expenses both before and after September 2014, when the amended Ordinance was enacted.

Accordingly, the Board improperly concluded that under the provisions of the amended Ordinance, a change in ownership constituted a change in use, and that Starlites was required to amend its zoning permit in order to legally continue the same use of the Property.

"Remand is not automatic when an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s)." *Morris Commc'ns Corp.*, 365 N.C. at 158, 712 S.E.2d at 872 (citation and internal quotation marks omitted). "Under such circumstances the appellate court can determine how the trial court *should have* decided the case upon application of the appropriate standards of review." *Id.* at 158-59, 712 S.E.2d at 872. Here, we can "reasonably determine from the record[,]" *id.* at 159, 712 S.E.2d at 872-73 (citation omitted), that Starlites' challenge to the Board's interpretation of the amended Ordinance warrants reversal of the Board's ultimate decision.

Because this issue is dispositive, we need not address Starlites' additional arguments.

**Conclusion**

"In sum, the rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here." *Id.* at 162, 712 S.E.2d at 874. The Board improperly concluded that Starlites was in violation of the 2014 amended Ordinance. Accordingly, because the Board's interpretation of its amended Unified Development Ordinance constituted an error of law, we reverse.

REVERSED.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
SAMUEL NATHANIEL ANGRAM, III, DEFENDANT

No. COA19-151

Filed 18 February 2020

**Robbery—with a dangerous weapon—sufficiency of evidence—aiding and abetting**

The State failed to present sufficient evidence to convict defendant of robbery with a dangerous weapon under the theory of aiding and abetting where the only substantive evidence of defendant's involvement was that the mother of his child observed the victim withdrawing $25,000 in cash from her employer bank and spoke to defendant by phone while the victim was still in the bank, and that defendant's brother was convicted of the robbery (which occurred when the victim returned home and was exiting his vehicle).

Appeal by defendant from judgment entered on or about 28 September 2018 by Judge R. Gregory Horne in Superior Court, Henderson County. Heard in the Court of Appeals 30 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.*

*Mark Hayes, for defendant-appellant.*

STROUD, Judge.

Defendant appeals his conviction for robbery with a dangerous weapon. Because the State failed to present substantial evidence of each element of aiding and abetting the commission of the robbery with a dangerous weapon by defendant's brother, Michael Angram, the trial court should have granted defendant's motion to dismiss. We therefore reverse.

## I. Background

The State's evidence tended to show that on 11 May 2017, Mr. Marvin Price went to Mountain Credit Union to close his account which contained approximately $25,000. Mr. Price received about $24,000 in cash and put about $300-400 in his wallet; the rest of the money was in an envelope. At least four employees were working in the credit union when Mr. Price withdrew his money.

When Mr. Price arrived home, he began to get out of his car and was robbed at gunpoint. The robber asked Mr. Price, "where is the 25,000[,]" and Mr. Price claimed he had taken it to another bank although he had not. Ultimately the robber only took Mr. Price's wallet and did not find the envelope. Mr. Price saw no one with the robber and did not see a vehicle the robber used to get to or leave his home. Mr. Michael Angram, defendant's brother, was convicted of robbing Mr. Price with a dangerous weapon.

One credit union employee, Ms. Robinson, had a child with defendant, Michael's brother. The State jointly tried both defendant and Ms. Robinson for charges of conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. The jury was instructed on aiding and abetting as to the robbery charge, and both were convicted of robbery with a dangerous weapon. Both were acquitted of the charge of conspiracy to commit robbery with a dangerous weapon. Both defendant and Ms. Robinson appealed, but this opinion addresses only defendant's appeal.

## II. Motion to Dismiss

Defendant argues that the trial court should have allowed his motion to dismiss due to the insufficiency of the evidence.

> The standard of review on a motion to dismiss is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.
>
> > Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

*State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (citations and quotation marks omitted).

> Our courts have held that the essential elements of the crime of robbery with a dangerous weapon are: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.

*State v. Van Trusell*, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (citation, quotation marks, and italics omitted).

Defendant was charged, but not convicted, with conspiracy to commit robbery with a dangerous weapon based upon an alleged conspiracy with Michael and Ms. Robinson. Defendant was convicted of robbery with a dangerous weapon based upon a theory of aiding and abetting the robbery by Michael. The trial court instructed the jury regarding the theory of aiding and abetting:

> The second count that the State must prove beyond a reasonable doubt as to this charge is that the defendant knowingly advised, instigated, encouraged, procured or aided the other person to commit that crime.
>
> And, third, that the defendant's action or statements caused or contributed to the commission of the crime by that other person.

Defendant argues the State presented no substantive evidence he participated in the robbery or that he "knowingly advised, instigated, encouraged, procured, or aided" Michael in committing the robbery. Defendant notes there are two theories upon which the State alleges defendant aided Michael: "through some kind of communication – by telling him about the money, or if Ms. Robinson told Michael about the money, then by encouraging Michael to rob Mr. Price" or "by driving him to or from Mr. Price's house." Defendant contends the State failed to present any substantive evidence of either theory of aiding and abetting and also failed to present sufficient evidence to support a valid inference of either theory.

Defendant begins his argument by focusing on testimony by Detective Aaron Lisenbee regarding his interview of Michael. The State called Michael as a witness. Michael had previously been convicted of the robbery, but at defendant's trial, he testified he did not remember anything about the robbery and did not know why he was convicted of robbing Mr. Price. Michael did not testify to anything incriminating as to defendant or Ms. Robinson. The State then called Detective Lisenbee to testify about his interview of Michael during his investigation of the robbery. The interview was videotaped but the recording was not in evidence.

The State had Detective Lisenbee testify, over defendant's objections, to the contradictions between Michael's trial testimony – which was minimal as he claimed not to remember anything – and what he had said during the interview. In responding to defendant's objections, the State emphasized it was not offering Detective Lisenbee's testimony

about Michael's statements as substantive evidence: "It is solely being offered to show that Michael Angram is not telling the truth to the jury . . . . We are not trying to get it in as substantive."

All of Detective Lisenbee's testimony regarding the interview with Michael was entered only for impeachment purposes and not as substantive evidence. In summary, the evidence admitted *only for purposes of impeachment* was that defendant told him about the $25,000 bank withdrawal and drove Michael to Mr. Price's home. The trial court gave the jury a limiting instruction noting that the detective's statements could only be considered for purposes of Michael's credibility and not "as evidence of the truth of what was said[;]" in other words, the testimony was not substantive evidence.

In its brief, the State does not seek to use Detective Lisenbee's testimony as part of its summary of evidence against defendant, as is appropriate since the testimony was not substantive evidence and cannot be used to prove the truth of any facts asserted. *See generally State v. Alston*, 131 N.C. App. 514, 517, 508 S.E.2d 315, 317 (1998) (noting that hearsay evidence admitted only as to state of mind was not to be used as substantive evidence).[1] Thus, we will address only the substantive evidence presented by the State for purposes of considering whether defendant's motion to dismiss should have been allowed. Here, the State's substantive evidence regarding defendant's involvement in the robbery of Mr. Price was that defendant was Michael's brother and that while Mr. Price was in the credit union, Ms. Robinson, one of the four employees on duty, spoke to defendant. The evidence also shows that *all* of the employees used their cell phones while Mr. Price was in the credit union, and all were questioned by law enforcement officers.

One employee, Ms. Heather Highland, assisted Mr. Price. One employee, Ms. Melissa Cameron was in the process of purchasing a new vehicle with a loan. Ms. Cameron testified that she expressed concern to Ms. Highland by saying, "What if he were to get robbed?" Another employee, Ms. Charne Tucker, was a childhood friend of Michael, but she denied having Michael's phone number. A third employee, Kristen Walker, did not testify. Another employee, Ms. Robinson, acknowledged

1. A portion of *State v. Alston*, 131 N.C. App. 514, 508 S.E.2d 315, was superseded on other grounds by North Carolina General Statute § 14-415.1 (2019) regarding possession of firearms: "*Alston* is super[s]eded by the current language of N.C. Gen. Stat. § 14–415.1 which contains no time bar for this charge." *State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003).

speaking with defendant, her child's father, on the phone, while Mr. Price was in the credit union. Detective Lisenbee wanted to examine Ms. Robinson's phone and obtained a search warrant for the phone, but according to Detective Lisenbee they did not extract anything of "evidentiary value" from Ms. Robinson's phone.

To be clear, from our reading of the transcript it is not in evidence that Ms. Robinson *initiated* the phone call to defendant though that is the inference the State would like us to make. Ms. Robinson acknowledged she "talked" to defendant but Detective Lisenbee's testimony does not clarify whether Ms. Robinson called defendant or he happened to call her while Mr. Price was in the credit union. When questioned on redirect Detective Lisenbee could not confirm Ms. Robinson's acknowledgement to him she had spoken with defendant during the relevant time,

> Q. Detective Lisenbee, Mr. Edney asked you if you knew -- how you knew whether Christina Robinson talked to Samuel Angram that day.
>
> A. Correct.
>
> Q. How do you know that?
>
> A. She told me.
>
> Q. And what exactly did Christina Robinson tell you?
>
> A. That she talked to . . . [defendant] on the phone while Mr. Price was in the bank.
>
> Q. And he asked you if you were able to confirm that information. Were you?
>
> A. No.
>
> Q. Were you able to confirm it through the phone records?
>
> A. I was not.
>
> Q. Were you able to confirm it through anybody else?
>
> A. No.

When questioned on cross-examination about retrieving data from any of the other employee's phones Detective Lisenbee was asked, "But you never even tried?" to which he responded: "We did not see a need to try."

The State contends that based only upon the relationship between Ms. Robinson, defendant, and Michael, and the fact that Ms. Robinson spoke to defendant while Mr. Price was in the bank,

> [a] reasonable jury could conclude that Christian Robinson, upon learning of Mr. Price's withdrawal of nearly $25,000 in cash, obtained his address from the driver's license photocopy in the employee workstation directly next to her's, left her employee workstation to call the defendant to inform him of this situation, that the defendant then communicated with his brother, with whom he is close, to inform and encourage his brother . . . to rob Mr. Price at gunpoint.

Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not, and the State's argument is based upon speculation. *See generally State v. Weston*, 197 N.C. 25, 29, 147 S.E. 618, 621 (1929).

> [W]hen the essential fact in controversy in the trial of a criminal action can be established only by an inference from other facts, there must be evidence tending to establish these facts. Evidence which leaves the facts from which the inference as to the essential fact must be made a matter of conjecture and speculation, is not sufficient, and should not be submitted to the jury.

*Id*. Without the information in Detective Lisenbee's testimony which was not admitted for substantive purposes, there is not substantial evidence to support defendant's conviction of aiding and abetting robbery with a dangerous weapon. Detective Lisenbee's testimony, admitted only for the purpose of impeachment, about Michael's communication with defendant and defendant's driving him to Mr. Price's home cannot be used to prove that defendant aided and abetted robbery with a dangerous weapon.

According to the State a "reasonable" juror could infer from the evidence that Ms. Robinson obtained Mr. Price's address from his drivers license, although she was not the employee assisting him; Ms. Robinson then called and informed defendant of Mr. Price's address and withdrawal of funds; defendant then contacted Michael and encouraged him to rob Mr. Price. The State's argument requires not just one but at least three layers of inference built solely on knowledge of Mr. Price's transaction and Ms. Robinson's phone call with the father of her child. The trial court should have granted defendant's motion to dismiss due to the

insufficiency of the evidence. Because we must reverse the judgment, we need not address defendant's other issue on appeal.

III. Conclusion

Because the State failed to present substantial evidence that defendant aided or abetted Michael in committing the armed robbery of Mr. Price, the trial court should have granted defendant's motion to dismiss. We therefore reverse.

REVERSED.

Judges ZACHARY and MURPHY concur.

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STATE OF NORTH CAROLINA
v.
JAMAR MEXIA DAVIS, DEFENDANT

No. COA19-500

Filed 18 February 2020

**1. Motor Vehicles—driving under the influence—jury instructions—limiting instruction—evidence of prior convictions**

In a trial for habitual driving while impaired, the trial court did not err by denying defendant's motion for jury instructions limiting consideration of his prior convictions to the sole purpose of his truthfulness because evidence of his prior convictions was elicited as part of his defense on direct examination and his credibility was not impeached.

**2. Appeal and Error—preservation of issues—effect of mistrial—objection not renewed in second trial**

Where defendant's first trial (for driving while impaired) resulted in a mistrial, his contention that the trial court erred by denying his request for law enforcement officers' personnel files during his first trial was not properly preserved for appellate review because he failed to make a subsequent request or objection during his second trial.

Appeal by Defendant from judgment entered 7 November 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State-Appellee.*

*Office of the Appellate Defender, by Assistant Appellate Defender Amanda S. Hitchcock, for the Defendant-Appellant.*

COLLINS, Judge.

Defendant appeals from judgment for felony habitual driving while impaired, entered after a jury found Defendant guilty of misdemeanor driving while impaired, and Defendant stipulated to having been convicted of three prior offenses involving impaired driving. Defendant argues that the trial court erred when it refused to give a limiting jury instruction concerning Defendant's prior convictions and asks this Court to review sealed personnel records to determine whether the trial court failed to provide him with information material and favorable to his defense. We discern no error.

## I. Background

On 4 October 2015, Defendant Jamar Mexia Davis was arrested for driving while impaired ("DWI"). On 15 December 2015, a grand jury indicted Defendant for misdemeanor driving while impaired, felony habitual driving while impaired, driving while license revoked, and transporting an open container of an alcoholic beverage after consuming alcohol.

On 10 May 2016, prior to a trial on all the charges ("first trial"), Defendant filed a motion to release personnel records, seeking the release and in camera review of the arresting officers' personnel records to determine whether they contained any impeachment evidence. The State did not object to Defendant's motion. That same day, the trial court entered an order compelling the production of the personnel records for in camera review. On 9 June 2016, the trial court entered an order denying release of the personnel records ("Order Denying Release") because, after reviewing the records in camera, the trial court determined the records did not contain material that was "favorable and material" to Defendant. The trial court ordered that the records not be disclosed and ordered them to remain under seal.

On 15 August 2016, Defendant's case came on for trial in superior court. The jury found Defendant guilty of driving while license revoked and transporting an open container of alcohol. The trial court declared

a mistrial on the charges of misdemeanor DWI and felony habitual DWI after concluding the jury was "hopelessly deadlocked."

Defendant appealed the Order Denying Release and his convictions for driving while license revoked and transporting an open container of alcohol to this Court. On 6 March 2018, this Court found no merit in Defendant's appeal of the Order Denying Release and affirmed his convictions. *State v. Davis*, COA17-615, 2017 WL 3222366, at *11 (N.C. Ct. App. Mar. 6, 2018) (unpublished).

On 5 November 2018, Defendant was retried on the charges of misdemeanor DWI and felony habitual DWI ("second trial"). On 6 November 2018, the jury found Defendant guilty of misdemeanor DWI. Defendant stipulated to attaining three prior DWI convictions within the past 10 years. The trial court arrested judgment on the misdemeanor DWI conviction and entered judgment and commitment on the felony habitual driving while impaired, and sentenced Defendant to an active term of 19 to 32 months' imprisonment. From entry of this judgment, Defendant gave notice of appeal in open court.

## II. Discussion

Defendant (1) argues that the trial court reversibly erred by refusing his request to give a limiting instruction to the jury that evidence of Defendant's prior convictions be used for purposes of truthfulness only and (2) asks this Court to review the sealed personnel records to determine if the trial court, after its in camera review, failed to provide him with information material and favorable to his defense.

### *1. Refusal to Give Limiting Instruction*

Preservation of Argument for Appellate Review

As a preliminary matter, we first address the State's contention that Defendant failed to preserve this issue for appellate review because he failed "to object on any relevant grounds during [his] own testimony about his prior convictions . . . ." However, the State mischaracterizes Defendant's argument on appeal. Defendant does not argue that the testimonial evidence of his prior convictions was improperly admitted, but instead argues that the trial court erred by refusing his request to give a limiting instruction to the jury regarding his prior convictions.

At the charge conference, Defendant requested the trial court give North Carolina Pattern Jury Instruction 105.40 in its pattern form. The trial court refused to give the instruction in its entirety. Defendant objected and the trial court noted his objection. Defendant's request

and objection were made "before the jury retire[d] to consider its verdict, [and] stat[ed] distinctly that to which objection [was] made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(1)(2). The issue of whether the trial court erred in refusing Defendant's request for a limiting instruction is thus preserved for this Court's review.

Analysis

**[1]** Defendant argues that the trial court erred by failing to instruct the jury regarding North Carolina Pattern Jury Instruction 105.40, "Impeachment of the Defendant as a Witness by Proof of Unrelated Crime." This instruction reads:

> Evidence has been received concerning prior criminal convictions of the defendant. You may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on the defendant's truthfulness, then you may consider it, and all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe the defendant's testimony at this trial. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charge(s) because of something the defendant may have done in the past.

N.C.P.I.—Crim. 105.40 (2018).

"Whether a jury instruction correctly explains the law is a question of law . . . ." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). Questions of law "regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"A limiting instruction is required only when evidence of a prior conviction is elicited on cross-examination of a defendant and the defendant requests the instruction." *State v. Gardner*, 68 N.C. App. 515, 522, 316 S.E.2d 131, 134 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986) (citations omitted). Where evidence of prior convictions is elicited "as part of defendant's defense . . . , the trial judge [is] not required to give a limiting instruction." *Id.* at 521-22, 316 S.E.2d at 134 ("[D]efendant testified on direct examination that he had been convicted of common law robbery in 1980 . . . . Since evidence of this prior crime was elicited as part of defendant's defense and . . . was . . . for the purpose of clarifying an issue raised by defendant, the trial judge was not required to give a limiting instruction.").

In *State v. Jackson*, 161 N.C. App. 118, 588 S.E.2d 11 (2003), defendant was not entitled to a special instruction limiting consideration of his testimony regarding his prior conviction to his "truthfulness" where defendant "initially offered this testimony on direct examination[.]" *Id.* at 124, 588 S.E.2d at 16.

> The record show[ed] that defendant Jackson took the stand and voluntarily testified upon direct examination concerning his prior crimes and convictions. Defendant Jackson's counsel asked the questions that elicited his responses. Defendant Jackson was not impeached on these prior crimes and convictions. He voluntarily admitted them, presumably to remove the sting before the State impeached him.

*Id.* at 124, 588 S.E.2d at 15-16.

Here, as in *Gardner* and *Jackson*, Defendant took the stand and testified upon direct examination concerning his prior convictions as follows:

> [Defendant's Attorney]: Who was driving?
>
> . . . .
>
> [Defendant]: Nick was driving the whole time. See, I don't drive because, honestly, I have priors.
>
> . . . .
>
> [Defendant's Attorney]: Why [were you in the driver's seat]?
>
> [Defendant]: Because I thought about driving, but I teach kids now and it's very important that one of the things we talk about is making the right decision. And for me, it's the wrong decision to drive at any point in my life right now, especially after consuming any amount of alcohol.
>
> . . . .
>
> [Defendant's Attorney]: All right. Where -- why -- when the police arrived, you seemed a bit disoriented. What was causing that?
>
> [Defendant]: Well, I had made the decision long before Officer Simon came not to go anywhere, to make arrangements to get picked up. I know better at this point in my

life. So decision had been made not to drive. Period. And so I sat in the car. I wasn't -- it was a rain storm. And I was making arrangements for a friend to come -- I don't have Uber -- called Darnell. He wasn't answering the phone. I was talking on the phone to a previous friend, but she lives in Chicago. But I fell asleep making arrangements to get picked up some kind of way.

. . . .

[Defendant's Attorney]: Well, at the back of the car, the video shows you at some point leaning against the car. Why did you do that?

[Defendant]: Well, I was out there for a while talking to the officers. I understand that when they approached me, what it looks like. And I also understand that in my past experiences with -- with who I am and my background, my experience with law enforcement is different. Maybe -- I don't know how many people can relate, but it's very different, which is why I took the stand to tell you guys I didn't answer too many questions, because they have a tendency to misspeak as they call it. Not anything against the officers. I can't really explain why that is. But I don't hold any ill will towards the officer. And I would hope that he doesn't have any ill will towards me. But I took the stand to let you guys know that the truth is that I made the right decision that night not to go anywhere. And it's through my experiences that I have had with law enforcement that I did not want to talk to the officers about that.

. . . .

[Defendant]: I will let the jury know that I am before you today in the presence of a higher server speaking the honest truth, and I had made the decision not to drive that night. Absolutely. Unequivocally. And that's what you found me in a deep sleep with -- you know, sometimes I might drool depending on how tired I am. I'm a man with -- I'm not perfect. And I want you to know that I do have prior DUI convictions. I have driven without a license before. I have another charge of sneaking into a movie theater, it's called defrauding [an] innkeeper.

. . . .

> [Defendant]: This is relevant because I want to know -- I want you guys to know that I have been very truthful. . . .

Defendant's counsel asked the questions that elicited Defendant's responses. Defendant voluntarily admitted to his prior convictions, using them as a basis to explain why he did not drive on the night in question and why he refused to answer the officers' questions. On appeal, Defendant specifically asserts that he offered this testimony at trial as an "important defense strategy of preempting a damaging cross-examination[.]" Accordingly, Defendant was not entitled to the North Carolina Pattern Jury Instruction 105.40 limiting consideration of his testimony regarding his prior DWI convictions to his "truthfulness[.]" *Gardner*, 68 N.C. App. at 521-22, 316 S.E.2d at 134; *Jackson*, 161 N.C. App. at 124, 588 S.E.2d at 15.

On cross-examination, the State asked Defendant:

> [State]: And you indicated that you do have prior charges of driving while impaired.
>
> [Defendant]: Yes.
>
> [State]: In fact, you've been convicted of driving while impaired –
>
> [Defendant's Attorney]: I ask the question be phrased in its proper manner.
>
> . . . .
>
> [State]: Mr. Davis, you have been convicted in Wake County of impaired driving in 2015, weren't you?
>
> [Defendant]: Yes.
>
> [State]: And you were also convicted in Sampson County of impaired driving in 2010, weren't you?
>
> [Defendant]: Yes.
>
> [State]: And this charge has been pending for about three years, hasn't it?
>
> [Defendant]: Yes.
>
> [State]: How many court appearances do you think that you've made during the pendency of each of these impaired driving cases?
>
> [Defendant]: Couldn't give you an answer.

[State]: More than --

[Defendant]: Been going on nearly all my life.

[State]: So --

[Defendant]: Adult life.

[State]: So would you say that you've been to court for these charges more than ten times?

[Defendant]: Yes.

[State]: Administrative dates, review dates, things like that?

[Defendant]: Yes.

[State]: I'm sure that you have seen other DWI cases play out in court, haven't you?

[Defendant's Attorney]: Object to relevance, Judge.

The Court: Overruled.

[Defendant]: No.

[State]: When you've been to court on those prior occasions, you haven't seen any other cases of driving while impaired?

[Defendant]: No. I'm tired of coming to court.

[State]: On prior occasions when you appeared in court, were there also other defendants who appeared in court who were facing charges of driving while impaired?

[Defendant]: I -- I -- I -- I can't answer that. I don't know. I don't pay attention to other charges. I listen for my name. My name is called, I answer.

[State]: Okay. So, I mean, you've been through this process before.

[Defendant]: Yes.

This exchange confirmed what Defendant had earlier stated on direct examination: "I have priors" and "I do have prior DUI convictions." The State's cross-examination of Defendant pertained to the convictions to which Defendant had previously voluntarily admitted, clarified the dates of the offenses, and was the only time that the State questioned

Defendant about his prior convictions; this limited line of questioning was not impeachment. *See State v. Marslender*, 222 N.C. App. 318, 2012 WL 3192640 (2012) (unpublished) (determining that the questions posed on cross examination, clarifying the nature of the defendant's prior convictions, "was the only time the State questioned [d]efendant about his prior convictions and, . . . we do not construe that line of questioning as impeachment"); *see also State v. Nelson*, 298 N.C. 573, 598, 260 S.E.2d 629, 647 (1979) (evidence which aids in "clarify[ing] an uncertainty which [the defendant] had already admitted" is not impeachment). As the State's clarification of Defendant's prior convictions did not constitute impeachment, Defendant was not entitled to a limiting instruction.

Defendant argues that this Court's decision in *Jackson* required Defendant to make an unfair choice because it forces "defendants to choose between the common strategy of mitigating a damaging cross-examination about prior convictions and preserving their right to ask that the evidence of those convictions be limited to its only permissible purpose." Defendant thus argues, "that decision should be overruled." We are bound by *Jackson*, and Defendant's argument that *Jackson* should be overruled is misplaced before this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

*2. Review of Sealed Records*

**[2]** Defendant next asks this Court "to review the sealed records in this case to determine if the trial court, after its *in camera* review, failed to provide him with information material and favorable to his defense."

Preservation of Argument for Appellate Review

The State argues that Defendant failed to preserve this issue for appellate review because Defendant, in his second trial, failed to move the trial court to review the officers' personnel records. Thus, we must first determine whether this issue is properly before this Court.

A mistrial has the legal effect of "no trial." *State v. Harris*, 198 N.C. App. 371, 376, 679 S.E.2d 464, 468 (2009). Thus, when a defendant's trial results in a hung jury and a new trial is ordered, the new trial is an entirely separate legal affair from the original trial, unaffected by the parties' requests, objections, and motions, and the trial court's rulings made therein during the original trial. *State v. Macon*, 227 N.C. App. 152, 156, 741 S.E.2d 688, 690 (2013); *see State v. Shepherd*, 796 S.E.2d 537,

538 (N.C. Ct. App. 2017) (unpublished) (determining that the defendant failed to preserve an issue for appeal where defendant filed a motion to compel prior to his first trial which ended in mistrial, did not renew the motion after the mistrial, and did not object at trial). Accordingly, a defendant may not rely upon a motion made at an original trial to preserve issues for appeal following his conviction in a subsequent trial.

Defendant filed a motion to release the officers' personnel records prior to the first trial; the first trial ended in a mistrial on the charges of misdemeanor DWI and felony habitual DWI. There is no record evidence in this appeal that Defendant made any request or motion asking the trial court to review the officers' personnel records prior to the second trial. Moreover, Defendant does not claim or argue on appeal that he moved the trial court prior to his second trial to review the records or that he requested a review of the records at his second trial. Thus, the motion to release made prior to his first trial had no effect in the second trial. *Shepherd*, 796 S.E.2d at 538. As Defendant made no timely request or motion of the trial court, he has failed to preserve this issue for our review. N.C. R. App. P. 10(a)(1).

## III. Conclusion

As Defendant offered evidence of his prior convictions on direct examination as part of his defense, Defendant's credibility was not impeached and thus the requested instruction was not warranted. Therefore, the trial court did not err when it denied Defendant's request for a jury instruction limiting the testimony to his truthfulness. Moreover, because Defendant made no motion to release prior to his second trial and did not request review at his second trial, he failed to preserve the issue on appeal.

NO ERROR.

Judges TYSON and YOUNG concur.

**STATE v. GRIFFIN**

[270 N.C. App. 98 (2020)]

STATE OF NORTH CAROLINA
v.
THOMAS EARL GRIFFIN, DEFENDANT

No. COA17-386-2

Filed 18 February 2020

**Satellite-Based Monitoring—period of years—felon on post-release supervision—*Grady* analysis**

A thirty-year term of satellite-based monitoring (SBM) imposed upon a defendant who had entered an *Alford* plea to first-degree sexual offense with a child constituted an unreasonable warrantless search where defendant had appreciable privacy interests in his person, home, and movements (which were diminished for only five of the thirty years, during his post-release supervision); SBM substantially infringed on those privacy interests even though defendant did receive a risk assessment and a judicial determination of whether and how long to be subject to SBM (and, unlike lifetime SBM, the period-of-years SBM was not subject to later review); and the State failed to produce any evidence at trial showing SBM's efficacy in accomplishing any of the State's legitimate interests.

Judge BRYANT concurring in the result only.

Appeal by Defendant from order entered 1 September 2016 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 September 2017, and opinion filed 7 August 2018. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Heard in this Court on remand on 8 January 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.*

INMAN, Judge.

Following the Supreme Court of North Carolina's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (*Grady III*), we hold that the trial court's order imposing satellite based monitoring ("SBM") of

a sex offender for thirty years, considering the totality of the circumstances of this case, is unreasonable and violates the Fourth Amendment to the United States Constitution.

In *State v. Griffin*, ___ N.C. App. ___, ___, 818 S.E.2d 336, 342 (2018) (*Griffin I*), this Court held that the State failed to demonstrate the reasonableness of a warrantless search of Defendant Thomas Earl Griffin ("Defendant") through imposition of SBM for a term of thirty years in violation of the Fourth Amendment to the United States Constitution. Our holding was based on this Court's decision in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*"), holding that lifetime SBM was unconstitutional as applied to a recidivist defendant because the State "failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." ___ N.C. App. at ___, 817 S.E.2d at 27.

After *Griffin I* was filed, the Supreme Court of North Carolina modified and affirmed *Grady II*, holding in *Grady III* that lifetime SBM was unconstitutional as applied to Mr. Grady *and* all defendants who were not on probation or post-release supervision but subject to lifetime SBM solely on the basis of recidivism. *Grady III*, 372 N.C. at 591, 831 S.E.2d at 572. *Griffin I* was then remanded to this Court by order of the Supreme Court "for further consideration in light of . . . [*Grady III*]."

After careful review following the decision in *Grady III*, supplemental briefing, and oral argument, we again hold that the imposition of SBM under N.C. Gen. Stat. § 14-208.40(a)(2) per the trial court's order is unconstitutional as applied to Defendant.[1] We again reverse the trial court's order.

## I. FACTUAL AND PROCEDURAL HISTORY

The facts of this case are fully described in *Griffin I*. ___ N.C. App. at ___, 818 S.E.2d at 337-39. However, since those facts do not render *Grady III* entirely dispositive of this appeal and the resolution of an as-applied challenge "is strongly influenced by the facts in a particular case[,]" *State v. Packingham*, 368 N.C. 380, 393, 777 S.E.2d 738, 749 (2015), *rev'd and remanded on other grounds*, 582 U.S. ___, 198 L. Ed. 2d 273 (2017), we recite pertinent details.

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1. At oral argument, Defendant made clear his constitutional challenge to SBM was limited to the facts of the instant case and that he was not pressing a facial constitutional challenge to the entire statutory SBM regime. We therefore limit our decision to the as-applied argument advanced by this appeal.

In 2004, Defendant entered an *Alford* plea to one count of first-degree sex offense with a child. *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 337. At sentencing, Defendant admitted to the digital and penile penetration of his girlfriend's minor daughter over the course of three years. *Id.* at ___, 818 S.E.2d at 338. The trial court sentenced Defendant to imprisonment for 144 to 182 months and recommended the completion of SOAR, a sex offender treatment program. *Id.*

Eleven years after his conviction, in 2015, Defendant was released from prison on a five-year term of post-release supervision. *Id.* Three months later, the State sought SBM of Defendant under N.C. Gen. Stat. § 14-208.40(a)(2), as he had been sentenced for a reportable sex offense as defined by N.C. Gen. Stat. § 14-208.6(4) and therefore could be subject to SBM if ordered by a court. *Id.*

Defendant appeared before the trial court at a "bring-back" hearing in August 2016, where a "Revised STATIC-99 Coding Form" ("Static-99"), prepared by the Division of Adult Correction and Juvenile Justice and designed to estimate the probability of recidivism, was entered into evidence. *Id.* According to the Static-99, Defendant presented a "moderate-low" risk, the second lowest of four possible categories. *Id.*

The State called Defendant's parole officer as a witness, who testified that Defendant failed to complete the SOAR program but had not violated any terms of his post-release supervision. *Id.* The officer also described the physical characteristics and operation of the SBM device. *Id.* The State did not introduce any evidence regarding how it would use the SBM data or whether SBM would be effective in protecting the public from potential recidivism by Defendant. *Id.*

After taking the matter under advisement, the trial court entered a written order imposing SBM on Defendant for thirty years. *Id.* at ___, 818 S.E.2d at 338-39. That order included the following findings of fact and conclusion of law:

> 1. The defendant failed to participate in and[/]or complete the SOAR program.
>
> 2. The defendant took advantage of the victim's young age and vulnerability: the victim was 11 years old [while] the defendant was 29 years old.
>
> 3. The defendant took advantage of a position of trust; the defendant was the live-in boyfriend of the victim's mother. The family had resided together for at least four years and [defendant] had a child with the victim's mother.

4. Sexual abuse occurred over a three year period of time.

The court has weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and the court concludes that the publics [sic] right of protection outweighs the "de minimis" intrusion upon the defendant's Fourth Amendment rights.

*Id.* at___, 818 S.E.2d at 339.

Based on the above record, we held in *Griffin I* that "because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years." *Id.* at ___, 818 S.E.2d at 342.

## II. ANALYSIS

We re-evaluate Defendant's appeal as directed by the Supreme Court, considering *Grady III* and determining whether that decision impacts our prior reversal of the SBM order. Because *Grady III* modifies and affirms *Grady II*, we look to both opinions to discern the scope, effect, and import of *Grady III*. We begin, then, with a review of *Grady II*.

### A. *Grady II*

In *Grady II*, this Court determined whether lifetime SBM imposed on an unsupervised recidivist defendant was " 'reasonable—when properly viewed as a search[.]' " *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 21 (quoting *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 463 (2015)). We ultimately held that Mr. Grady's diminished privacy expectations did not render lifetime SBM reasonable under the totality of the circumstances. *Id.* at ___, 817 S.E.2d at 28.

Our analysis in *Grady II* focused on four things: (1) the defendant's expectation of privacy as a convicted sex offender subject to registration, *id.* at ___, 817 S.E.2d at 23-25; (2) the physical intrusion of the SBM monitor itself, *id.* at ___, 817 S.E.2d at 25; (3) SBM's continuous intrusion into the defendant's locational privacy interest, *id.* at ___, 817 S.E.2d at 25-26; and (4) the State's interest in monitoring the defendant and whether lifetime SBM served that interest, *id.* at ___, 817 S.E.2d at 27-28.[2]

2. We reviewed the issue under a "general Fourth Amendment approach based on diminished expectations of privacy" and declined to examine whether the SBM order constituted a special needs search, holding that the State's failure to raise a special needs argument before the trial court resulted in its waiver on appeal. *Id.* at ___, 817 S.E.2d at 23 (citations and quotation marks omitted).

As to the first circumstance, we held that registration on the sex offender registry meant the "[d]efendant's expectation of privacy [was] . . . appreciably diminished as compared to law-abiding citizens." *Id.* at ___, 817 S.E.2d at 24. We next explained that the impact of the ankle monitor used to conduct SBM was "more inconvenient than intrusive, in light of [the] defendant's diminished expectation of privacy as a convicted sex offender." *Id.* at ___, 817 S.E.2d at 25. We also observed, however, that SBM's "continuous, warrantless search of defendant's location through the use of GPS technology . . . . is 'uniquely intrusive' as compared to other searches upheld by the United States Supreme Court." *Id.* at ___, 817 S.E.2d at 25-26 (quoting *Belleau v. Wall*, 811 F.3d 929, 940 (7th Cir. 2016) (Flaum, J., concurring)). Lastly, we recognized "the State's compelling interest in protecting the public, particularly minors, from dangerous sex offenders[,]" *id.* at ___, 817 S.E.2d at 27, but nonetheless held the SBM search unreasonable because "the State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases." *Id.* at ___, 817 S.E.2d at 28. In announcing that holding, we stressed that it was strictly "limited to the facts of this case." *Id.*

### B. *Grady III*

Our decision in *Grady II* was modified and affirmed by our Supreme Court in *Grady III*. In a comprehensive opinion, the Supreme Court reviewed every aspect of this Court's analysis in *Grady II* and identified two points of express disagreement: (1) "the Court of Appeals erroneously limited its holding to the constitutionality of the program as applied only to Mr. Grady, when our analysis of the reasonableness of the search applies equally to anyone in Mr. Grady's circumstances[,]" *Grady III*, 372 N.C. at 510-11, 831 S.E.2d at 546 (citation omitted); and (2) the Supreme Court "[dis]agree[d] with the Court of Appeals that [the SBM ankle monitor's] physical restrictions, which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient than intrusive.' " *Id.* at 535-36, 831 S.E.2d at 562-63 (citations omitted).[3] It then modified the holding in *Grady II* to expand its application "equally to anyone in defendant's circumstances," rendering SBM monitoring under N.C. Gen. Stat. §§ 14-208.40A(c) and

3. Although the Supreme Court did not directly contradict this Court's determination that the State had failed to preserve a "special needs" analysis of the SBM program on appeal, it did address the question of whether a special need was present on the merits and concluded that "the 'special needs' doctrine is not applicable here." *Id.* at 527, 831 S.E.2d at 557 (citations omitted).

14-208.40B(c) unconstitutional as applied to any registered sex offenders who are otherwise not under State supervision but would be subject to SBM solely on the basis of recidivism. *Id.* at 550-51, 831 S.E.2d at 572.

Despite broadening *Grady II*'s impact, *Grady III* examined largely the same factors: (1) the nature of the defendant's legitimate privacy interests in light of his status as a registered sex offender, *id.* at 527-34, 831 S.E.2d at 557-61; (2) the intrusive qualities of SBM into the defendant's privacy interests, *id.* at 534-38, 831 S.E.2d at 561-64; and (3) the State's legitimate interests in conducting SBM monitoring and the effectiveness of SBM in addressing those interests, *id.* at 538-45, 831 S.E.2d at 564-68.

The Supreme Court first concluded that SBM intruded upon the defendant's privacy interests in his physical person, *id.* at 527-28, 831 S.E.2d at 557, his home, *id.* at 528, 831 S.E.2d at 557, and his location and movements, *id.* at 528-29, 831 S.E.2d at 557-58. Though the defendant was a convicted felon and did have to register as a sex offender, the Supreme Court held those facts diminished his privacy interests only in contexts distinct from SBM. *See id.* at 531, 831 S.E.2d at 559 ("None of the conditions imposed by the registry implicate an individual's Fourth Amendment 'right . . . to be secure in [his] person[ ]' or his expectation of privacy 'in the whole of his physical movements.' " (quoting *Carpenter v. United States*, 585 U.S. ___, ___, 201 L. Ed. 2d 507, 523 (2018)). It also drew a contrast between Mr. Grady and defendants subject to probation or post-release supervision:

> Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life. This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the "continuum of possible [criminal] punishments" and have no ongoing relationship with the State.

*Id.* at 531, 831 S.E.2d at 559-60 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874, 97 L. Ed. 2d 709, 718 (1987)). The Supreme Court summarized this portion of its analysis by concluding, "except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored." *Id.* at 534, 831 S.E.2d at 561.

Turning to the intrusive nature of SBM, the Supreme Court noted that recidivists who are required to undergo SBM do not receive the benefit of judicial review of the search's necessity prior to or following its imposition, and "the fact that North Carolina's mandatory SBM program involves no meaningful judicial role is important in the analysis of the constitutionality of the program." *Id.* at 535, 831 S.E.2d at 562.[4] It then explained that SBM constituted a significant invasion of Mr. Grady's physical privacy, as "Mr. Grady . . . must not only wear the half-pound ankle monitor at all times and respond to any of its repeating voice messages, but he also must spend two hours of every day plugged into a wall charging the ankle monitor." *Id.* The Supreme Court held that the State's ability to track Mr. Grady's movements was likewise a substantial intrusion: "mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests." *Id.* at 538, 831 S.E.2d at 564.

In the final step of its analysis, the Supreme Court looked to the State's interests in imposing SBM and " 'consider[ed] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.' " *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660, 132 L. Ed. 2d 564, 579 (1995)). It identified several compelling interests promoted by the State, namely protecting the public from sex offenders through solving crimes, reducing recidivism, and deterring criminality. *Id.* at 538-39, 543, 831 S.E.2d at 564-65, 567. Despite acknowledging the legitimacy of these interests, the Supreme Court echoed the efficacy-based decision in *Grady II* and wrote that "a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Id.* at 540-41, 831 S.E.2d at 566. It further noted that reliance on "unsupported assumptions . . . [does not] suffice to render an otherwise unlawful search reasonable." *Id.* at 543 n.20, 831 S.E.2d at 567 n.20. Given that the State failed to introduce any evidence that SBM is effective in protecting the public against sex offenders, the Supreme Court refused to "simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to

4. The Supreme Court noted that those subject to lifetime SBM do have the opportunity to petition for termination of SBM in front of the Post-Release Supervision and Parole Commission. *Id.* at 534, 831 S.E.2d at 562. It also held that such an opportunity was not equivalent to or a substitute for judicial review of a warrantless search. *Id.* at 534-35, 831 S.E.2d at 562.

it[.]" *Id.* at 544, 831 S.E.2d at 568. And, because "the State . . . simply failed to show how monitoring [a recidivist] individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime[,]" the Supreme Court held that "the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches." *Id.*

The Supreme Court did not, however, treat the lack of evidence that SBM is effective as a dispositive threshold issue, as opposed to one factor among the totality of the circumstances. *See id.* at 543, 831 S.E.2d at 567 ("The State's inability to produce evidence of the efficacy of the lifetime SBM program in advancing any of its asserted legitimate State interests *weighs heavily against* a conclusion of reasonableness here." (emphasis added)).

Following the above analysis, the Supreme Court reached its ultimate holding: not only was mandatory lifetime SBM under N.C. Gen. Stat. §§ 14-208.40A(c) and 14-208.40B(c) unconstitutional as applied to Mr. Grady, it was also unconstitutional as applied to all unsupervised defendants who received mandatory lifetime SBM solely on the basis of recidivism. *Id.* at 550-51, 831 S.E.2d at 572. In other words, because SBM monitoring of such a defendant on the basis of recidivism alone would never be reasonable under the totality of the circumstances, this Court erred in limiting its holding in *Grady II*. *See id.* at 545, 831 S.E.2d at 568 ("In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute."). The Supreme Court was mindful to restrict this quasi-facial element of its decision to the specific facts before it:

> The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen.

*Id.* at 545, 831 S.E.2d at 568-69.

### C. *Grady III*'s Effect on This Appeal

Defendant's circumstances place him outside of the facial aspect of *Grady III*'s holding; he is not an unsupervised recidivist subject to

mandatory lifetime SBM, but is instead a felon on post-release supervision who was convicted of an offense involving the physical, mental, or sexual abuse of a minor. Defendant, then, is subject to SBM under N.C. Gen. Stat. § 14-208.40(a)(2), not subsection (a)(1) as in the *Grady* cases, and he therefore received the benefit of a risk assessment and judicial determination of whether and for how long he would be subject to the SBM search. *See* N.C. Gen. Stat. §§ 14-208.40A(d)-(e) (2019) (providing that defendants subject to SBM under N.C. Gen. Stat. § 14-208.40(a)(2) must receive a risk assessment before the trial court "determines . . . the offender does require the highest possible level of supervision and monitoring" and imposes SBM for "a period of time to be specified by the court"). Plainly, then, *Grady III*'s holding does not directly determine the outcome of this appeal.

Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there. As conceded by the State at oral argument, *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns. *See Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564. Before doing so, however, we must address whether that analysis is conducted pursuant to the "special needs" doctrine or upon a diminished expectation of privacy as was done in *Grady III*. *See id.* at 524-27, 831 S.E.2d at 555-57.

*1. Special Needs v. Diminished Expectations of Privacy*

In its initial briefing to this Court, the State argued that SBM serves a special need in this case. However, we held in *Griffin I* that the State's failure to assert a special need before the trial court waived that argument on appellate review. *Griffin I*, ___ N.C. App. at ___ n.5, 818 S.E.2d at 340 n.5. We reaffirm our holding that the State's failure to advance a special need before the trial court waived its application on appeal, and, even assuming *arguendo* that this argument was not waived, we conclude that it is inapplicable to the SBM order appealed here.

Defendant is subject to post-release supervision until June of this year. As recognized in *Grady III*, a supervisory relationship between a defendant and the State may give rise to a special need for warrantless searches. 372 N.C. at 526, 831 S.E.2d at 556 (rejecting the State's special needs argument partly on the basis that Mr. Grady was unsupervised and was "not [in] a situation . . . in which there is any 'ongoing

supervisory relationship' between defendant and the State" (quoting *Griffin v. Wisconsin*, 483 U.S. at 879, 97 L. Ed. 2d at ___)). The thirty years of SBM at issue in this appeal is unrelated to the State's post-release supervision of Defendant.

As acknowledged by counsel at oral argument, all defendants convicted of a reportable conviction or the sexual abuse of a minor who receive post-release supervision must submit to SBM as a condition of their release. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(7) (2019) (establishing SBM monitoring as a required condition of post-release supervision for registered sex offenders and those convicted of sexual abuse of a minor).

Defendant has not contested the imposition of SBM as a condition of post-release supervision but has instead appealed an entirely different search lasting six times the length of his supervisory relationship with the State. In light of the fact that the State's special need to monitor Defendant through SBM can already be met as a term of his release—and given that Defendant has not contested the imposition of SBM in connection with his post-release supervision—we analyze the separate, thirty-year SBM search imposed independent of his supervised release under a diminished expectation of privacy exception to the Fourth Amendment's warrant requirement rather than as a special needs search. *Cf. Grady III*, 372 N.C. at 526-27, 831 S.E.2d at 556-57 ("[T]he primary purpose of SBM is to solve crimes. . . . Because the State has not proffered any concerns other than crime detection, the special needs doctrine is not applicable here." (citations and quotation marks omitted)).

*2. Defendant's Privacy Interests*

Defendant, as a registered sex-offender subject to post-release supervision, does have a diminished expectation of privacy in some respects. His appearance on the sex offender registry does not mean, however, that his rights to privacy in his person, his home, and his movements are forever forfeit. *Id.* at 534, 831 S.E.2d at 561. And while those rights may be appreciably diminished during his five-year term of post-release supervision, that is not true for the remaining 25 years of SBM imposed here. Treating this search on its own terms, Defendant's "constitutional privacy rights, including his Fourth Amendment expectations of privacy, [will] have been restored" one-sixth of the way into the warrantless search at issue. *Id.* Defendant, then, will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of the thirty-year term.

*3. Intrusive Nature of SBM*

*Grady III* made several observations concerning the intrusive nature of SBM, and those same observations generally apply here. For example, the physical qualities of the monitoring device used in this case appear largely similar to those in *Grady III*, and thus meaningfully conflict with Defendant's physical privacy rights. *Id.* at 535-37, 831 S.E.2d at 562-63. And, as recognized in *Grady III*, SBM's ability to track Defendant's location is "uniquely intrusive," *id.* at 537, 831 S.E.2d at 564 (citation and quotation marks omitted), and thus weighs against the imposition of SBM.

Despite the above parallels, the intrusion in this case is different from that in *Grady III* in some respects. Defendant is subject to thirty years of warrantless intrusions, not a lifetime, and, unlike recidivists, was ordered to submit to that term of SBM after a risk assessment and a determination by the trial court that he "require[s] the highest possible level of supervision and monitoring[.]" N.C. Gen. Stat. § 14-208.40A(e). These differences, however, do not sufficiently tilt the scales in favor of SBM in this case. The thirty-year term of SBM imposed here, though less than a lifelong term, nonetheless constitutes a significantly lengthy and burdensome warrantless search. Although Defendant did have the benefit of judicial review in determining whether SBM should be imposed, persons subject to SBM for a term of years do not have the opportunity to later petition the Post-Release Supervision and Parole Commission for relief. "In [this] aspect, the intrusion of SBM on Defendant in this case is greater than the intrusion imposed in *Grady II* [and *Grady III*], because unlike an order for lifetime SBM, which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review[.]" *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 341 (citing N.C. Gen. Stat. § 14-208.43). Thus, even when these differences from *Grady III* are taken into account, the intrusive nature of SBM as implemented in this case weighs against the reasonableness of the warrantless search ordered below.

*4. The State's Interests*

Our case law is clear that the State has advanced legitimate interests in favor of SBM. *See*, *e.g.*, *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568 ("[T]he State's asserted interests here are without question legitimate[.]"). Those interests, as acknowledged in *Grady III* and *Griffin I*, include protecting the public from sex offenders, *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 341, reducing recidivism, *id.*, solving crimes, *Grady III*, 372 N.C. at 542, 831 S.E.2d at 567, and deterring criminality,

*id.* at 543, 831 S.E.2d at 567. But, in addition to showing valid objectives, "the State bears the burden of proving the reasonableness of a warrantless search" which, in the context of SBM, includes "the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public." *Id.* at 543-44, 831 S.E.2d at 568 (citation omitted). The State's failure to produce any evidence in this regard "weighs heavily against a conclusion of reasonableness[.]" *Id.* at 543, 831 S.E.2d at 567.

The State conceded at oral argument that it did not introduce any record evidence before the trial court showing SBM is effective in accomplishing any of the State's legitimate interests. *See also Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 340 (noting the absence of record evidence on efficacy). Although the State proffered testimony that Defendant had betrayed the minor victim's trust and then failed to complete the SOAR program in prison, "[t]he SBM order did not reflect in any finding or conclusion whether the trial court determined that Defendant's betrayal of trust or failure to complete or participate in SOAR increased his likelihood of recidivism." *Id.* at ___, 818 S.E.2d at 342.

The Static-99 produced by the State disclosing a "moderate-low risk" of reoffending is, standing alone, "insufficient to support the imposition of SBM on a sex offender." *Id.* (citing *State v. Kilby*, 198 N.C. App. 363, 370, 679 S.E.2d 430, 434 (2009); *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013)). And, as explained above, the State's interest in monitoring Defendant via SBM during post-release supervision is already accomplished by a mandatory condition of post-release supervision imposing that very thing. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(7). The State, therefore, failed to carry its burden to produce evidence that the thirty-year term of SBM imposed in this case is effective to serve legitimate interests.

*5. Reasonableness of SBM Under the Totality of These Circumstances*

As explained above, the circumstances reveal that Defendant has appreciable privacy interests in his person, his home, and his movements—even if those interests are diminished for five of the thirty years that he is subject to SBM. Those privacy interests are, in turn, substantially infringed by the SBM order imposed in this case. Taken together, these factors caution strongly against a conclusion of reasonableness, and they are not outweighed by evidence of any legitimate interest served by monitoring Defendant given the State's failure to meet its burden showing SBM's efficacy in accomplishing the State's professed aims.

In short, the totality of the circumstances discloses that the order for thirty years of SBM in this case constitutes an unreasonable warrantless search in violation of the Fourth Amendment. We therefore hold, consistent with the balancing test employed in *Grady III*, that the imposition of SBM under N.C. Gen. Stat. § 14-208.40(a)(2) as required by the trial court's order is unconstitutional as applied to Defendant and must be reversed. *See State v. Greene*, ___ N.C. App. ___, ___, 806 S.E.2d 343, 345 (2017) (holding that when the State had the opportunity but failed to introduce evidence in showing the reasonableness of SBM, reversal—rather than vacatur and remand—is the appropriate disposition).

## III. CONCLUSION

We reaffirm our prior disposition under *Griffin I*, as that result is consistent with the totality of the circumstances test as employed by our Supreme Court in *Grady III*. Because the order imposing thirty years of SBM is an unreasonable warrantless search of Defendant in violation of the Fourth Amendment, we reverse the trial court's order.

REVERSED.

Judge YOUNG concurs.

Judge BRYANT concurs in the result only.

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STATE OF NORTH CAROLINA
v.
ROBERT LEE HODGE, DEFENDANT

No. COA19-443

Filed 18 February 2020

**1. Indictment and Information—habitual felon status—defective—subject matter jurisdiction—continuance**

Where the parties and the trial court discovered—after the jury returned a guilty verdict on the substantive felony—that defendant's indictment for attaining habitual felon status was marked "NOT A TRUE BILL," the trial court retained subject matter jurisdiction to sentence defendant as a habitual felon by continuing judgment on the substantive felony to allow the State to obtain a superseding indictment on habitual felon status.

**2. Indictment and Information—habitual felon status—defective—continuance—no abuse of discretion**

Where the parties and the trial court discovered—after the jury returned a guilty verdict on the substantive felony—that defendant's indictment for attaining habitual felon status was marked "NOT A TRUE BILL," the trial court did not abuse its discretion by continuing judgment on the substantive felony to allow the State to obtain a superseding indictment on habitual felon status. Defendant had notice the State was pursuing habitual felon status, and any public perception of irregularity was cured by the return of a true bill of indictment.

Judge MURPHY dissenting.

Appeal by Defendant from judgment entered 17 July 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for the Defendant.*

BROOK, Judge.

Robert Lee Hodge ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of attaining the status of habitual felon. Defendant argues that the trial court lacked subject matter jurisdiction to sentence him as a habitual felon because the original habitual felon indictment was marked "not a true bill" by the grand jury foreman. Defendant also argues that the trial court abused its discretion when it granted the State's request for a continuance upon the trial court's discovery that the indictment charging Defendant as a habitual felon was so marked. Because we find that the trial court retained jurisdiction over the proceeding by granting the State's motion for a continuance, and that it did not abuse its discretion in granting that continuance, we find no error.

## I. Background

Defendant was charged with three counts of residential breaking and entering, three counts of larceny after breaking and entering, two

counts of obtaining property by false pretenses, and one count of felonious possession of stolen goods. The State also ostensibly indicted Defendant for attaining the status of habitual felon on 7 November 2017, and Defendant waived arraignment on this charge. However, the grand jury returned the indictment marked "NOT A TRUE BILL[.]"

A trial was held on the substantive charges before Judge Henry W. Hight, Jr., from 9 April 2018 to 12 April 2018. At the beginning of trial, counsel for the State listed the charges Defendant faced, including referencing the habitual felon indictment. At the close of the State's evidence, Defendant moved to dismiss the charges of breaking and entering, larceny after breaking and entering, and one count of obtaining property by false pretenses; the trial court granted the motions and dismissed the charges. The jury found Defendant not guilty of felony breaking and entering and felony larceny but found Defendant guilty of one count of obtaining property by false pretenses and of the lesser included offense of non-felonious possession of stolen goods. The charges of which the jury found Defendant guilty resulted from the jury's finding that Defendant knowingly possessed five stolen videogames and sold those videogames to a pawn shop for $12.

After the jury returned its verdict, a bench conference was held off the record to discuss the trial court's discovery that the habitual felon indictment was marked "NOT A TRUE BILL[.]" The State then requested to continue sentencing pursuant to *State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477 (1994) "so that the State can go to the grand jury and apply for a new indictment, a superseding indictment." The prosecutor acknowledged that the habitual felon indictment in the case file was marked "NOT A TRUE BILL[.]" In support of its motion, the State argued that Defendant "was on notice from the moment that we discussed the habitual felon indictment that . . . the State was proceeding with this case habitually if he was convicted of the substantive felonies."

The trial court agreed that Defendant had notice of the State's intention to seek sentencing enhancements under the habitual felon statute, and that "until the court discovered that it was not a true bill, [] everyone was proceeding as if there was a valid true bill as to the status of the defendant." The trial court continued judgment and sentencing until 21 May 2018. The State sought a superseding indictment on the charge of habitual felon status, which a grand jury returned 17 April 2018.

Defendant was arraigned on the charge of attaining the status of habitual felon before Judge Vince Rozier on 20 April 2018. A trial was then held on that charge on 21 May 2018 before Judge Hight, Jr. Before

the trial began, Defendant renewed his motion to dismiss for lack of jurisdiction. The State called Assistant Clerk of Superior Court Sonya Clodfelter to testify at Defendant's trial on the status of being a habitual felon.

The jury began deliberations, and outside the presence of the jury, Ms. Clodfelter testified again on voir dire. Ms. Clodfelter testified as to the process that resulted in the original copies indicating different findings by the grand jury:

> [MS. CLODFELTER]: After testifying or finishing testifying this morning, I went back downstairs to do some research to find out if we had a scanned copy of the true bill of indictment that was issued on November 7, 2017.
>
> Our office has been scanning indictments for the last two years, and so after digging through our scanned copies, I found a scanned copy of the original showing it was a true bill of indictment.
>
> I knew there was an issue with this case and so I brought it to Judge Hight's attention this afternoon.
>
> THE COURT: And what happened to the scan?
>
> [MS. CLODFELTER]: The scanned copy, back in 2017, we were receiving two copies, two original copies from the grand jury. The first copy, separated, goes to the attorney or it goes to the magistrate's office if we have to issue a warrant for arrest for the serving of the true bill of indictment.
>
> The second copy goes in the court file since they are both originals. So the original of this copy that was scanned in would have gone to the magistrate's office for service when the order for arrest was served on the defendant.

None of the original copies are file stamped. Ms. Clodfelter testified that when the clerk's office sends one copy to the defendant to provide notice and retains the other for the court records, "we separate the two copies, assuming that they are the same[.]"

One juror experienced a family emergency during an overnight recess from deliberations, and the trial court excused her and declared a mistrial. A second trial on the charge of attaining the status of habitual felon was held before Judge Rebecca W. Holt from 16 July 2018 to 17 July 2018. At the beginning of this trial, Defendant again moved to dismiss the indictment for lack of jurisdiction. The trial court denied

the motion, finding that the State had jurisdiction as a result of the superseding indictment returned 17 April 2018.

At the close of all evidence, Defendant renewed the motion to dismiss for lack of subject matter jurisdiction based on the irregularities in the indictments charging Defendant with the status of being a habitual felon. The trial court denied the motion, finding that the State was proceeding on the superseding indictment, returned as a true bill. The jury found Defendant guilty of attaining the status of habitual felon. The trial court entered judgment on the jury verdicts and sentenced Defendant on both the underlying charges and the charge of attaining the status of habitual felon. The trial court sentenced Defendant to a minimum of 115 and a maximum of 150 months in prison.

Defendant entered notice of appeal orally, and appellate counsel was appointed.

## II. Standard of Review

Questions of subject matter jurisdiction are questions of law, which we review de novo. *State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016).

North Carolina General Statutes § 15A-1334(a) provides that "[e]ither the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." N.C. Gen. Stat. § 15A-1334(a) (2019). Therefore, we review a decision to allow a continuance for an abuse of discretion. *Oakes*, 113 N.C. App. at 336, 438 S.E.2d at 479. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

## III. Analysis

Defendant argues that because the original habitual felon indictment was marked "NOT A TRUE BILL" by the grand jury foreman, it was not an indictment, and the trial court did not have jurisdiction to sentence Defendant as a habitual felon. As such, Defendant further argues that the trial court was required to enter judgment upon the jury verdicts for the underlying substantive felony and to deny the State's motion for a continuance. Defendant argues that the trial court abused its discretion in granting the State's motion for a continuance to allow the State to procure a valid indictment on the charge of habitual felon because the decision to continue sentencing was "an error of law that undermines public faith in the criminal justice system."

A. Jurisdiction to Sentence Defendant

**[1]** Criminal defendants possess "the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense." *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). The Habitual Felons Act contemplates that defendants will be so charged through "the finding of a true bill by the grand jury." N.C. Gen. Stat. § 14-7.3 (2019); *see also State v. Langley*, 371 N.C. 389, 394, 817 S.E.2d 191, 195 (noting "a valid indictment is an essential of jurisdiction" in this context and reviewing statutorily required contents of valid habitual felon indictment) (internal marks and citation omitted).[1]

Moreover, a valid habitual felon indictment does not in and of itself grant a trial court jurisdiction to hear the proceeding. In order for the superior court to have jurisdiction to enter judgment on a charge of attaining the status of habitual felon, the indictment alleging the defendant's status as a habitual felon must be "part of, and ancillary to, the prosecution of defendant for the underlying felony, for which no judgment" has yet been entered. *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482. A proceeding to establish a defendant's status as a habitual felon may not be "independent from the prosecution of some substantive felony[.]" *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977). Consequently, if an indictment is returned after judgment has been entered on all substantive felony proceedings upon which a habitual felon charge is based, the indictment must be dismissed. *Id.* at 436, 233 S.E.2d at 589; *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482.

The trial court had jurisdiction under these facts. While the State could not establish jurisdiction over the habitual felon charge without evidence beyond a charging document marked "NOT A TRUE BILL[,]" the State obtained a valid indictment before judgment was entered on the substantive felony. Because judgment had not been entered, the habitual felon indictment was still "part of, and ancillary to," an underlying felony and, as a consequence, the trial court retained jurisdiction. *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482.

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1. The State argues that "Defendant is not constitutionally entitled to an indictment for habitual felon status, and nothing in the Habitual Felons Act requires a grand jury to attest to a true bill" here. We disagree. As noted above, the Habitual Felons Act and governing case law do not permit the State to proceed pursuant solely to an indictment marked "NOT A TRUE BILL." Further, our Constitution states clearly that "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment[,]" N.C. Const. Art 1, § 22; no such valid predicate to the habitual felon prosecution at issue existed before the grand jury returned a true bill on 17 April 2018.

B. Trial Court's Order Continuing Judgment

**[2]** Given that the trial court retained jurisdiction over the habitual felon indictment here only by continuing judgment on the underlying felony, we turn now to whether the trial court properly continued judgment.

"A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Id.* at 337, 438 S.E.2d at 480 (citation omitted). In assessing the continuance at issue here we bear in mind that "[o]ne basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*." *Allen*, 292 N.C. at 436, 233 S.E.2d at 588 (emphasis in original); *see also Oakes*, 113 N.C. App. at 339, 438 S.E.2d at 481 ("As *Allen* makes clear, the critical issue is whether defendant had notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge.").

Defendant first argues that the trial court's decision to grant a continuance under these circumstances was "exceedingly prejudicial" because it resulted in an exponential increase in his sentence. The argument is straightforward: the continuance prejudiced Defendant because the habitual felon charge increased his sentence from 20 to 30 months to between nine-and-a-half and twelve-and-a-half years. Relatedly, Defendant highlights the undeniable outrageousness of incarcerating him for, at a minimum, the better part of a decade for knowingly possessing five stolen video games.

Our Court, however, has not made punishment the determinative factor in the proscribed procedural prejudice inquiry. In *Oakes*, a continuance granted at the same moment in the proceeding to remedy the same general malady, a defect in indicting the Defendant on habitual felon grounds, did not establish prejudice. 113 N.C. App. at 339-40, 438 S.E.2d at 481. The continuance in *Oakes* also resulted in an exponential increase in the defendant's sentence. *Id.* at 334, 438 S.E.2d at 478.

And, as there, Defendant had notice that the State was pursuing a habitual charge here. Defendant waived arraignment on the charge of being a habitual felon before trial on the substantive charges. Each participant in the proceedings against Defendant was operating under the impression that the grand jury had returned a valid habitual felon indictment and that the State intended to prosecute Defendant as a recidivist. Neither Defendant, nor defense counsel, nor counsel for the State, nor the trial court realized the indictment in the court file was marked "NOT

A TRUE BILL" until the trial court discovered as much after the jury returned its verdicts.

As such, despite the highly irregular nature of the proceedings and the grossly disproportionate sentence that resulted, Defendant did not suffer prejudicial procedural conduct. *Id.*

Defendant next argues that the trial court's decision to continue the sentencing proceeding to allow the State to seek a superseding indictment manifested an abuse of discretion because the proceedings offended the public sense of fair play and "undermine[d] public faith in the criminal justice system." Defendant contends that our Court should not be seen to condone the State's mistake here by permitting the State to correct its error at the eleventh hour. Defendant undoubtedly raises important concerns; however, we cannot hold that the trial court's grant of the continuance was manifestly unsupported by reason. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Indeed, the trial court expressed concern regarding continuing the proceedings, but its comments do not suggest an absence of reason:

> THE COURT: I am sure that there is an innocent reason why we have two different documents. I am concerned about the integrity of the court file, so I will have to call somebody to do an investigation on it to determine why we have got different things. It might be fine. It may not. But I don't think that would defer our proceeding at this point. They can do that. I don't believe they depend upon each other.

We are not insensitive to the notion that granting the State time to fix its error at a moment when the only evidence in the court file suggested the grand jury did not find probable cause to indict Defendant could, under different circumstances, offend the public sense of fair play. However, any public perception of irregularity was cured here by the return of a true bill by the grand jury on 17 April 2018.

Consequently, we cannot say that the trial court's grant of a continuance so offended the public sense of fair play that it constituted an abuse of discretion. *See Oakes*, 113 N.C. App. at 336-37, 438 S.E.2d at 479-80.

## IV. Conclusion

The trial court retained jurisdiction at the moment it discovered the State's habitual felon indictment error. The State thus could still and, in fact, did seek to rectify its mistake by requesting a continuance and

procuring a valid indictment. We need not agree with the trial court's finding of good cause to nevertheless hold it did not abuse its discretion. *See State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (reviewing for abuse of discretion "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record."). Therefore, we must find no error.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

Is a defective indictment the same as a nonexistent indictment? If I buy a car and get a car without an engine, that is a defective car. If I ask for a car and get a covered wagon, that is *not* a defective car. I can fix an engineless car; I cannot transform a covered wagon into a car. What we have here is the covered wagon of indictments.

I cannot agree with the Majority's view that, when determining a trial court's ability to retain jurisdiction over a habitual felon indictment, sufficient notice alongside a *defective* indictment is the same as sufficient notice alongside a *nonexistent* indictment. *Compare State v. Oakes*, 113 N.C. App. 332, 334, 438 S.E.2d 477, 478 (1994) (considering an habitual felon indictment that "failed to allege the underlying felony with particularity"), *with State v. Allen*, 292 N.C. 431, 432, 233 S.E.2d 585, 586 (1977) (considering "an independent proceeding purportedly pursuant to the North Carolina Habitual Felons Act" where "defendant was indicted, tried and convicted of being an habitual felon" in the absence of a cognizable offense). Especially when the statute tells us "the proceedings shall be as if the issue of habitual felon were a principal charge[,]" N.C.G.S. § 14-7.5 (2019), and "does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon." *Allen*, 292 N.C. at 434, 233 S.E.2d at 587. Hence, I cannot agree with the Majority that the facts of this case fail to show an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Oakes*, 113 N.C. App. at 337, 438 S.E.2d at 480 (internal quotation marks and citation omitted).

The facts of Defendant's case are qualitatively different from *Oakes* and qualitatively similar to *Allen*. *Oakes*'s reasoning relied on the reasoning and holding of *Allen*, and both cases relied on the existence of a defective true bill of indictment or a valid, but after-the-fact, true bill of indictment.

In *Allen*, there was no habitual felon indictment until after the defendant was sentenced for an underlying felony. Our Supreme Court held the State could not "bring [an] independent proceeding to declare [the defendant] an habitual felon when the indictment itself revealed that before it was returned all the proceedings by which he had been found guilty of the underlying substantive felonies had been concluded." *Allen*, 292 N.C. at 432, 233 S.E.2d at 586. Our Supreme Court emphasized that "[o]ne basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*." *Id.* at 436, 233 S.E.2d at 588. It never said that was the only purpose.

In *Oakes*, we extended the notice-purpose rationale of *Allen*. We considered an indictment that was defective for failing to allege an underlying felony with particularity. *Oakes*, 113 N.C. App. at 334, 438 S.E.2d at 478. We stated that "[t]he sentencing phase of a criminal prosecution constitutes a significant component of the prosecutorial process." *Id.* at 339, 438 S.E.2d at 481. We held, relying on *Allen*, that "for the purpose of our habitual felon laws, until judgment was entered upon defendant's conviction of [his underlying felony], there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach." *Id.* Later in the opinion, we also declared "the defect in the initial habitual felon indictment" did not cause the trial court to lose jurisdiction for two reasons: (1) the defect was "technical"; and (2) that defect "was not such as to deprive defendant, when entering his plea to the substantive charge, of notice and understanding that the State was seeking to prosecute [defendant] on that charge as a recidivist." *Id.* at 339-40, 438 S.E.2d at 481. Part of our reasoning was that "[a]t the time defendant entered his plea to the underlying substantive felony and proceeded to trial, there was pending against him an habitual felon indictment presumed valid by virtue of its 'return by the grand jury as a true bill.' " *Id.* at 339, 438 S.E.2d at 481 (quoting *State v. Mitchell*, 260 N.C. 235, 238, 132 S.E.2d 481, 482 (1963)). Unlike *Allen*, our holding in *Oakes* depended on the existence of a true bill of indictment presumed valid.

In habitual felon status proceedings, the first step of having a valid indictment is at least as important as the last step of sentencing. Although a significant step in prosecuting a case is sentencing, so too

is having a true bill of habitual felon status indictment to attach to an underlying felony.

The facts here are more akin to the independent proceeding in *Allen* than the ancillary proceeding in *Oakes*. At sentencing, Defendant's attorney aptly argued why *Oakes* should not apply to this case:

> Your Honor, I would object to the State's motion to continue[. U]nderstanding that their argument based on *State v. Oakes* is that they can, when an indictment is found to be defective, still seek an effective indictment, and I think that's well established in this case. *However*, *that's not what we have here. We don't have a defective indictment. We don't have a true bill.* . . .
>
> As far as we know, as far as anyone other than the people in [the grand jury room] know, they issued – they came up with not a true bill and it's signed by the foreperson for that grand jury. That is their will. That is that body's will. . . .
>
> What we know is that we have an indictment that is issued as not a true bill that is signed by a foreperson in the file. That's it. . . .
>
> There is nothing at this point -- there is no accusatory instrument that Your Honor can continue judgment on in order to at this point sentence down the road on a new -- on a new instrument. . . .
>
> A continuance at this point is to allow the State to seek a different answer from another jury, *not to fix a defect*, and so I don't believe *State v. Oakes* applies.

Indeed, the indictment in this case was not marred by a "technical" defect as in *Oakes* —it did not exist. The State could not request a continuance to get a true bill of indictment when no indictment existed because this is functionally the same after-the-fact independent proceeding as in *Allen*. The trial judge should have commenced sentencing the moment the State presented him with a covered wagon.

Moreover, having a true bill at the time a defendant pleads guilty or not guilty to the underlying felony is more important as a matter of due process than notice. The Majority's holding invites a dereliction of duty. Now, all the State must do is give notice in some unprescribed manner. I anticipate a future argument wherein the State relies only on

an oral communication with counsel and having delivered defendant's prior history, and then, when the defendant is about to be sentenced upon conviction for a felony, ask for a continuance to seek an indictment for habitual felon status. I cannot support even a preliminary step in that direction. Such a procedure is totally out of line with *Allen*, the Habitual Felon Act, and notions of procedural due process. The result here is beyond the boundaries of due process. What happened here was an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, [and] conduct which offends the public sense of fair play." *Oakes*, 113 N.C. App. at 337, 438 S.E.2d at 480 (internal quotation marks and citation omitted).

Therefore, I respectfully dissent.

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STATE OF NORTH CAROLINA
v.
CLAYTON JAMES KOWALSKI

No. COA19-709

Filed 18 February 2020

**1. Appeal and Error—preservation of issues—challenge to limits placed on cross-examination—testimony elicited at voir dire**

In an appeal from a conviction for assault on a female where defendant argued that the trial court erred by prohibiting him from cross-examining the victim about her mental health history, defendant preserved his argument for appellate review by eliciting the contested testimony during voir dire and obtaining a ruling from the trial judge. Thus, defendant did not waive appellate review by deciding not to elicit the testimony in the jury's presence.

**2. Evidence—cross-examination—impeachment—assault victim's mental health history—relevance—prejudice**

At a trial for assault on a female arising from a fight between defendant and his ex-girlfriend, the trial court did not err by prohibiting defendant from cross-examining his ex-girlfriend about her mental health history because he failed to show the proposed testimony was relevant for purposes of impeaching his ex-girlfriend's credibility. Further, the trial court did not abuse its discretion in

finding the proposed testimony was more prejudicial than probative under Evidence Rule 403.

**3. Assault—on a female—jury instruction—variance from criminal summons—invited error—plain error analysis**

At a trial for assault on a female, the trial court did not commit plain error by instructing the jury that the State needed to prove defendant assaulted his ex-girlfriend by "grabbing, pushing, dragging, kicking, slapping, and/or punching" where the criminal summons charged defendant with "striking her neck and in her ear." Defendant not only failed to object to the variance between the court's instruction and the summons, but he also recommended that the court add the words "slapping" and "punching" to the instruction; thus, any error was invited error.

Appeal by defendant from judgment entered 14 February 2019 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 January 2020.

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

*William D. Spence for defendant-appellant.*

TYSON, Judge.

Clayton James Kowalski ("Defendant") appeals from judgment entered on the jury's verdict finding him guilty of misdemeanor assault on a female. We find no error.

## I. Background

Defendant and Katelyn Policke dated on-and-off for five years, from approximately 2012 until 2017. They lived together in an apartment for a year and a half until October 2017, when Policke moved out and into a house without Defendant. Defendant and Policke had drinks at his parents' house on 23 December 2017. Defendant and Policke left around 11 p.m. Defendant drove Policke to her house and then drove himself home.

Policke called Defendant shortly after he returned home to discuss their relationship. Policke believed their relationship was not progressing and asserted it "was going backwards." The conversation escalated and Defendant hung up the phone. Policke repeatedly tried to call Defendant back, but he refused to speak with her.

Policke drove to Defendant's house and rang the doorbell. Policke and Defendant presented differing versions of what happened at his house during the trial.

A. Policke's Version

Policke testified Defendant answered the door while holding a loaded shotgun. Defendant allowed Policke to come inside and they spoke. At one point, Policke went upstairs to gather her possessions and leave. Policke was sitting on Defendant's bed when he grabbed her head and tried to pull her off the bed. She fell and injured her neck. Defendant dragged her down the hallway and pushed her down the stairs. Defendant stood over Policke on the stairs, kicking and hitting her in the face.

Policke screamed, hoping someone would eventually hear her. Defendant allegedly told her, "the louder you scream, the more [I'm] going to hit [you]." Defendant took Policke's purse and keys from her and threw them out the front door into a flower bed. Defendant threatened to call the police. Policke eventually got up and walked out the front door. She found her purse and keys and drove herself home.

Policke's mother, Kathy, testified at trial. She said Policke called her between 12:30 and 1 a.m. as she drove from Defendant's house. Policke was "in a panic" and told her mother "she had been assaulted." Kathy drove to meet her at her home as Policke told her what happened. Kathy testified Policke gave a detailed account, which was consistent with her own testimony at trial.

Kathy called the police shortly before arriving at Policke's home. Police and emergency medics responded to Policke's home. Policke went to the hospital. Policke had bruises and scratches on her cheeks and neck and complained her eardrum had burst and she could not hear.

B. Defendant's Version

Defendant testified he heard banging on his door as well as the doorbell ringing. Defendant denied having a shotgun when he opened the door. Defendant described Policke as "upset but not violent at that moment."

Defendant went upstairs and Policke followed. They sat on his bed and continued discussing the status of their relationship. Defendant testified he told Policke, "until there's no problems and you don't have violent – you know, end up getting violent, I can't give a ring to someone that acts like that." Policke continued to question Defendant about their

relationship until "she felt like [Defendant] was ignoring her," at which point she slapped Defendant in his face.

Defendant told Policke she had to leave. Policke punched Defendant in the arm. Defendant pushed her away onto his bed and went downstairs. Policke followed Defendant down the stairs, but she stumbled and fell. Defendant opened the front door and told Policke to leave his home. She was yelling loudly at him and did not leave. Defendant closed the front door and called the police while Policke resumed slapping and punching him. When Policke told Defendant she would leave, he hung up the phone call. She did not leave.

Defendant went into the kitchen and Policke followed. Policke swung at Defendant and fell into his stove. Defendant denied pushing her into his stove. Policke tried to punch Defendant again after following him to the living room. Defendant threatened to call the police again. He took her purse and threw it out the front door. Policke left to look for it and Defendant closed and locked the door. Defendant denied slapping, punching, or kicking Policke.

C. Adjudication

Defendant was charged with assault on a female on 24 December 2017, and Policke obtained an *ex parte* domestic violence protective order ("DVPO") that same day. After Policke received a blank text message from Defendant on 26 December 2017, he was charged with violating the DVPO on 3 January 2018. The State joined both charges for trial.

The jury found Defendant guilty of misdemeanor assault on a female on 14 February 2019. The jury found Defendant not guilty of violating the DVPO. The trial court sentenced Defendant to a suspended sentence of 75 days' imprisonment and placed Defendant on supervised probation for 18 months. Defendant filed his written notice of appeal on 27 February 2019.

II. Jurisdiction

This Court possesses jurisdiction over Defendant's appeal from judgment as a matter of right pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court abused its discretion by prohibiting Defendant from cross-examining Policke about her prior mental health history. Defendant also argues the trial court committed plain error in its instruction to the jury.

## IV. Cross-Examination

Policke and Kathy each testified for the State, along with an officer from the Huntersville Police Department. During cross-examination of Policke, Defendant's counsel began a line of questioning by asking Policke if she gets aggressive "when things don't go your way[.]" Defendant's counsel then asked about a previous incident in which Policke had allegedly attacked her mother. The State objected, and the trial court excused the jury. The court heard arguments from both parties on the issue and conducted a *voir dire* of Defendant's line of questioning to "see where this leads."

Defendant's counsel demonstrated the proposed cross-examination of Policke in *voir dire*. Defendant's counsel asked some questions about prior incidents of Policke's physical aggression, anger, and her mental health and treatment. The State objected to the relevance of the questions, which the trial court overruled for the purpose of taking the *voir dire*. The trial court heard arguments on the admissibility of the proposed testimony at the conclusion of Defendant's *voir dire* cross-examination.

The trial court ruled some of Defendant's proposed line of questioning admissible, but determined the questions concerning Defendant's mental health and treatment were not relevant and inadmissible. Additionally, the trial court ruled "to the extent [the questions had] some attenuated relevance, [they are] more prejudicial than [they are] probative." Defendant did not attempt to elicit any of the proposed testimony about Policke's mental health when cross-examination resumed in front of the jury.

### A. Preservation

**[1]** The State argues Defendant failed to preserve this issue for appellate review by failing to elicit the contested testimony in the presence of the jury. The State cites *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), to support its argument. The State's reliance on *Coffey* is misplaced.

In *Coffey*, the State called a police officer to testify and the trial court conducted a *voir dire* of his proposed testimony. *Id.* at 286-87, 389 S.E.2d at 59. The court ruled most of the officer's proposed testimony was inadmissible hearsay. *Id.* at 287, 389 S.E.2d at 59.

During the *voir dire*, the defendant's counsel asked if he could question the officer about another possible culprit for the crime charged. *Id.* "The trial court indicated that the defendant's counsel could do so, but that the trial court would sustain an objection to such questions at

that time." *Id.* When the jurors returned, the defendant's counsel had no questions for the officer on cross-examination. *Id.* The defendant's counsel did not attempt to elicit and preserve the proposed testimony from the officer, even during the *voir dire*. *Id.*

One purpose of conducting a *voir dire* examination of contested evidence, when a trial court determines its admissibility, is to preserve an offer of proof of the evidence for appellate review. *See id.* at 289-90, 389 S.E.2d at 61 (where "the defendant never actually attempted to introduce [the contested] evidence . . . . the defendant may not now be heard to complain on appeal that such evidence was not before the jury *or that the trial court did not allow him to cause the record to show what any such evidence might have been.*") (emphasis supplied); *see also State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978) ("A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk . . . that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record.").

Unlike the defendant's counsel in *Coffey*, Defendant's counsel elicited Policke's contested testimony in *voir dire*, secured a ruling from the trial judge, and preserved the issue in the record for review on appeal.

B. Standards of Review

"[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." S*tate v. Larrimore*, 340 N.C. 119, 150, 456 S.E.2d 789, 805 (1995) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 611(a) (2019). "In general, we review a trial court's limitation on cross-examination for abuse of discretion." *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019).

"Even though a trial court's rulings on relevancy [under Rule 401] technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Muhammad*, 186 N.C. App. 355, 360, 651 S.E.2d 569, 573 (2007) (citation and alterations omitted). "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

C. Analysis

**[2]** Defendant argues the trial court abused its discretion in limiting his trial counsel's cross-examination of Policke by ruling portions of his intended questioning not relevant and more prejudicial than probative.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Relevant evidence, as a general matter, is considered to be admissible. . . . Any evidence calculated to throw light upon the crime charged should be admitted by the trial court." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988) (citations and internal quotation marks omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

Defendant argues the proposed cross-examination of Policke was relevant evidence for the purpose of impeaching her credibility. *See State v. Williams*, 330 N.C. 711, 723, 412 S.E.2d 359, 367 (1992) ("Where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects."). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2019). However, evidence that has no bearing on truthfulness or untruthfulness is not proper impeachment evidence. *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998); N.C. Gen. Stat. § 8C-1, Rule 608(b) (2019).

The excluded testimony at issue concerned prior instances of Policke's mental health and treatment. One instance involved treatment Policke had sought for childhood trauma. The trial court noted Defendant's counsel did not ask Policke about nor attempt to introduce evidence of a mental health diagnosis or mental state in the proposed cross-examination.

Defendant has not shown the excluded testimony was relevant to Policke's truthfulness or untruthfulness to challenge her credibility before the jury. S*ee Call*, 349 N.C. at 411, 508 S.E.2d at 514. Defendant has not shown the trial court committed prejudicial error in ruling the proposed cross-examination was not relevant under Rule 401. To the extent the excluded evidence may have had some relevance, the trial court's ruling that the proposed testimony was more prejudicial than

probative under Rule 403 was not an abuse of discretion. Defendant's argument is overruled.

## V. Jury Instructions

### A. Standard of Review

Defendant failed to proffer instructions or to object to the jury instructions given by the trial court.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). To "specifically and distinctly" show plain error to challenge instructions given to the jury, Defendant "must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012) (citations and internal quotation marks omitted).

### B. Analysis

**[3]** Defendant argues the trial court committed plain error in charging the jury that the State needed to prove Defendant had intentionally assaulted Policke by "grabbing, pushing, dragging, kicking, slapping, and/or punching" when the criminal summons charged Defendant with "striking her neck and in her ear."

Defendant correctly argues: "It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (citations omitted). "[T]he failure of the allegations [in a warrant or indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *Id.* at 631, 350 S.E.2d at 357.

However, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019). "[A] defendant who invites error has waived his right to all appellate

review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002).

The trial court followed the pattern jury instruction for misdemeanor assault on a female, which requires the court to describe the alleged assault. *See* N.C.P.I.–Crim. 208.70 (2019). During the charge conference, the trial court proposed describing Defendant's alleged assaultive conduct in its jury instructions as "grabbing, pushing, dragging and/or kicking." Defendant's counsel replied: "I think there was slapping and punching in there as well. I think that is what they are alleging. So drag, punched, slapped, kicked."

The trial court incorporated Defendant's counsel's addition of "slapping and punching" to its original proposed instruction, resulting in the final description in the jury instruction as Defendant: "grabbing, pushing, dragging, kicking, slapping, and/or punching" Policke.

Defendant's counsel failed to object to the variance he now alleges to have been plain error. Defendant's counsel did not request the trial court include the specific language of "striking her neck and in her ear" from the criminal summons. Rather, Defendant's counsel contributed to the variance by adding more descriptive words, which were consistent with the evidence presented at trial by the State and not found in the criminal summons.

The variance, which Defendant now alleges is plain error, resulted in part from his own conduct in the proposed instructions. Defendant cannot show prejudice. *See* N.C. Gen. Stat. § 15A-1443(c). Defendant's asserted error, if any, was invited and he "will not be heard to complain" on appeal. *See McPhail*, 329 N.C. at 643, 406 S.E.2d at 596. Defendant's argument is overruled.

## VI. Conclusion

Defendant preserved the excluded testimony and the issue of the trial court's limitation of his cross-examination of Policke for appellate review. Defendant has not shown relevancy or that the trial court abused its discretion by limiting his cross-examination of Policke to exclude certain testimony about her mental health and treatment to challenge her credibility.

Defendant's counsel did not object to the jury instruction as a fatal variance, which he now alleges was plain error to warrant a new trial. The unpreserved error, if any, was invited error, as Defendant's counsel contributed to the variance. Defendant received a fair trial, free from

prejudicial errors he preserved and argued. We find no reversible errors to award a new trial. *It is so ordered.*

NO ERROR.

Judges DIETZ and INMAN concur.

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STATE OF NORTH CAROLINA
v.
RICKY SCOTT MILLS, DEFENDANT

No. COA19-597

Filed 18 February 2020

**1. Probation and Parole—probation revocation—willfully absconding—failure to report to probation officer—failure to provide valid address and phone number**

The trial court did not abuse its discretion in revoking defendant's probation after finding that defendant willfully absconded from supervision, where competent evidence showed defendant failed to report to his probation officer for at least twenty-one days after being released from custody, reported an invalid home address (belonging to a stranger), and failed to report a valid phone number for contact purposes (his sister's phone number was inadequate because she rarely saw him and was not aware that he had been released from custody).

**2. Probation and Parole—probation revocation—willfully absconding—additional findings—regarding violations of other conditions—completion not due yet**

Where the trial court revoked defendant's probation for willfully absconding from supervision, the court did not err by also finding defendant violated other conditions of his probation even though the time period for completing them had not yet expired, because defendant presented no evidence showing he had taken steps to begin complying with those conditions and, at any rate, the absconding violation was the only one for which the trial court could and did revoke his probation.

Appeal by defendant from judgment entered 7 February 2019 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.*

BERGER, Judge.

Ricky Scott Mills ("Defendant") appeals from the judgment revoking probation entered February 7, 2019. Defendant contends the trial court erred in finding that Defendant violated the terms of probation and willfully absconded. We disagree.

Factual and Procedural Background

On December 5, 2018, Defendant pleaded guilty to assault with a deadly weapon on a government official and was placed on supervised probation. That same day, Defendant met with Buncombe County probation intake coordinator, Officer Robin Canipe ("Officer Canipe"), in the local jail to complete his intake paperwork. Defendant informed Officer Canipe that he would reside at his sister's house in Arden, North Carolina and provided his sister's phone number as his contact point. Officer Canipe gave Defendant "Reporting Instructions" which required Defendant to meet with his probation officer within three days of his release from custody. Defendant signed and acknowledged the requirements and indicated that he understood that he could be arrested if he failed to comply. Defendant was also provided with, and initialed, the "Regular Conditions of Probation."

On Friday, December 21, 2018, Defendant was released from custody and was required to report to Officer Michael Britton ("Officer Britton") by December 24, 2018. The Buncombe County Probation Office was closed the following Monday, Tuesday, and Wednesday in observance of the Christmas holiday. Soon after, Officer Britton attempted to locate Defendant through the address and phone number which Defendant provided during his intake interview.

Officer Britton called the phone number Defendant provided. Defendant's sister answered and claimed that she "rarely has contact with him and hasn't had contact with him in some time and didn't even

know he was out of custody." In early January, Officer Britton went to the address given by Defendant as his sister's residence, but the owner had "never heard of" Defendant.

On January 11, 2019, Officer Britton filed a violation report that alleged Defendant had violated the following conditions of probation: (1) "The Defendant has avoided supervision or is making their whereabouts unknown and has absconded;" (2) "Defendant has failed to provide proof to supervising officer of attending one community support meeting a week;" (3) "Defendant has failed to provide proof to supervising officer of completing any of 100 community service hours ordered;" (4) "Defendant has failed to report to supervising officer in any way since being released from custody on 12/21/2018," "Defendant has failed to report a valid address," and "Defendant has failed to report a phone number to be contacted on;" (5) "Defendant has failed to provide proof to supervising officer of enrolling in a G.E.D. program;" (6) "Defendant has an [active] warrant for non support;" (7) "[Defendant] has failed to provide supervising officer proof of obtaining a substance abuse assessment;" and (8) "Defendant has failed to provide proof of obtaining a job and working at[]least 20 hours a week."

On February 7, 2019, this matter came on for hearing. At the time, Defendant was in custody on an active warrant for nonsupport. The trial court determined that Defendant willfully violated the terms of his probation and revoked Defendant's probation. Defendant appeals, arguing that the trial court erred in finding (1) Defendant violated the conditions of his probation and that the State failed to present competent evidence to support the violations, and (2) that Defendant willfully absconded from supervision. We disagree.

Standard of Review

"In a probation revocation, the standard is that the evidence be such as to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant has willfully violated a valid condition" upon which probation can be revoked. *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007) (*purgandum*).

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

*State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (*purgandum*). "We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Newsome*, ___ N.C. App. ___, ___, 828 S.E.2d 495, 498 (2019) (*purgandum*).

Analysis

**[1]** "Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (citations and quotation marks omitted). Pursuant to N.C. Gen. Stat. § 15A-1344, the trial court "may only revoke probation for a violation of a condition of probation" including committing a "criminal offense in any jurisdiction" or absconding "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. §§ 15A-1344(a); 15A-1343(b)(1), (b)(3a) (2017). "It is a defendant's responsibility to keep his probation officer apprised of his whereabouts." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498.

Here, the violation report alleges that Defendant has willfully violated:

> 1. Regular Condition of Probation: General Statute 15A-1343 (b) (3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS AVOIDED SUPERVISION OR IS MAKING THEIR WHEREABOUTS UNKNOWN AND HAS ABSCONDED.
>
> 4. "Report as dire[c]ted by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that
>
> -DEFENDANT HAS FAILED TO REPORT TO SUPERVISING OFFICER IN ANY WAY SINCE BEING RELEASED FROM CUSTODY ON 12/21/2018.
>
> -DEFENDANT FAILED TO REPORT A VALID ADDRESS
>
> -DEFENDANT FAILED TO REPORT A PHONE NUMBER TO BE CONTACTED ON

Prior to Defendant's release, Defendant was instructed to meet with Officer Britton within three days of his release from custody. "This was

more than a regular office visit. It was a special requirement imposed upon Defendant . . . , and it was his responsibility to keep his probation officer apprised of his whereabouts" upon release. *Id.* at ___, 828 S.E.2d at 499 (citation and quotation marks omitted). Defendant was released on December 21, 2018 and failed to report to Officer Britton for at least 21 days. Although the probation office was closed around the time of his release, Officer Britton testified he still would have been notified if Defendant had attempted to contact the office. Moreover, the evidence tended to show that Defendant had failed to contact the probation office by January 11, 2019 when the probation violation report was filed.

In addition, Officer Britton further testified that he tried to contact Defendant using the phone number and address that Defendant provided in the intake form. When Officer Britton called the phone number, he was connected with Defendant's sister, who lives in South Carolina. She informed Officer Britton that she "rarely has contact with [Defendant] and hasn't had contact with him in some time and didn't even know he was out of custody." Officer Britton then went to the address provided by Defendant on the intake form. The homeowner was not Defendant's sister, Defendant was not there, and the homeowner did not know Defendant.

"[O]nce the State present[s] competent evidence establishing [a] defendant's failure to comply with the terms of his probation, the burden [is] on [the] defendant to demonstrate through competent evidence his inability to comply with those terms." *State v. Trent*, 254 N.C. App. 809, 819, 803 S.E.2d 224, 231 (2017), *writ denied*, *review denied*, 370 N.C. 576, 809 S.E.2d 599 (2018). Defendant did not present any evidence at the probation violation hearing.

The evidence demonstrated that Defendant failed to provide accurate contact information, made his whereabouts unknown, failed to make himself available for supervision, actively avoided supervision, and knowingly failed to make contact with Officer Britton after release. Thus, the trial court did not abuse its discretion when it found that Defendant absconded and thereafter revoked Defendant's probation.

**[2]** Defendant further argues the trial court erred in revoking probation because the time period for the alleged violations had not expired. Specifically, Defendant alleges that the trial court erred in finding that he violated the following conditions of probation even though the time period had not yet expired: enrolling in a G.E.D. program, proof of paying child support, and proof of enrollment in a substance abuse program.

While Defendant was not required to complete any of these requirements as of the filing of the violation report, Defendant failed to provide any evidence that he was making progress, or any effort, towards enrolling in or satisfying these court-ordered requirements. Defendant admitted each of the violations in the violation report, and Defendant failed to present any evidence which demonstrated his failure to abide by valid terms and conditions of his probation was not willful. In addition, Defendant failed to produce any evidence that he had taken steps to begin complying with the terms and conditions of his probation. Therefore, the trial court did not err when it found that Defendant willfully violated each of the conditions as alleged in the violation report.

Further, the trial court specifically revoked Defendant's probation "for the willful violation of the condition that he not . . . abscond from supervision" pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). The absconding violation is the only violation for which the trial court could and did revoke Defendant's probation. Defendant's argument that the trial court may have revoked his probation for his other violations is without merit. Accordingly, the trial court did not err because it properly revoked Defendant's probation "for the willful violation of the conditions that [he] not commit any criminal offense . . . or abscond from supervision."

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges ZACHARY and YOUNG concur.

STATE OF NORTH CAROLINA
v.
SHANIKA NICOLE MITCHELL, DEFENDANT

No. COA18-1163

Filed 18 February 2020

**1. Evidence—Rule 602—third party testimony—defendant's knowledge of shooting—plain error analysis**

In a murder prosecution, although testimony from a witness regarding whether defendant knew her brother planned to shoot the victim should not have been admitted due to a lack of foundation, the erroneous admission did not amount to plain error given the substantial other evidence, though circumstantial, of defendant's participation in the events that led to the shooting and which supported the State's theory that defendant conspired to murder the victim.

**2. Evidence—Rule 701—inferential testimony—lack of foundation—plain error analysis**

In a murder prosecution, although the admission of testimony from two witnesses—regarding whether defendant concealed evidence on her phone via use of an application to prevent the preservation of text messages—was erroneous due to the lack of a proper foundation that the opinions were rationally based on the witnesses' perception, the admissions did not amount to plain error where there was sufficient other evidence from which the jury could draw the same conclusion, along with other evidence of defendant's guilt.

**3. Evidence—Rule 404(a)—victim's nonviolent character—not used for rebuttal—plain error analysis**

In a murder prosecution, testimony regarding the victim's nonviolent character was erroneously admitted because it was not offered to rebut any evidence from defendant that the victim was the initial aggressor in the incident, or that defendant's brother shot the victim in self-defense. However, the admission did not amount to plain error given other evidence of defendant's guilt.

**4. Conspiracy—multiple potential victims—single agreement—only one count permitted**

In a murder prosecution, where the State presented evidence of only one agreement between conspirators (including defendant) to ambush two brothers at a particular time and location, defendant

could be convicted of only one charge of conspiracy to commit murder. Therefore, a second conspiracy conviction was vacated and the matter remanded for resentencing.

Judge BRYANT concurring in the result.

Appeal by Defendant from judgments entered 13 April 2018 by Judge Tanya T. Wallace in Bladen County Superior Court. Heard in the Court of Appeals 3 September 2019.

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

*David Weiss for the Defendant.*

BROOK, Judge.

Shanika Nicole Mitchell ("Defendant") appeals from judgments entered upon jury verdicts finding her guilty of first-degree murder under the first-degree felony murder rule, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder. Defendant alleges that the trial court committed plain error in admitting certain inferential testimony and character evidence, and that the evidence supported only one charge of conspiracy. We disagree that the trial court committed plain error. However, we vacate the second conspiracy conviction and remand for resentencing because the State's evidence supported only one agreement among co-conspirators.

## I. Background

On 4 January 2016, Defendant was indicted on charges of first-degree murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder stemming from a shooting that occurred on 8 November 2015.[1]

In the instant case, the State presented evidence at trial that the November 2015 shooting stemmed from a 2013 dispute that involved

1. The facts of this case are set out more fully in the appeal to this Court by Defendant's brother from his convictions for first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder, which arose from the same incident. *See State v. Mitchell*, ___ N.C. App. ___, 822 S.E.2d 327, 2019 WL 190153, at *1 (2019) (unpublished).

Defendant's brother, Montise Mitchell ("Mitchell"). In 2013, Mitchell was working at a Smithfield packing plant with Robert Council ("Robert"). Mitchell saw Robert talking to Mitchell's girlfriend. Mitchell waited for Robert in the parking lot one evening after work and started a fistfight. A few months later, Robert and his cousin Antwan Council ("Antwan") retaliated, starting a fistfight with Mitchell. After the 2013 incidents, the Council family had no contact with Mitchell until 2015.

On the afternoon of 8 November 2015, Mitchell dropped off Defendant and his girlfriend, D'Nazya Downing ("Downing"), at Defendant and Mitchell's home. Downing contacted Antwan to purchase marijuana. She and Defendant went to the home shared by Antwan and his brother Darrell Council ("Darrell"). While Darrell called someone to bring the marijuana, Defendant and Downing waited. Once the marijuana was delivered, Defendant and Downing left.

Then, between 5:00 and 5:30 p.m., Downing contacted Antwan about meeting to smoke the marijuana, and the brothers picked up Defendant and Downing. Accompanied by a friend of the Council brothers, Isiah Long ("Long"), the group returned to the brothers' house. They sat in the car as Defendant and Downing began texting Mitchell their whereabouts. Mitchell communicated with Defendant and Downing through a texting app. Defendant and Downing also texted each other while in the car. Soon thereafter, Mitchell texted Downing that he was going to shoot the brothers. Defendant, Downing, and Mitchell then began to text each other as to when the ambush would take place and to coordinate the location.

The text messages went back and forth between Defendant and Downing, with Downing informing Defendant of at least some portions of Mitchell's plan. Downing testified to the following exchange at trial. At 5:45 p.m., Downing texted:

> Downing: "Think [Mitchell] said gonna do it when they get ready to drop us off."
>
> Defendant: "Oh okay. Do it where??"
>
> Downing: "Idk [I don't know] you see any guns in here?"
>
> Defendant: "No."
>
> Defendant: "When [are] they drop[ping] us off? Where?"
>
> Downing: "At the house and [Mitchell] probably gonna be down the road somewhere, but I'm bout [sic] to see."

> Defendant: "We need to go yo [sic] way so they can sit in the cut somewhere."

At 6:53 p.m., Downing texted Defendant:

> "He told us don't leave yet and don't leave til [sic] about 7:40."
>
> Defendant: "I thought he said hurry up?"
>
> Downing: "He did[,] he said he ain't [sic] have all night, and I said [I] think [we] bout [sic] [to] be there in [a] few, and he said don't leave til [sic] like, 7:40."

Defendant, Downing, and the brothers sat in the car and smoked marijuana for another 40 minutes. At 7:29 p.m., Downing texted Defendant: "I think [Mitchell] [is] ready!!" Downing again texted Defendant: "[Mitchell] said just get dropped off [at your] house and when they leave from the house he gonna [sic] call us."

The brothers then drove Defendant and Downing to Defendant's house at Defendant and Downing's request. Once there, Defendant and Downing went inside. The brothers drove away. Within five minutes, Downing heard multiple gunshots. Darrell was shot and killed. Mitchell was later identified as a shooter.

Mitchell called Downing and told her and Defendant to come out of the house. Together, they drove to a Food Lion parking lot in Cameron, North Carolina, an hour away. Upon their arrival, family members picked up Defendant and Mitchell. Mitchell then deleted the texting app he had been using and destroyed his phone. Mitchell also asked Downing to destroy her phone, but Downing refused.

Detective Thomas Morgan Johnson of the Bladen County Sheriff's Office investigated the death of Darrell and issued warrants for the arrests of Defendant, Downing, and Mitchell. A month later, Defendant and Mitchell were discovered in a neighboring county and arrested for the murder of Darrell.

On 13 April 2018, Defendant was tried and convicted by a jury in Bladen County Superior Court of first-degree murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder.

Defendant was sentenced to life imprisonment with the possibility of parole for the first-degree murder conviction and sentenced to 125

to 162 months in prison for the attempted first-degree murder and conspiracy convictions. The trial court arrested judgment on the conviction for discharging a weapon into an occupied vehicle. Defendant appeals.

## II. Analysis

Defendant contends that the trial court committed plain error by admitting (1) speculative testimony of Downing, (2) improper inferential testimony of Downing and Detective Johnson, and (3) improper character evidence of the victim's good character. After addressing the applicable standard of review, we consider each of these contentions in turn.

### A. Standard of Review

Alleged evidentiary error to which a defendant does not object at trial may be reviewed only for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

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

*Id.* at 518, 723 S.E.2d at 334 (internal marks and citations omitted).

### B. Testimony of Defendant's Knowledge of the Planned Shooting

**[1]** We first consider whether the admission of Downing's testimony that Defendant knew her brother planned to shoot the Council brothers was error. As we explain below, the admission of this testimony was error because the record reflects that it was outside Downing's personal knowledge. However, we hold that the erroneous admission of this testimony was not plain error because it did not have "a probable impact on the jury's finding that the defendant was guilty." *Id.*

North Carolina Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2019). Personal knowledge includes what a witness saw, *see generally State v. Tuck*, 173 N.C. App. 61, 69-70, 618 S.E.2d 265,

271-72 (2005) (witness had personal knowledge of robber by looking through his mask and personally observing him); what a witness heard, *see generally State v. Wright*, 151 N.C. App. 493, 496, 566 S.E.2d 151, 153-54 (2002) (witness had personal knowledge that victim was shot because witness heard the gunshot from an adjoining room); what a witness smelled, *see generally State v. Norman*, 213 N.C. App. 114, 119-20, 711 S.E.2d 849, 855 (2011) (testimony deemed proper where witness testified that defendant seemed impaired where, among other observations, witness testified to smelling the odor of alcohol on Defendant); what a witness feels, knows, or believes regarding his or her own mind, *see generally State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001) (witness had personal knowledge of how certain she was of her own testimony); and what a witness learns from other reliable sources, *see generally State v. Watson*, 179 N.C. App. 228, 245, 634 S.E.2d 231, 242 (2006) (witness investigator had personal knowledge that defendant did not have a brother by conducting research).

However, a lay witness generally may not testify as to the contents of another person's mind without providing a foundation to support that testimony. For example, testimony that a witness's wife was familiar with certain corporate financial records violated Rule 602 because the witness did not provide a foundation supporting the assertion. *Lee v. Lee*, 93 N.C. App. 584, 587, 378 S.E.2d 554, 556 (1989). Additionally, testimony that a defendant acted with a particular purpose, without establishing that the witness has personal knowledge of the defendant's purpose, violates Rule 602. *See State v. Harshaw*, 138 N.C. App. 657, 662, 532 S.E.2d 224, 227 (2000) (holding admission of testimony in violation of Rule 602 was not prejudicial, however, because other evidence at trial supported the State's theory of premeditation and deliberation).[2]

Defendant contends that two instances of Downing's testimony constituted inadmissible evidence under Rule 602. First, Downing testified that when she texted Defendant that Mitchell was "gonna do it when they get ready to drop us off[,]" she did not explain to Defendant what

2. Relatedly, under North Carolina Rule of Evidence 701 lay witnesses may not testify to their inferences unless based on their rational perceptions. N.C. Gen. Stat. § 8C-1, Rule 701 (2019). For example, testimony by a witness that her husband sold drugs out of a back bedroom and that the defendant went into the back bedroom with her husband has been held to constitute an inadequate factual foundation to support the witness's further testimony that the defendant bought drugs from her husband in the back bedroom where the witness did not observe the sale. *State v. Wilkerson*, 363 N.C. 382, 414-15, 683 S.E.2d 174, 194-95 (2009) (holding that admission of speculative testimony not prejudicial in light of other evidence against defendant).

"it" was because she "was aware just like I was . . . of the situation," referring to Mitchell's intent to shoot the Council brothers. Similarly, Defendant challenges the admission of Downing's affirmative response to the State's question "that both [Downing] and [Defendant] knew that [Mitchell] was going to shoot at Darrell and Antwan?"

Downing did not testify about the basis for her knowledge that Defendant was aware that Mitchell had planned a shooting. For example, she did not testify regarding any messages she saw between Mitchell and Defendant suggesting that Mitchell told Defendant the plan, nor did she testify regarding anything Defendant said that indicated that she was aware of the planned shooting. Without such foundation, Downing's testimony that Defendant "was aware just like [Downing] was" aware of the planned shooting was speculative and inadmissible under Rule 602.

Defendant asserts that, without this testimony, "the jury had little basis to conclude [Defendant] was aware the confrontation would be anything more than a fist fight between feuding young men"; we must consider whether the improper admission amounts to plain error. The evidence showed that Defendant was aware of and involved in the plan to ambush the Council brothers. Defendant concedes as much, contending that the evidence did not support a finding that Defendant was aware that the ambush *involved firearms*. Although Downing provided the only direct testimony that Defendant was aware Mitchell was planning a shooting—and not merely a fistfight—the State provided additional circumstantial evidence that Defendant assisted in planning and carrying out the ambush; that she knew her brother planned to shoot the Councils; and that she therefore "counseled or knowingly aided" the underlying felony, shooting into an occupied vehicle. As we explain below, the circumstantial evidence is sufficient to rebut Defendant's plain error argument.

First, the State presented evidence that Defendant was communicating with both Downing and Mitchell and that she had endeavored to hide these communications from the Council brothers and Long. The jury heard testimony that Defendant was using her phone to communicate with both Downing and Mitchell throughout the afternoon she spent with the Council brothers, and that she was holding her cellphone "real close to her body" and "hid[ing]" it in such a way that Antwan and Long could not see what she was communicating or with whom. While Downing was in the car with the Council brothers, she asked Defendant via text whether she saw any guns. Downing also texted Defendant, "Think [Mitchell] said gonna do it when they get ready to drop us off." Defendant did not ask Downing what "it" meant in reply; instead,

Defendant responded, "Oh okay. Do it where?[,]" whereupon Downing replied, "At the house and [Mitchell] probably gonna be down the road somewhere[.]" Defendant told Downing, "We need to go yo way so they can sit in the cut somewhere." Downing testified that she understood "in the cut" to mean that Mitchell would be hiding out to ambush the Council brothers when they passed in their car.

Second, the State presented additional evidence to support its theory that Defendant participated in the conspiracy both immediately before and immediately after her brother shot at the Council brothers. When the brothers dropped Defendant off at her house, Antwan testified that he knew something bad was going on when he told Defendant, "see you later" and she replied, "You ain't got to worry about that." Less than five minutes later, Mitchell shot at the Council brothers and killed Darrell. Shortly after Mitchell shot and killed Darrell, he met Downing and Defendant outside the house he shared with Defendant, and they drove to Cameron, North Carolina.

Finally, the State presented evidence supporting the jury's findings that not only was Defendant aware of and involved in a conspiracy to ambush the Council brothers, but also Defendant knew her brother planned to use a gun in the ambush. When Detective Johnson interviewed Defendant for the second time, on 10 November 2015, Defendant told him that, while Downing knew that the Council brothers would be shot, Defendant only knew that "something" was going to happen when she got to the Councils' house. Further, the jury heard testimony that Defendant knew that the Council brothers were going to drop her and Downing off by car, and that her brother would be hiding down the road. This evidence supports the narrative presented by the State that the jury chose to credit — that the planned ambush was more than merely the latest episode of fisticuffs between Mitchell and the Council brothers.

From this evidence, a jury could reasonably determine that Defendant "counseled or knowingly aided" the underlying felony, shooting into an occupied vehicle, by assisting in luring the Council brothers to the stakeout spot. We cannot say that Defendant has established that the jury probably would have reached a different result without considering Downing's speculative testimony. While Downing's testimony was speculative and its admission was error, we hold that its admission did not constitute plain error.

C. Testimony Regarding Cellphone Technology

**[2]** Defendant alleges that the trial court committed plain error when it permitted Downing and Detective Johnson "to testify, without

foundation, that [Defendant] concealed evidence using a smartphone texting app." As explained below, we agree that the admission of this testimony was error, but we hold that it did not rise to the level of plain error.

Rule 701 of the North Carolina Rules of Evidence provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2019). When questioning calls for testimony based on opinion or inference, a foundation must first be laid that the testimony is rationally based on the lay witness's perception. *Matheson v. City of Asheville*, 102 N.C. App. 156, 174, 402 S.E.2d 140, 150 (1991) ("As there was no foundation showing that the opinion called for was rationally based on the witness's perception, the opinion was inadmissible."); *see also State v. Givens*, 95 N.C. App. 72, 79, 381 S.E.2d 869, 873 (1989) (holding admission of officer's testimony that "scales were common drug paraphernalia" violated Rule 701 because there was no showing in the record that the officer had "a basis of personal knowledge for his opinion.") (internal marks omitted).

Downing testified that she had seen Defendant use an application on her smartphone to text with her brother, Mitchell. The following exchange took place between the prosecutor and Downing at trial:

> [PROSECUTOR]: And, to your knowledge, if you're trying to hide communications, could you go through an app and it wouldn't show up on your cell phone records?
>
> [DOWNING]: Yes, sir.
>
> [PROSECUTOR]: So if [Defendant] was texting or if [Mitchell] was also texting [Defendant] and he did it on an app, then it wouldn't appear on these records? If they were trying to hide that conversation, it would appear on an app that you could get rid of?
>
> [DOWNING]: Yes, sir.
>
> [PROSECUTOR]: But your cell phone records, you can't get rid of those? Those are saved?

> [DOWNING]: Yes, sir.

Because of the leading nature of these questions, the State laid no foundation regarding how Downing was familiar with the data retention questions at issue. These affirmative responses require inferential leaps about what cellphone records contain, how the use of apps impacts cell phone records, and the effect deleting any particular app would have on the data that app contained. While there are myriad ways to rationally connect a witness's perceptions to his or her inferences, the State made no efforts to do so with Downing, instead simply asking leading questions. Without the required foundation, Downing's testimony about the cellphone technology and the records it generated was inadmissible.

Detective Johnson testified that he received certain cellphone data from Defendant's cellphone company, U.S. Cellular. He testified that he did not see any records of communications between Defendant and Mitchell on the date of the shooting. The following exchange then took place between the prosecutor and Detective Johnson:

> [PROSECUTOR]: And, to your knowledge, if you know, that network, that company only preserves texts that are sent on their network; is that right?
>
> [DET. JOHNSON]: That is correct.
>
> [PROSECUTOR]: So if a message is sent using an app or some third party, would U.S. Cellular have access to that?
>
> [DET. JOHNSON]: No, they would not.

As illustrated above, the foundation for Detective Johnson's testimony about U.S. Cellular's preservation policies and U.S. Cellular's ability to access messages sent using an app was inadequate. For example, the State did not establish that Detective Johnson had ever seen the cellphone records from this particular telecommunications company before conducting this investigation; that Detective Johnson knew how U.S. Cellular preserves its cellphone records; or that Detective Johnson had any knowledge about U.S. Cellular's ability to access data sent through an app or third party. The leading nature of these questions again prevented the State from laying the necessary foundation and, as such, Detective Johnson's above testimony was inadmissible.

Having concluded that the admission of the aforementioned portions of Downing's and Detective Johnson's testimony regarding Defendant's cellphone records were error, we turn to whether they amounted to plain error. The jury heard testimony from Downing that she knew Defendant

was communicating with Mitchell on her phone because Downing saw messages on Defendant's screen appear with Mitchell's name. The jury also heard testimony that Downing had observed Defendant communicate with Mitchell via a smartphone app and not through the normal text messaging function. The jury then heard Detective Johnson testify that Defendant's phone records revealed no communications between Defendant and Mitchell during the relevant time frame. Even excluding the inadmissible evidence offered by Downing and Detective Johnson, the jury was left to square the fact that they had heard testimony indicating Defendant was communicating with her brother via cellphone; that her brother had destroyed his cellphone; and that there were no records reflecting their communication. The jury could have resolved this tension in a manner disadvantageous to Defendant. Given the reasonable inferences arising from admissible testimony, along with the other evidence of guilt discussed more fully above, we cannot say that the jury probably would have reached a different result absent the inadmissible testimony.

D. Evidence of Victim's Good Character

**[3]** Defendant contends that "[t]he trial court committed plain error by admitting irrelevant testimony about the good character of the victim." We agree that the testimony was admitted in error, but we hold that it did not amount to plain error.

Rule 404(a) of the North Carolina Rules of Evidence provides that evidence of a person's character is generally not admissible to prove "that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2019). The Rule provides, however, that "[e]vidence of a pertinent trait of character of the victim of the crime" is admissible if "offered by an accused, or by the prosecution to rebut the same[.]" *Id.* § 8C-1, Rule 404(a)(2). The prosecution also may offer "evidence of a character trait of peacefulness of the victim in a homicide case to rebut evidence that the victim was the first aggressor[.]" *Id.*; *see also State v. Faison*, 330 N.C. 347, 354-55, 411 S.E.2d 143, 147 (1991).

Here, Defendant did not offer any evidence that Darrell was the first aggressor, that Mitchell acted in self-defense, or that Mitchell was in any way justified in shooting and killing Darrell. Regardless, the State introduced evidence through the testimony of Long that Darrell was kind, protective, and the kind of person who would "give you the clothes off his back." Long testified further that Darrell was part of a motorcycle club called "Bikes Up/Guns Down," which he testified was

> a movement, man. We'd rather see you on a dirt bike or a four-wheeler riding than have a pistol in your hand or somebody in the corner selling drugs, man. It was a movement to try to uplift the community to keep young black men and just young people in general out of the way, you know, out of *this* situation.

(Emphasis in original). He testified further that Darrell was "[n]onviolent."

This testimony was inadmissible under Rule 404(a)(2) because it was not offered to rebut any testimony offered by Defendant that Darrell was the first aggressor in the altercation between Mitchell and the Council brothers. We therefore conclude that the admission of this testimony was error.

However, the admission of evidence of the victim's nonviolent character did not rise to the level of plain error. Given the evidence consistent with Defendant's guilt discussed above, we cannot say that the jury probably would not have convicted Defendant had it not heard that Darrell was nonviolent.

E. Conspiracy

**[4]** Finally, Defendant argues, and the State concedes, that the trial court erred in allowing the jury to convict her of two counts of conspiracy. We agree.

"According to North Carolina law, a criminal conspiracy is an agreement by two or more persons to perform either an unlawful act or a lawful act in an unlawful manner." *State v. Wilson*, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992). "To determine whether single or multiple conspiracies are involved, the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered." *Id.* (internal marks and citation omitted). "When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy." *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987) (emphasis in original).

Here, the evidence presented at trial established the existence of one agreement between Defendant, Downing, and Mitchell. Their agreement involved determining a location and a specific time for the ambush to occur. While the shooting involved two potential victims, the State did not present sufficient evidence of two separate agreements to support

the second conspiracy conviction. *See Mitchell*, ___ N.C. App. at ___, 822 S.E.2d at 327, 2019 WL 190153, at *3 ("Here, the evidence at trial only was sufficient to show a single agreement . . . that Mitchell conspired with D'Nazya Downing, Shanika Mitchell, and the second shooter to ambush and shoot Darrell and Antwan Council in their car.").

Therefore, we must vacate the second conspiracy conviction and remand for resentencing.

## III. Conclusion

Even considering the above evidentiary errors cumulatively, we cannot say that they had a probable impact on the jury's findings. *See State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015) (considering the cumulative prejudicial effect of errors at trial). While we hold that the admission of speculative testimony that Defendant knew of the planned shooting, the insufficiently supported inferences drawn by Downing and Detective Johnson, and the improper character evidence of the victim's peacefulness were error, we cannot conclude that the jury probably would have reached a different result absent this inadmissible testimony. Accordingly, we find no error in part, vacate in part, and remand for resentencing only.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE concurs.

Judge BRYANT concurs in the result.

**STATE v. RICHARDSON**

[270 N.C. App. 149 (2020)]

STATE OF NORTH CAROLINA
v.
ROBIN RENE RICHARDSON, DEFENDANT

No. COA19-627

Filed 18 February 2020

**1. Appeal and Error—preservation of issues—jury instructions—language omitted by trial court—lack of objection**

In a trial for voluntary manslaughter, defendant failed to preserve for appellate review an argument that the trial court erroneously omitted certain language from a requested jury instruction—since the trial court did not completely fail to give the instruction, defendant was required to object to the instruction as given. However, since defendant distinctly argued that the instruction amounted to plain error, appellate review of defendant's challenge to the instruction could be reviewed for plain error.

**2. Homicide—voluntary manslaughter—jury instructions—omission from pattern instruction—plain error analysis**

The trial court's omission of language from the pattern jury instruction on voluntary manslaughter—regarding the use of excessive force—in its final mandate to the jury did not amount to plain error where the trial court correctly included similar language in other parts of the jury charge. Taken as a whole, the instructions accurately stated that the State carried the burden of proving every element of voluntary manslaughter beyond a reasonable doubt.

Appeal by Defendant from judgment entered 24 January 2019 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Assistant Solicitor General Nicholas S. Brod, for the State-Appellee.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.*

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of voluntary manslaughter. Defendant argues that the trial court reversibly erred by omitting certain verbiage from the final mandate of its charge of voluntary manslaughter. Although the trial court erred, the trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury. We thus discern no reversible error.

## I. Procedural History

Defendant Robin Rene Richardson was indicted on 1 February 2016 for the first-degree murder of Timothy Lee Fry. The case came on for trial on 14 January 2019. On 24 January 2019, a jury returned a verdict of guilty of voluntary manslaughter. Defendant was sentenced to 73-100 months' imprisonment. Defendant gave notice of appeal in open court.

## II. Factual Background

At trial, the evidence tended to show the following: Defendant and her boyfriend, Timothy Lee Fry, met in August of 2012 and moved into a house together a few months later. At first their relationship was good, but it started to deteriorate after about a year. Fry was peculiarly fastidious about the organization and cleanliness of their home and "it got to where [Fry] really had a need to have everything just perfect in the household." Defendant testified that Fry verbally and physically abused her. Fry did not approve of Defendant's smoking habit and told her she was getting too fat. Fry would choke her, pull her hair, and push her face.

Fry was a gun enthusiast who kept loaded guns around the house. He would take them out, load and unload them, and point the laser sight at different things. He pointed the laser sight at Defendant's forehead and chest, which scared her. The abuse also included repeated instances where Fry would coerce Defendant into engaging in sexual activity with him and other, older men. Defendant suffered from depression and, at one point, attempted suicide.

On 11 December 2015, Defendant returned home from work to find Fry in their basement. Three guns were also in the basement—two handguns and a 12-gauge shotgun. Fry asked Defendant to go with him to South Carolina to have sex with an older man. Defendant refused. She testified that Fry held a handgun to her chest, acted like he was pulling the trigger, and told her he would kill her if she did not go with him.

Defendant left the basement and went upstairs. When she returned to the basement, Fry was standing behind a couch, folding laundry. Defendant testified:

> He told me I am going to South Carolina, and he was making the reservations and he was calling me names. Then he told me that he was going to kill me if I didn't go. He reached over and grabbed where the gun was and he started towards me[.]

Defendant testified that she grabbed a shotgun that was up against the bathroom wall and "and started firing. The closer he came, the more I would shoot because he wouldn't stop, he just kept coming towards me." Defendant fired five rounds, hitting Fry four times. Two shots entered Fry's chest. Another two entered through Fry's left arm and armpit, traveling through his left lung and fracturing five ribs. Each shot required Defendant to reload or "rack" the shotgun. After each shot, she had to pull back on the shotgun's slide to load a new shell into the chamber, push the slide forward, and then pull the trigger.

The State's forensic pathologist testified that any one of the shots would have been enough to incapacitate and kill Fry. Three bullet holes from the shotgun's slugs were found in the carpet underneath Fry's body, suggesting that he was on the ground when Richardson shot him. Each of the four bullet wounds had a downward trajectory.

After she shot Fry, Defendant called 911 and told the operator that she had shot her boyfriend. Fry was pronounced dead shortly after paramedics arrived on the scene.

After a four-day trial, the trial court held a jury charge conference. During the conference, Defendant asked the trial court to instruct the jury with North Carolina Pattern Jury Instruction 206.10, which provides model instructions for first-degree murder, its lesser included offenses, and self-defense. The trial court agreed. The trial court also agreed to Defendant's request to omit from the pattern instruction any instructions about the aggressor doctrine. The State pointed out that there was no evidence to support an involuntary manslaughter instruction.

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished mental capacity. In giving the final mandate on voluntary manslaughter, the trial court omitted certain verbiage. After excusing the jury to commence its deliberations, the trial court asked, "[Does the] State have any additions or corrections or modifications to

the jury instructions?" The State answered, "No, sir." The trial court then asked, "Defendant?" Defendant responded, "No, Your Honor." The trial court thus announced, "Okay, very well. We will be at ease in this case."

## III. Discussion

Defendant's sole argument on appeal is that the trial court reversibly erred by omitting certain verbiage from the final mandate on voluntary manslaughter when the trial court charged the jury.

*A. Preservation and Standard of Review*

**[1]** We first determine to what extent Defendant preserved this issue for our review.

Defendant argues that this issue is preserved for review, even though she did not object to the erroneous instruction before the trial court, because she requested at the charge conference that the trial court instruct the jury using N.C.P.I.—Crim. 206.10 and the trial court agreed to do so, but the trial court failed to accurately give the instruction.

Where a defendant has properly preserved her challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). On appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. N.C. Gen. Stat. § 15A-1442(4)(d) (2019). "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2019).

The State argues this issue is only reviewable for plain error because Defendant did not object to the voluntary manslaughter instruction before the trial court.

> [T]he plain error rule . . . 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" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original)).

Pursuant to our Rules of Appellate Procedure:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2).

However, our Supreme Court has recently stated, specifically on the issue of a self-defense instruction, as follows:

> Though the trial court here agreed to instruct the jury on self-defense under N.C.P.I.—Crim. 206.10, it omitted the "no duty to retreat" language of N.C.P.I.—Crim. 206.10 without notice to the parties and did not give any part of N.C.P.I.—Crim. 308.10, the "stand-your-ground" instruction. . . . The State nonetheless contends that defendant did not object to the instruction as given, thereby failing to preserve the error below and rendering his appeal subject to plain error review only.
>
> *When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.*
>
> > [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

> *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Because the trial court here agreed to instruct the jury in accordance with N.C.P.I.—Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review under [N.C. Gen. Stat.] § 15A-1443(a).

*State v. Lee*, 370 N.C. 671, 675-76, 811 S.E.2d 563, 567 (2018) (emphasis and brackets added).

In *Ross*, upon which the *Lee* Court relied, "defendant requested, and the trial judge indicated he would give, a jury instruction concerning defendant's decision not to testify in his own defense at trial. Yet, . . . the trial judge neglected to give the requested and promised jury instruction." *Ross*, 322 N.C. at 264, 367 S.E.2d at 891. This Court "note[d] at the outset that the trial judge's failure to give the requested and promised instruction [was] properly before [the Court] on appeal despite defendant's failure to object prior to the commencement of the jury's deliberation[,]" despite defendant's "fail[ure] to embrace a final, explicit opportunity provided by the trial judge for remaining comments on the jury instructions[,]" and notwithstanding the fact that "Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that no party may assign as error any portion of the jury charge or omission therefrom unless he enters an objection before the jury retires to consider its verdict." *Id.* at 264-65, 367 S.E.2d at 891.

In concluding that defendant's issue was properly preserved for review, the Court relied upon the then-recent case of *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), in which it "held that a request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." *Ross*, 322 N.C. at 265, 367 S.E.2d at 891.

In *Pakulski*, "[d]uring the instruction conference, defense counsel asked the court to give the pattern instruction on prior inconsistent statements (N.C.P.I.—Crim. 105.20)." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 327. "The judge then stated, 'If I overlook that, call it to my attention. I don't think I will.' " *Id.* "The court never gave the requested instruction" and "the omission was not called to the court's attention prior to jury deliberations." *Id.* The Court concluded that the issue was preserved for review under N.C. Gen. Stat. § 15A-1443 because "defense counsel

complied with the spirit of Appellate Rule 10(b)(2)" by "request[ing] an instruction on impeaching a witness with a prior inconsistent statement." *Id.* at 575, 356 S.E.2d at 327.

In *Lee*, *Ross*, and *Pakulski*, the error our Supreme Court determined to be preserved under Appellate Rule 10 solely by defendant's request for a specific jury instruction was the trial court's complete failure to give the requested jury instruction. Accordingly, when a trial court agrees to give a requested instruction, an "erroneous deviation from that instruction" occurs when the trial court fails to give the requested instruction. *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Thus, under *Lee*, it is the trial court's failure to give the agreed-upon instruction that is "preserved for appellate review without further request or objection." *Id.*; *see State v. Gordon*, 104 N.C. App. 455, 458, 410 S.E.2d 4, 7 (1991) (Defendant's challenge to the manner in which the trial court instructed the jury on self-defense was not preserved by her request for the self-defense instruction, and the trial court's indication that it would give the pattern instruction, because a defendant's request for a pattern instruction preserves a challenge only to "the failure of the trial judge to give [that] instruction at all.").

Here, Defendant requested that the trial court instruct the jury pursuant to N.C.P.I.—Crim. 206.10, which includes the relevant provision on voluntary manslaughter. The trial court agreed to instruct the jury accordingly. The trial court instructed the jury pursuant to N.C.P.I.—Crim. 206.10, including instructing on voluntary manslaughter. However, the trial court omitted certain verbiage from the instruction when giving the final mandate to the jury on voluntary manslaughter. As the trial court did not completely fail to give the agreed-upon instruction, Defendant's argument that the trial court erroneously delivered the mandate was not "preserved for appellate review without further request or objection." *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. As Defendant did not object when the instruction was given, and "failed to embrace a final, explicit opportunity provided by the trial judge for remaining comments on the jury instructions," *Ross*, 322 N.C. at 264, 367 S.E.2d at 891, Defendant has failed to preserve this issue for review under N.C. Gen. Stat. § 15A-1443.

However, Defendant, in an alternative argument, "specifically and distinctly" contended the trial court's erroneous jury instruction amounted to plain error. Thus, we may analyze the issue for plain error. N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). We nevertheless

note that, under both the review described in N.C. Gen. Stat. § 15A-1443 and plain error review, Defendant has failed to show reversible error.

*B. Analysis*

**[2]** "When analyzing jury instructions, we must read the trial court's charge as a whole." *State v. Fowler*, 353 N.C. 599, 624, 548 S.E.2d 684, 701 (2001). "We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct." *Id.* "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E.2d 476, 479 (1971) (citation omitted).

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished mental capacity. Near the beginning of the charge, the trial court instructed, "The State must prove to you that the defendant is guilty beyond a reasonable doubt." After instructing the jury on the definition of each theory of guilt and of self-defense, the trial court then specifically instructed, "The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense and did not use excessive force under the circumstances." Later in the charge, the trial court instructed the jury as follows:

> If the State fails to prove that the defendant did not act in self-defense, you may not convict the defendant of either first- or second-degree murder; however, you may convict the defendant of voluntary manslaughter if the State proves that the defendant used excessive force.

After instructing the jury on the elements of first-degree murder and second-degree murder, the trial court instructed the jury on the elements of voluntary manslaughter, as follows:

> For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt: first, that the defendant killed the victim by an intentional and unlawful act; second, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. And third, that the defendant did not act in self-defense, or though acting in self-defense used excessive force. Voluntary manslaughter is also committed if the defendant kills in self-defense but uses excessive force.

> The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense; however, if the State proves beyond a reasonable doubt that defendant, though otherwise acting in self-defense, used excessive force, the defendant would be guilty of voluntary manslaughter.

This instruction accurately followed N.C.P.I.—Crim. 206.10, for voluntary manslaughter. However, in its final mandate for voluntary manslaughter, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the State has failed to prove that the defendant did not act in self-defense.

As the State concedes, this instruction was erroneous. Pursuant to N.C.P.I.—Crim. 206.10, the instruction should have been given as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, *and that the defendant . . . used excessive force*, it would be your duty to find the defendant guilty of voluntary manslaughter even if the State has failed to prove that the defendant did not act in self-defense.

N.C.P.I.—Crim. 206.10 (2018) (emphasis added).

Shortly after the erroneous instruction, the trial court instructed the jury as follows:

> And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense or that the defendant used excessive force, then the defendant's action would be justified by self-defense, and therefore, it would be your duty to return a verdict of not guilty.

Although the trial court erroneously omitted the verbiage "*and that the defendant . . . used excessive force*" from the voluntary manslaughter

final mandate, the trial court correctly instructed the jury on three separate occasions during the charge on the State's burden to prove Defendant's use of excessive force for the jury to find Defendant guilty of voluntary manslaughter. Moreover, on two other occasions during the charge, including once after the erroneous voluntary manslaughter final mandate was given, the trial court correctly instructed the jury that it should return a verdict of not guilty if defendant acted in self-defense and did not use excessive force. We thus conclude that the trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury, and the isolated mistake, standing alone, affords no ground for reversal. *McWilliams*, 277 N.C. at 685, 178 S.E.2d at 479.

The trial court's error is similar to the one made in *State v. Baker*, 338 N.C. 526, 564, 451 S.E.2d 574, 597 (1994). In *Baker*, the trial court properly instructed the jury on the State's burden of proof for the charges of murder, common law robbery, and first-degree kidnapping. *Id.* at 564-65, 451 S.E.2d at 597. However, after instructing the jury properly on the kidnapping charge, the trial court concluded as follows: "However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of *guilty*." *Id.* at 564, 451 S.E.2d at 597 (emphasis added).

Our Supreme Court concluded this error was not prejudicial, explaining that

> [t]his Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction. In the instant case, the trial court repeatedly instructed the jury that the State had the burden of proving defendant was guilty beyond a reasonable doubt. The court also instructed that "[a]fter weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." In addition, in its instructions on murder and common-law robbery, the court stated that if the jurors did not find each element had been shown, it would be their duty to return a verdict of not guilty. Reading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of.

*Id.* at 565, 451 S.E.2d at 597 (internal citation omitted).

As in *Baker*, the trial court here repeatedly instructed the jury that the State had the burden of proving Defendant was guilty beyond a reasonable doubt, including when it instructed in detail on voluntary manslaughter, and emphasized that, if the jury did not find each element of the charge had been proven beyond a reasonable doubt, it must find Defendant not guilty. Thus, as in *Baker*, when "[r]eading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of." *Id.*

The facts of the present case are distinguishable from those in *State v. Hunt*, 192 N.C. App. 268, 664 S.E.2d 662 (2008).[1] In *Hunt*, the trial court properly instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. *Id.* at 270, 664 S.E.2d at 664. However, the instruction on voluntary manslaughter included the following misstatement:

> Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the *defendant* fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

*Id.* at 271, 664 S.E.2d at 664 (emphasis added). Although the trial court first properly instructed the jury that the burden of proof was on the State, it incorrectly instructed the jury in the next sentence that the burden was on the defendant. *Id.*

"Shortly after deliberation began, the jury returned to the court and requested 'a list of requirements for [second] [d]egree [m]urder and [two] [m]anslaughters.' " *Id.* (alterations in original).

> The trial judge asked the court reporter to type up the original oral instructions as to those charges and give each juror a copy of the instructions. The instructions given to the jury included the misstatement on the instruction of voluntary manslaughter. The jury ultimately convicted defendant of second[-]degree murder.

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1. Defendant relies on *State v. Hamilton*, No. COA14-1005, 2015 N.C. App. LEXIS 181 at *1 (N.C. Ct. App. 2015) (unpublished), in support of her argument that the erroneous instruction was reversible error. "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs . . . in the trial and appellate divisions is disfavored[.]" N.C. R. App. P. 30(e)(3). As *Hunt* has similar facts and a similar analysis to *Hamilton*, we distinguish the case before us from *Hunt*.

*Id.* On appeal, this Court was "unable to conclude that the instructional error did not have a probable impact on the jury's finding of guilt[,]" explaining,

> [t]his is not a case with a singular misstatement where the trial court repeatedly instructed the jury that the State had the burden of proving that defendant was guilty beyond a reasonable doubt. Nor is this a case where the trial court made a misstatement of law which was preceded by several correct instructions. Instead, the trial court made a misstatement as to the burden of proof for the voluntary manslaughter charge and then provided that same misstatement to the jury in writing, along with the correct second[-]degree murder and involuntary manslaughter charges.

*Id.* (internal quotation marks and citations omitted).

Unlike the instructions in *Hunt*, the instructions at issue in this case included a "singular misstatement," *id.*, after the trial court repeatedly instructed the jury that the burden of proof was on the State to prove every element of the charge beyond a reasonable doubt. Moreover, the record before this Court does not indicate that the trial court provided the misstatement to the jury in writing. Although the trial court indicated that it would give the jurors a copy of the instructions for their deliberations, it is apparent from the transcript, and Defendant does not argue otherwise,[2] that the trial court intended to give jurors a copy of the written instructions as agreed upon by the parties, not a copy of the transcribed oral instructions given in the jury charge. *Hunt* is distinguishable, and we are bound by *Baker*.

## IV. Conclusion

The trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury. We thus discern no plain error.

NO PLAIN ERROR.

Judges ARROWOOD and HAMPSON concur.

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2. The record does not contain a copy of the jury instructions provided to the jurors. "The record on appeal in criminal actions shall contain . . . copies of all other papers filed . . . in the trial courts which are necessary for an understanding of all issues presented on appeal[. . . .]" N.C. R. App. P. 9(a)(3)(i). "It is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983).

THOMAS C. WETHERINGTON, PETITIONER
v.
NC DEPARTMENT OF PUBLIC SAFETY, NC HIGHWAY PATROL, RESPONDENT

No. COA18-1018

Filed 18 February 2020

**Police Officers—dismissal of highway trooper—untruthfulness—consideration of necessary factors**

In upholding the dismissal of a highway trooper for making untruthful statements about the loss of a hat, the Administrative Law Judge (ALJ) failed to appropriately address all of the factors deemed by the Supreme Court in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015), as a necessary part of determining whether to impose discipline on a career state employee for unacceptable personal conduct. Although the ALJ did address some of the factors, his conclusory reasoning echoed the per se rule previously rejected by the Supreme Court, and overlooked the mitigating nature of some of the factors. The matter was reversed and remanded to the Office of Administrative Hearings to order appropriate discipline, short of dismissal, to reinstate the trooper to his position, and to grant relief pursuant to N.C.G.S. § 126-34.02.

Appeal by petitioner from order entered 17 May 2018 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 7 August 2019.

*The McGuinness Law Firm, by J. Michael McGuinness; Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellant.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill, for respondent-appellee.*

*Milliken Law, by Megan A. Milliken, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.*

*Crabbe, Brown & James, LLP, by Larry H. James and Christopher R. Green, for National Fraternal Order of Police; Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, amici curiae.*

*Edelstein & Payne, by M. Travis Payne, for the Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.*

*Tin, Fulton, Walker & Owen, PLLC, by John W. Gresham, for the National Association of Police Organizations, amicus curiae.*

STROUD, Judge.

It is unlikely so many lawyers have ever before written so many pages because of a lost hat. True, hats have caused serious problems in prior cases. Once a street car passenger was blinded in one eye by a hat thrown by a man quarreling with others.[1] Lost and misplaced hats have been important bits of evidence in quite a few murder and other felony cases.[2] People have suffered serious injuries trying to catch a hat.[3] As in those cases, the real issue here is far more serious than an errant hat, but that is where it started. Up to this point, this case includes over 1,000 pages of evidence, testimony, briefs, and rulings from courts, from the agency level to the Supreme Court and back to this Court for a second time. But we agree with Respondent, this matter is not just about a hat. It is about the tension between the statutorily protected rights of a law enforcement officer and proper discipline to protect the integrity and reliability of the North Carolina State Highway Patrol.

This case began in 2009 when Petitioner Wetherington, then a trooper with the North Carolina State Highway Patrol, misplaced his hat during a traffic stop; he then lied about how he lost his hat, which was later recovered, mostly intact. Respondent terminated Petitioner's employment as a trooper based upon its "per se" rule that any untruthfulness by a state trooper is unacceptable personal conduct and just cause for dismissal. *See* N.C. Gen. Stat. § 126-35 (2017). In the first round of appellate review, the North Carolina Supreme Court concluded, "Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law," and remanded for Respondent to make a decision on the proper legal basis "as to whether petitioner should be

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1. *Giblett v. Garrison*, 232 N.Y. 618, 134 N.E. 595 (1922).

2. *Sulie v. Duckworth*, 743 F. Supp. 592, 598 (N.D. Ind. 1988), *aff'd*, 908 F.2d 975 (7th Cir. 1990); *Johnson v. State*, 289 Ga. 106, 709 S.E.2d 768 (2011); *Bower v. State*, 5 Mo. 364 (1838); *People v. Baker*, 27 A.D. 597, 50 N.Y.S. 771, (N.Y. App. Div. 1898); *Thomas v. State*, 171 Tex. Crim. 54, 344 S.W.2d 453 (1961);*Wilson v. State*, 63 Tex. Crim. 81, 138 S.W. 409 (1911); *Nelson v. State*, 52 Wis. 534, 9 N.W. 388 (1881).

3. *Rosenberg v. Durfree*, 87 Cal. 545, 26 P. 793 (1891); *Gulf, C. & S.F. Ry. Co. v. Newson*, 45 Tex. Civ. App. 562, 102 S.W. 450 (1907).

dismissed based upon the facts and circumstances and without the application of a per se rule." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 593, 780 S.E.2d 543, 548 (2015) (hereinafter *Wetherington I*), *aff'd as modified*, 231 N.C. App. 503, 752 S.E.2d 511 (2013). In 2015 on remand, based upon the same evidence and facts, Respondent again determined Petitioner engaged in unacceptable personal conduct and there was just cause for his dismissal. Because Respondent failed to consider the factors as directed by the Supreme Court on remand, we again reverse and conclude as a matter of law, on *de novo* review, that Petitioner's unacceptable personal conduct was not just cause for dismissal. In accord with North Carolina General Statute § 126-34.02(a), we remand to the Office of Administrative Hearings for entry of a new order imposing some disciplinary action short of dismissal and reinstating Petitioner to the position from which he was removed.

## I. Background

The full factual and procedural history of this case leading up to remand can be found in *Wetherington I*, 368 N.C. 583, 780 S.E.2d 543. By the time of remand from the Supreme Court, Colonel Randy Glover, who had originally terminated Petitioner's employment, had retired. In March 2013, Colonel William Grey became the Commander of the North Carolina State Highway Patrol responsible for considering the appropriate discipline for Petitioner's violation of the truthfulness policy on 28 March 2009. Col. Grey did not provide notice or a pre-dismissal conference to Petitioner, and he reviewed the existing record. On 20 May 2016, Col. Grey sent a termination letter to Petitioner. The letter states:

> Pursuant to the decision of the North Carolina Supreme Court filed on 18 December 2015, this case has been remanded back to the North Carolina Highway Patrol for me to determine, based upon the facts and circumstances of this case, whether you should be dismissed from the Highway Patrol, as previously determined by Colonel Glover, or whether you should be reinstated.
>
> This letter serves as notification of my decision to uphold your dismissal. My decision is based on my review of the Report of Investigation and attached documents, my viewing of the video recording of your interview with Internal Affairs and the evidence presented by you during your pre-dismissal conference.
>
> This case has been remanded for me to review based on a determination that Colonel Glover's earlier decision to

dismiss you from the Highway Patrol was premised on a "misapprehension of the law, namely that he had no discretion over the range of discipline he could administer." Accordingly, I review this case with an open mind and with the full understanding that the range of discipline to be administered, if any, is within my discretion and based on the unique facts and circumstances of your case.

Your dismissal was based on evidence that you provided contradictory statements about an incident in which you lost your campaign hat during a traffic stop, thereby violating the Highway Patrol's truthfulness policy. That policy, at all relevant times, stated, in pertinent part: "Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information."

. . . .

Consistent with the mandate of the North Carolina Supreme Court, I have reviewed the record with the understanding that I have discretion in determining what, if any, level of punishment is most appropriate based on the facts and circumstances of this case. I have considered the entire range of disciplinary actions available under state law. In that regard, I have taken into consideration the fact that you had been employed by the Highway Patrol as a Cadet and as a State Trooper from June 2007 until the time of your dismissal on August 4, 2009 that you did not have any disciplinary actions prior to the time of your dismissal and that your overall performance rating and work history since being sworn as a Trooper in November 2007 was "Good."

I am also mindful that, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have constitutional obligation to disclose evidence favorable to the defendant. "Favorable evidence" includes evidence that is exculpatory as well as information that could be used to impeach the testimony of a prosecution witness. *Giglio v. U.S.*, 405 U.S. 150 (1972). Consistent with this Constitutional obligation, law enforcement agencies have a duty to disclose information to prosecutors, including a summary of Internal Affairs findings

and other applicable conduct that bears on the credibility of any witness who may testify. In federal court, the United States Attorney, in each of the three North Carolina districts, routinely requires the Highway Patrol to disclose, in writing, potential *Giglio* issues for each and every case in which a Trooper may testify. Several District Attorneys have adopted similar policies based on an understanding that the credibility of the judicial system rests on the foundation that public servants possess integrity that is beyond reproach and can be trusted to testify truthfully in every case. Despite these Constitutional concerns, I understand that not every violation of the Highway Patrol's truthfulness policy warrants dismissal.

Based upon the facts and circumstances of this case, as described above, I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings. Given that you were willing to fabricate and maintain a lie about such an insignificant fact as losing a campaign cover[4] as part of an attempt to cover up the fact that you did not wear it during an enforcement contact, I have no confidence that you would not alter material facts in court in an attempt to avoid evidence from being suppressed or for the purpose of obtaining a conviction. Even if my confidence in your ability to testify truthfully had not been lost, your ability to perform the essential job functions of a Trooper is reparably limited due to the Highway Patrol's duty to disclose details of the internal investigation to prosecutors, as discussed above. If you were to return to duty with the Highway Patrol I could not, in good conscience, assign you to any position where you may potentially have to issue a citation, make an arrest or testify in a court of law or administrative proceeding. There are no Trooper positions available within the Highway Patrol that do not include these essential job functions, accordingly, any assignment would compromise the integrity of the Highway Patrol and the ability of the State to put on credible evidence to prosecute its cases.

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4. Campaign cover is another term for the official hat worn by State Highway Patrol troopers.

> For the above-stated reasons, I do not find any level of discipline, short of dismissal, to be appropriate in your case. Your violation of the Highway Patrol's truthfulness policy, while over a trivial matter, does not negate the fact that your false story was created by you with premeditation and deliberation to lie to your supervisor and you continued to lie to your supervisor for a period of weeks and only decided to tell the truth after being confronted with compelling evidence that your story was untruthful. Additionally, there was no coercion, no trickery and no other mitigating circumstance present to mitigate or even explain your misconduct. Instead, the evidence shows that your fabricated an elaborate story merely because you were afraid you would possibly be reprimanded for leaving your patrol vehicle without your cover. As indicated above, I simply have no confidence that, if allowed to return to the Highway Patrol, you can be trusted to testify truthfully and having considered all mitigating factors and lesser levels of discipline, I have concluded that the appropriate level of discipline in this case is Dismissal from the North Carolina Highway Patrol.
>
> The obligations outlined above under *Brady* and *Giglio*, as well as the high standards expected of each member of the Highway Patrol, preclude me, in my capacity as Patrol Commander, from ever allowing you to testify in court as a representative of the Highway Patrol. Therefore it is my decision to uphold your dismissal.

Petitioner received a final agency decision from Frank Perry, Secretary of the North Carolina Department of Public Safety, by a letter dated 31 August 2016. The letter stated the North Carolina Department of Public Safety Employee Advisory Committee convened and upheld his dismissal for the same reasons as stated in Col. Grey's letter. Having exhausted his administrative remedies for a second time, Petitioner filed a second contested case petition with the Office of Administrative Hearings ("OAH") to challenge his termination. Petitioner filed motions for judgment as a matter of law, for judgment on the pleadings, and for summary judgment. These were all denied by Administrative Law Judge Donald W. Overby. A contested case hearing was held on 29-30 January 2018 before ALJ Overby.

At the 2018 hearing, all of the exhibits and testimony from the 2009 hearing were admitted. The only new witnesses were Melvin Tucker, an

expert witness for Petitioner, and Col. Grey, who testified regarding his decision-making process after remand from the Supreme Court.[5] Col. Grey testified that he did not draft or prepare Petitioner's termination letter. Col. Grey also testified that he did not review the Supreme Court's decision or this Court's prior decision before making his determination regarding Petitioner's termination:

> Q. Okay. Now, at that point -- well, I would presume that you would have been provided the supreme court decision that, sort of, dumped this back in your lap?
>
> A. I never saw the supreme court decision.
>
> Q. Oh.
>
> A. I didn't review it.
>
> Q. Okay. All right.· Did anyone provide you the court of appeals decision in the case right before it reached the supreme court?
>
> A. And I don't know -- I do -- I saw the OAH information, but I don't know that -- you know, I don't recall reviewing the court of appeals stuff.

Col. Grey was asked about this again on cross examination:

> Q. Colonel, you did share with us earlier that you did not read the supreme court decision; but didn't you become aware through some source that the entire court of appeals and the superior court found there was no just cause for Trooper Wetherington's termination?
>
> MS. HILL: Objection.
>
> BY MR. MCGUINNESS:
>
> Q. Did you become aware of that?
>
> THE COURT: Overruled.
>
> THE WITNESS: I did. At some point I understood that, I think, correct me if I'm wrong, Mr. McGuinness, that OAH was in favor of the organization, superior court and court the appeals was in favor of Mr. Wetherington, and the supreme court remanded it back to the agency. Am I right?

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5. At the time of the hearing, Col. Grey had been retired from the Highway Patrol for approximately one year.

BY MR. MCGUINNESS:

Q. I believe you are. And I guess it just makes me curious as to why in light of the history of the case and the concerns that you've articulated that -- that you didn't get into the supreme court decision and see what particular factors that they thought was most important, not myself or Miss Hill, but the supreme court. In your, obviously, your course of actions, but you chose not to get into that, apparently?

A. That's correct.

In an order entered 17 May 2018, ALJ Overby conducted *de novo* review of whether just cause existed for Petitioner's termination and affirmed the decision to terminate Petitioner concluding in part:

> 38. Whether just cause existed for disciplinary action against a career status State employee is a question of law, to be reviewed de novo. In conducting that review, this Court owes no deference to DPS's just cause decision or its reasoning therefore and is free to substitute its judgment for that of the agency on whether just cause exists for the disciplinary action taken against the employee.
>
> 39. Respondent met its burden of proof and established by substantial evidence that it had just cause to dismiss Petitioner from employment with the State Highway Patrol for unacceptable personal conduct.
>
> 40. The Respondent has not exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; and has not failed to act as required by law or rule.

(Citations omitted.) Petitioner timely appealed to this Court.

## II. Preliminary Procedural Issues

We first note that during the long pendency of this case, the procedure for this appeal has changed.

### A. Jurisdiction

The appeal process under North Carolina General Statute Chapter 126, Article 8 for Petitioner's case changed as of 21 August 2013, when amendments to North Carolina General Statute Chapter § 126-34.02 became effective.

> Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 (2015). As relevant to the present case, N.C. Gen. Stat. § 126-34.02(a) provides:
>
> > (a) [A] former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the [ALJ] may grant the following relief:
> >
> > > (1) Reinstate any employee to the position from which the employee has been removed.
> > >
> > > (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
> > >
> > > (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.
>
> One of the issues, which may be heard as a contested case under this statute, is whether just cause existed for dismissal, demotion, or suspension. As here, "[a] career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." N.C. Gen. Stat. § 126-34.02(b)(3). In such cases, "the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). In a contested case, an "aggrieved party" is entitled to judicial review of a final decision of an administrative law judge [ALJ] by appeal directly to this Court. N.C. Gen. Stat. § 126-34.02(a); N.C. Gen. Stat. § 7A-29(a).

*Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 131-32, *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017) (alterations in original).

The amendments in 2013 eliminated one step in appellate review, so there was no Superior Court review of the OAH decision after remand by the Supreme Court, as there was in *Wetherington I*. Neither party has raised any challenges to the procedure on remand. Petitioner timely

appealed the ruling from the OAH to this Court pursuant to North Carolina General Statute § 126-34.02(a) and North Carolina General Statute § 7A-29(a). *See Peterson v. Caswell Developmental Ctr.*, ___ N.C. App. ___, ___, 814 S.E.2d 590, 593 (2018) ("An appeal lies with this Court of a final decision of the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 7A-29 (2017).").

B. Standard of Review

> Section 150B-51 of our State's Administrative Procedure Act (APA) establishes the scope and standard of review that we apply to the final decision of an administrative agency. The APA authorizes this Court to affirm or remand an ALJ's final decision, but such a decision may be reversed or modified only
>
> > if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
> >
> > (1) In violation of constitutional provisions;
> >
> > (2) In excess of the statutory authority or jurisdiction of the agency or [ALJ];
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> >
> > (6) Arbitrary, capricious, or an abuse of discretion.
>
> The particular standard applied to issues on appeal depends upon the nature of the error asserted. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test."
>
> To that end, we review *de novo* errors asserted under subsections 150B-51(b)(1)-(4). Under the *de novo* standard of review, the reviewing court "considers the matter anew and freely substitutes its own judgment[.]"
>
> When the error asserted falls within subsections 150B-51(b)(5) and (6), this Court must apply the "whole record standard of review." Under the whole record test,

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

" 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion."

"In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed." It is also well established that

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

Our review, therefore, must be undertaken "with a high degree of deference" as to " '[t]he credibility of witnesses and the probative value of particular testimony[.]' " As our Supreme Court has explained, "the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact."

*Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 12-13, 802 S.E.2d 115, 124-25 (2017) (alterations in original) (citations omitted), *review denied*, 371 N.C. 343, 813 S.E.2d 857 (2018).

The primary issue on appeal is whether the OAH erred in upholding Col. Grey's determination of "just cause" to terminate Petitioner's employment.

> Career state employees are entitled to statutory protections, including the protection from being discharged, suspended, or demoted without "just cause." This Court established a three-part analysis to determine whether just cause existed for an employee's adverse employment action for unacceptable personal conduct:
>
> > The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."
>
> Here, only the third prong of the analysis is at issue, as the ALJ concluded, and Petitioner did not appeal, the first two findings that Petitioner had engaged in the alleged unacceptable personal conduct and that conduct fell within one of the provided categories.

*Peterson*, ___ N.C. App.at ___, 814 S.E.2d at 593 (citation omitted) (quoting *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012)).

Here, as in *Peterson*, only the "third inquiry" is challenged on appeal, and we review the conclusion of "just cause" *de novo*. "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington I*, 368 N.C. at 590, 780 S.E.2d at 546 (citation and brackets omitted).

C. Law of the Case

This case's long history adds another layer of complication. Our review of the order on appeal is guided both by the standard of review and by the prior rulings in this case under the law of the case doctrine.

> According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision

> becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal.

*Weston v. Carolina Medicorp*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) (citing *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974)).

The law of the case doctrine applies only to the issues decided in the previous proceeding.

> In North Carolina courts, the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not. "[T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case."

*Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009) (alteration in original) (quoting *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956)), *aff'd by an equally divided court*, 364 N.C. 416, 700 S.E.2d 223 (2010).

In his Petition for a Contested Case Hearing filed after Col. Grey issued his determination on remand, Petitioner argued, "The law of the case controls[,]" citing to *Wetherington I*. In *Wetherington I*, the Supreme Court notably did not reverse or vacate either the Superior Court's order or this Court's opinion, which was affirmed as modified. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548-49. In addition, the Superior Court's order and this Court's opinion reversed ALJ Gray's order which was on appeal in *Wetherington I*. The Supreme Court instead held:

> Nevertheless, the superior court determined that petitioner's conduct did not constitute just cause for dismissal, and the Court of Appeals affirmed that determination. Because we conclude that Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law, we find it prudent to remand this matter for a decision by the employing agency as to whether petitioner should be dismissed based upon the facts and circumstances and without the application of a per se rule. As a result, we do not decide whether petitioner's conduct constitutes just cause for dismissal.

> Accordingly, the decision of the Court of Appeals is modified and affirmed, and the case is remanded to the Court of Appeals with instructions to that court to remand to the Superior Court, Wake County for subsequent remand to the SPC and further remand to the employing agency for additional proceedings not inconsistent with this opinion.

*Id.* at 593, 780 S.E.2d at 548 (citation omitted). Therefore, the Supreme Court modified this Court's opinion in *Wetherington I* only regarding this Court's holding, which was, "The superior court did not err in concluding that Petitioner's conduct did not constitute just cause for dismissal." 231 N.C. App. at 513, 752 S.E.2d at 517.

As ALJ Overby noted, the basic facts as to the traffic stop in 2009, the loss of the hat, and Petitioner's statements about it were determined in *Wetherington I*. The remand by the Supreme Court did not limit Respondent's options on remand but gave Respondent the *opportunity* to develop additional evidence as to those events in 2009, to amend its charges against Petitioner, and to present additional substantive evidence at another contested case hearing. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548-49. Since the Supreme Court was considering a legal issue, the holding and open-ended remand gave Respondent at least two options. One option was for Respondent to pursue amended charges or consider additional evidence on remand, if it determined the facts required further development. *See N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 674-75, 599 S.E.2d 888, 904 (2004) ("Ordinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding."). Another option, which Respondent elected, was to proceed upon the same evidence and facts as established in *Wetherington I* regarding the events in 2009 and to make a new determination of "whether petitioner's conduct constitutes just cause for dismissal" based upon the specific factors as directed by the Supreme Court. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548.

D. Adjudicated Facts

At the second contested case hearing, no new substantive evidence regarding the facts surrounding the loss of the hat was presented. The transcripts and exhibits from the first hearing were all admitted into evidence. In the order, ALJ Overby noted that both the Court of Appeal and Supreme Court in *Wetherington I* had quoted "fifteen specific findings of fact" from the prior order which were not "successfully challenged on appeal" in *Wetherington I* and "thus are conclusively established on

appeal."[6] "[T]he established and settled facts of the underlying events for which Petitioner was terminated" quoted by the Supreme Court in *Wetherington I* are:

> 5. On March 29, 2009, Petitioner, while on duty, observed a pickup truck pulling a boat and made a traffic stop of that truck on U.S. 70 at approximately 10:00 pm. During that traffic stop, Petitioner discovered two loaded handguns in the truck and smelled the odor of alcohol coming from the interior of the truck. The two male occupants of the truck were cooperative and not belligerent. Petitioner took possession of the handguns. At the conclusion of that traffic stop, Petitioner proceeded to a stopped car that had pulled off to the side of the road a short distance in front of the truck and boat trailer.
>
> 6. Petitioner testified that he first noticed his hat missing during his approach to the car parked in front of the truck. Petitioner heard a crunch noise in the roadway and saw a burgundy eighteen-wheeler drive by.
>
> 7. Petitioner testified that after the conclusion [of] his investigation of the stopped car, he looked for his hat. Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened.
>
> . . . .
>
> 9. After searching for, but not locating his hat, Petitioner contacted Sergeant Oglesby, his immediate supervisor, and told him that his hat blew off of his head and that he could not find it.
>
> . . . .
>
> 11. Trooper Rink met Petitioner on the side of the road of U.S. 70. Trooper Rink asked Petitioner when

6. These findings were in ALJ Beecher Gray's order based upon the 2009 hearing. It is true that these findings are the "established and settled facts," although the Superior Court and this Court *reversed* ALJ Gray's order in *Wetherington I* based upon *de novo* review of the "just cause" conclusion. Petitioner challenges some of these "adjudicated facts" on appeal as unsupported by substantial evidence. There are good arguments both ways on whether this Court would be able to review those facts on appeal or if they are part of the law of the case. But based upon our analysis of the case, we need not address this portion of Petitioner's argument.

he last saw his hat. Petitioner said he did not know. . . . Petitioner said that he was going down the road . . . and was putting something in his seat when he realized he did not have his hat. Petitioner then indicated that he turned around and went back to the scene of the traffic stops and that is when he found the acorns from his hat. Petitioner was very upset and Trooper Rink told Petitioner that everybody loses stuff and that if Petitioner did not know what happened to his hat, then he should just tell his Sergeants that he didn't know what happened to it. Petitioner replied that it was a little late for that because he already had told his Sergeant that a truck came by and blew it off of his head.

. . . .

13. The testimony of Trooper Rink provides substantial evidence that Petitioner did not know what happened to his hat, was untruthful to Sergeant Oglesby when he said it blew off of his head, and that Petitioner's untruthfulness was willful.

. . . .

15. The next day, March 30, 2009, Sergeant Oglesby and several other members of the Patrol looked for Petitioner's hat.

16. Sergeant Oglesby had a detailed conversation with Petitioner on the side of the road regarding how the hat was lost. During the conversation, Petitioner remained consistent with his first statement to Sergeant Oglesby from the night of March 29, 2009 as he explained to Sergeant Oglesby that a gust of wind blew his hat off of his head. Petitioner continued stating that the wind was blowing from the southeast to the northwest. Petitioner said he turned back towards the direction of the roadway and saw a burgundy eighteen[-]wheeler coming down the road so he could not run out in the roadway and retrieve his hat. Petitioner then heard a crunch and did not see his hat anymore.

. . . .

18. Petitioner was not truthful to Sergeant Oglesby on March 30, 2009, when he explained how he lost his hat.

. . . .

20. Petitioner testified that, approximately three to four days after the loss of the hat, he suddenly realized that the hat did not blow off of his head, but that he had placed the hat on the light bar of his Patrol vehicle and it blew off of the light bar. Petitioner never informed any supervisors of this sudden realization.

21. Approximately three weeks after the hat was lost, Petitioner received a telephone call from Melinda Stephens, during which Petitioner was informed that her nephew, the driver of the truck and boat trailer on March 29, 2009, had Petitioner's hat.

22. Petitioner informed Sergeant Oglesby that his hat had been found.

23. Petitioner's hat subsequently was returned to Sergeant Oglesby. When returned, the hat was in good condition and did not appear to have been run over.[7]

24. Due to the inconsistencies in Petitioner's statements and the condition of the hat, First Sergeant Rock and Sergeant Oglesby called Petitioner to come in for a meeting. During the meeting, First Sergeant Rock asked Petitioner to clarify that the hat blew off of his head and that the hat was struck by a car. Petitioner said yes. First Sergeant Rock then pulled Petitioner's hat out of the cabinet and told Petitioner that his story was not feasible because the hat did not appear to have been run over. At that point, Petitioner broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off. Petitioner stated that he told Sergeant Oglesby that the hat blew off his head because he received some bad counsel from someone regarding what he should say about how the hat was lost.

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7. As noted in Finding 7, "Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened." *Wetherington I*, 368 N.C. at 586, 780 S.E.2d at 544. When the hat was recovered, the acorns were missing from the hat, but it was not crushed. Thus, the hat had not been run over by an eighteen-wheeler—at least not to the point the hat was destroyed. There was some debate at the hearing over whether a hat without acorns is in "good condition." For purposes of this opinion, we assume so.

> 25. During his meeting with First Sergeant Rock and Sgt. Oglesby, Petitioner was untruthful when he told First Sergeant Rock that the hat blew off of his head because by Petitioner's own testimony, three days after losing his hat he realized that he placed it on his light bar. However, three weeks after the incident, in the meeting with First Sergeant Rock and Sergeant Oglesby he continued to claim that the hat blew off of his head. It wasn't until First Sergeant Rock took the hat out and questioned Petitioner more that Petitioner admitted that the hat did not blow off of his head, but blew off of the light bar. Therefore, even if Petitioner was confused on March 29, 2009, as he claims, he still was being untruthful to his Sergeants by continuing to tell them that the hat blew off of his head . . . .
>
> . . . .
>
> 33. Petitioner's untruthful statements to First Sergeant Rock and Sergeant Oglesby were willful and were made to protect himself against possible further reprimand because of leaving the patrol vehicle without his cover.

*Wetherington I*, 368 N.C. at 585-88, 780 S.E.2d at 544-46 (alterations in original).

## III. New Findings of Fact on Remand

ALJ Overby made additional findings of fact regarding Col. Grey's consideration on remand. Many of these findings did not exist before remand and were not addressed in *Wetherington I*, although some are essentially reiterations of the "adjudicated facts" regarding events in 2009 and some are actually conclusions of law. We will refer to these new findings as the "remand findings" to distinguish them from the "adjudicated facts." Petitioner challenges some of the remand findings as unsupported by substantial evidence.[8]

> 8. Col. Grey's termination letter is very specific about what he reviewed in making his decision. He considered the Report of Investigation and attached documents, the video recording of Petitioner's interview with Internal Affairs, and the evidence presented by Petitioner during his pre-dismissal conference.

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8. Petitioner challenges Findings 15, 17, 18, 28, 29, 30, 32, 34, 35, 36, 47, 48, 60, 62, 64, 65, and 66. We address the arguments as to specific findings as appropriate below.

9. In the letter, Col. Grey recognizes that he has discretion to administer any level of punishment. He acknowledges mitigating factors, including Petitioner's work history.

10. There are four enumerated facts that the Colonel recites as the basis of his decision to terminate. Those facts, as set forth in the letter, are consistent with the Facts as found by ALJ Gray. Within the four enumerated facts, Col. Grey states his conclusions regarding the facts as he recites the proven facts as the basis for his decision.

11. Col. Grey states that Petitioner violated the Patrol's truthfulness policy by making contradictory statements (plural) about how he lost his campaign cover.

. . . .

14. Col. Grey did not write the termination letter, and he does not know who wrote the letter. It was given to him to sign.

15. It is not of consequence that Col. Grey did not write the dismissal letter. By signing the letter, he is taking full responsibility and ownership for its contents. Likewise, Col. Grey did not need to be fully aware of Col. Glover's testimony because Col. Grey was reviewing the file and drawing his own conclusions from the full record in the hearing.

16. Trooper Wetherington's employment was terminated based on the allegations of untruthfulness. Petitioner's untruthful statements were about where his hat was physically located when it was blown away from his care and control.

17. Wetherington initially stated his hat blew off his head and became lost during a traffic stop, and that is what he reported to his supervisor, Sergeant Oglesby, knowing that statement not to be true.

18. From the Adjudicated Facts of this case, Petitioner Wetherington sought counsel from someone who suggested what he should say about the lost hat, after which he called Sgt. Oglesby. He then talked with

Trooper Rink who counseled him to tell the truth, but Petitioner told Trooper Rink that it was too late because he had already told Sgt. Oglesby a story that was not true. Petitioner continued to maintain his untrue statements until confronted with the return of his campaign cover, i.e., hat.

19. According to Petitioner Wetherington, he had a sudden realization three to four days later of the hat's actual location when he lost it but never informed any of his superiors of that revelation.

20. It has been practically a universally held opinion, including Col. Grey, that the underlying premise of a lost campaign cover in and of itself was not a significant violation. The issue pertains to Petitioner's untruthfulness.

. . . .

23. The remand hearing before the undersigned primarily focused on Col. Grey's decision, including his application of the just cause factors required by North Carolina's just cause law. Two witnesses testified at the remand hearing on January 29 and 30, 2018, Col. William Grey for the Respondent and retired Chief Melvin Tucker for Petitioner.

. . . .

25. At the time of the hearing, Col. Grey was still familiar with the policies of the SHP. The policy on truthfulness, he remembered, was fairly simple: "You're just required to be truthful in all your communications whether they're oral or written at all times."

26. As the commander of the SHP, Col. Grey felt that truthfulness was paramount, not just for the SHP, but for all law enforcement:

> [Y]ou gotta have trust that a person is credible, has moral courage to step up and do the right thing and is going to be honest and forthright in all their communications…. You take people's freedoms, you're gonna charge them with stuff and in a worst case scenario, you can-you can take their life, if the situation calls for it,

> so you got [to] be sure that person is always aboveboard and forthright.

27. During his tenure as Colonel, Col. Grey disciplined members of SHP. He gave the full range of discipline from written warnings to days off to dismissals. In making his decision to discipline a member, it was Col. Grey's practice to review the entire case, including the internal affairs investigation and the member's work history, and he would make a decision based on the totality of the circumstances surrounding the case.

28. Col. Grey received this case after the Supreme Court ruled to remand the matter for decision. Col. Grey never read the Supreme Court decision in this contested case; however, it was explained to him. As he understood the Supreme Court ruling, he was to review the case as if for the first time and make his decision from the evidence presented.

29. Col. Grey did not have to read the Supreme Court decision to understand the full import of all of its holdings. The provisions of the decision were explained to him in sufficient detail for him to properly consider the provisions of the Supreme Court decision in conducting the review and making his decision in this contested case.

30. Over the course of a few days, Col. Grey reviewed the recordings, transcripts, internal investigation report, and pre-disciplinary information, as well as Petitioner's work history and disciplinary history. Col. Grey treated this case like any other case coming to him for the first time.

31. Col. Grey did not know Petitioner and had never worked with him at SHP. Col. Grey did not speak with Petitioner during his review of Petitioner's case. This was not unusual since he did not usually speak with members prior to issuing discipline. He would only review the information presented to him after the pre-disciplinary conference just as he did with Petitioner's case.

32. Col. Grey determined Petitioner's dismissal was appropriate based on Petitioner's violation of the truthfulness policy. It was not a "spontaneous lie." Rather,

Petitioner "had time to think about it, he thought about it, and then he called his sergeant and told him a lie, knowing that it was untrue, and then he changed his story from his first statement to a second statement." It was not until he was confronted with the truth that Petitioner finally admitted: "Okay, I'm not telling the truth."

33. Col. Grey considered evidence of mitigation, as well as all other forms of discipline available to him, but decided that dismissal was the most appropriate discipline given Petitioner's conduct. Col. Grey made his decision without regard for what the Secretary of the Department of Public Safety or anyone else wanted. He was not pressured to dismiss Petitioner.

34. Col. Grey did not feel that the matter was "just about a hat." Instead, the Colonel was bothered that Petitioner was willing to go to such lengths to lie about an event when there was not "a whole lot on the line there." Had Petitioner been truthful and confessed that he simply did not know what happened to his hat, the Colonel likely would not have known about it, because it would not rise to the level of his review. Petitioner would most likely have been given a written warning or a counseling.

35. Col. Grey felt that the fact that Petitioner had just concluded a "high-intensity" yet routine traffic stop does not negate the fact that Petitioner intentionally lied to his sergeant about how he lost his hat. Col. Grey also felt that the fact that Petitioner was a relatively new trooper does not negate the fact that he intentionally lied to his sergeant and continued to maintain the lie. While it might be expected that less experienced troopers will make more technical mistakes, the same cannot be said for moral mistakes, according to Col. Grey.

36. The fact that Petitioner was willing to lie about such a relatively small thing as losing his hat caused Col. Grey to lose confidence in the integrity of Petitioner. This is consistent with the findings in the Recommended Decision by Judge Gray, which speaks of the widely held position with the Highway Patrol and not just Colonel Glover's position of a *per se* violation. For Col. Grey to reach that conclusion is not a new allegation, but a finding

based upon the facts and circumstances existing in the 2009 case as found by Judge Gray.

. . . .

52. The transcript of the first OAH hearing shows that Trooper Wetherington was 23 years old at the time of the first hearing. He graduated from New Bern High School in 2005. Wetherington was a volunteer firefighter and an American Red Cross Instructor. Wetherington graduated from the Highway Patrol Academy in 2007.

53. According to that transcript, Wetherington was not previously disciplined by SHP. Wetherington was rated as one of the highest producers while in the field training program. His work and conduct history revealed exemplary service and conduct. In his 2008-2009 evaluation, Trooper Wetherington was rated as good or very good in every rating category. Judge Gray found that Wetherington's overall performance rating in 2008 was "3," which was average. Colonel Grey was aware of Wetherington's work history.

54. *The Employee Advisory Committee* report found that Wetherington was a very "devoted, dedicated" Trooper, and unanimously recommended reinstatement. Colonel Grey was aware of the Committee report.

55. The record of this contested case reflects that several laypersons and some of Wetherington's supervisors testified before Judge Gray in the first hearing at OAH. They testified to Wetherington's excellent work performance, character, and conduct. This Tribunal did not hear their testimony and therefore is unable to assess the credibility of their individual testimonies by taking into account the appropriate factors generally used for determining credibility. Their testimony is considered and given the appropriate weight.

56. Likewise, seven letters were written on Petitioner's behalf. Two of the authors also appeared and testified before Judge Gray. The letters have been considered.

57. The circumstances of the traffic stop wherein the hat was lost was also considered by Col. Grey and the

undersigned. It is noted that there were two occupants in the truck he stopped, that there was an odor of alcohol, and that there were two guns in the truck. The guns were removed, and the occupants were cooperative and were released without incident.

. . .

58. Disparate treatment is a factor which may be considered in assessing discipline.

59. The issue of disparate treatment was raised in the OAH hearing before Judge Gray in 2009. Judge Gray made specific Findings of Fact concerning disparate treatment.

60. In 2009, Judge Gray, in Finding No. 43, found that substantial evidence existed that "since at least 2002 all members of the Patrol with substantiated violations of truthfulness have been dismissed."

61. Judge Gray concluded then that it was not incumbent on the Highway Patrol to look back through history to find a lowest common denominator for assessing punishment from the historical point forward. There is no evidence of cases of disparate treatment more recent in time before this Tribunal for determining the most recent punishment by the Patrol for violation of the truthfulness policy; however, this Tribunal is not going to reach back into history in order to compare Petitioner's case with similar cases from several years ago, without any recent cases for comparison, and especially cases decided by Col. Grey.

62. This current case was decided by Col. Grey in 2016. It is not fair or reasonable to hold the Highway Patrol to a standard set by disposition of its worse cases from many years before. Col. Grey decided the case based upon his thorough review of the totality of facts and circumstances of this case, including how he had disposed of cases during his tenure as Colonel. Col. Grey acknowledged that he reviewed only cases decided during his tenure.

. . .

63. Petitioner Wetherington contends that Col. Grey's reliance on the Brady and Giglio cases is tantamount to

inserting a new allegation of sorts that should not have been brought into consideration in this current review on remand.

64. The undersigned excluded evidence on the Brady and Giglio cases, at least in part, out of an abundance of caution, to avoid evidence that would indeed constitute a totally new allegation not within the purview of the original charge sheet. On further review, Col. Grey's reliance on Brady and Giglio was not ill-founded. Brady was decided by the Supreme Court of the United States in 1963, and Giglio was decided by the Supreme Court of the United States in 1973, well before even the first hearing in OAR on this matter.

65. Assuming *arguendo* that Col. Grey should not have referenced specifically to those cases, Col. Glover had considered the impact of findings of untruthfulness with Highway Patrol Troopers as reflected in his testimony. Further, in upholding Col. Glover's decision to terminate Petitioner, Secretary Reuben Young referenced the effect of a Trooper having his honesty, integrity and truthfulness questioned, especially from the witness stand. Thus, Col. Grey's reliance on the impact of loss of credibility for untruthfulness would have been in keeping with the initial determinations in this case, including Col. Glover's testimony in the first hearing before OAR.

66. Col. Grey's reliance on the Brady/Giglio factors was directly related to Petitioner's actions which were the cause of his termination, and referenced in Col. Glover's very abbreviated dismissal letter and the original Charge Sheet.

(Citations and parentheticals omitted) (alterations in finding 26 in original.)

## IV. Just Cause

Petitioner first argues on appeal that DPS did not follow the instructions from the North Carolina Supreme Court regarding factors to consider on remand. Respondent contends that "[d]espite the numerous argument headings in Petitioner's brief, there is solely one issue before this Court: the existence of just cause to affirm Petitioner's dismissal." We review whether just cause existed to terminate Petitioner *de novo*. *See Peterson*, ___ N.C. App. at ___, 814 S.E.2d at 593.

As this Court noted in *Warren v. North Carolina Department of Crime Control*:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925 (2012) (footnote omitted) (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900).

In *Wetherington I*, the Supreme Court noted Col. Glover's testimony that

> because petitioner's conduct "was obviously a violation of the truthfulness policy," dismissal was required, and he repeatedly asserted that he "had no choice" to impose any lesser punishment. After petitioner's counsel asked Colonel Glover whether, "when there is a substantiated or adjudicated finding of untruthfulness . . . [a trooper] would necessarily need to be terminated," Colonel Glover reiterated that if "that's the violation, again . . . I have no choice because that's the way I view it." Petitioner's counsel then asked, "[D]oes that mean if you find a substantiated or adjudicated violation of the truthfulness policy . . . that you don't feel like that gives you any discretion as Colonel to do anything less than termination?" Colonel Glover agreed with that statement.

368 N.C. at 592, 780 S.E.2d at 548 (alterations in original). The Supreme Court then noted that the "truthfulness policy" applies to a wide range

of communications, whether related to the trooper's duties or not, but as Col. Glover described his application of that policy, any untruthful or inaccurate statement, in any context, required termination:

> As written, the truthfulness policy applies to "all written and oral communications," and it applies to a wide range of untruthful, inaccurate, "improper," or "misleading" statements. Nothing in the text of the policy limits its application to statements related to the trooper's duties, the Patrol's official business, or any other significant subject matter. Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

*Id.*

The Supreme Court rejected the "per se" rule of dismissal for any violation of the truthfulness policy. *Id.* at 593, 780 S.E.2d at 548. Although Respondent had discretion in choosing an appropriate punishment for violation of the policy, that discretion was to be guided by consideration of certain factors outlined by the Supreme Court. Specifically, on remand, DPS was required to consider

> the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

*Id.* at 592, 780 S.E.2d at 548. The Supreme Court also noted that Respondent should consider a "range of disciplinary actions" and not just termination:

> While dismissal may be a reasonable course of action for dishonest conduct, *the better practice*, *in keeping with*

> *the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.*

*Id.* at 593, 780 S.E.2d at 548 (emphasis added).

On remand, the Supreme Court did not limit DPS to relying on the existing record. *Id.* The ALJ found that "[t]he Supreme Court's directive is specifically sending this matter back to the agency to make a determination based on the facts and circumstances of this case. The directive does not indicate that an entirely new investigation should be undertaken." We agree the Supreme Court did not direct "an entirely new investigation" but it also did not preclude Respondent from conducting further investigation or from developing additional evidence as needed to address the factors as directed by the Supreme Court.[9] In any event, Respondent elected to rely only on the existing record, so all the evidence and facts as to the events in 2009 are exactly the same as considered by this Court and the Supreme Court in *Wetherington I*. Only the findings on remand as to Col. Grey's decision are new, and many of these findings are actually reiterations of the 2009 "adjudicated facts" or conclusions of law, which we will review as such.

Petitioner argues, and ALJ Overby found, that Col. Grey did not read either the opinions issued by the Court of Appeals or Supreme Court in *Wetherington I*:

> 28. Col. Grey received this case after the Supreme Court ruled to remand the matter for decision. Col. Grey never read the Supreme Court decision in this contested case; however, it was explained to him. As he understood the Supreme Court ruling, he was to review the case as if for the first time and make his decision from the evidence presented.

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9. Since the Supreme Court was reviewing "just cause" *de novo*, it could have performed that review based upon the existing record in *Wetherington I* without remand, but because Respondent had erroneously applied a "per se" rule of dismissal, the Supreme Court gave Respondent the opportunity on remand to develop the record as to the additional factors it had directed Respondent to consider and to exercise its discretion accordingly. We also agree with the ALJ that if Respondent had considered new evidence, "then such new allegations would have necessitated procedural due process, including, among other things, written notice and an opportunity to be heard in a pre-dismissal conference." But Respondent elected to rely on the existing record, so another pre-dismissal conference was not required.

> 29. Col. Grey did not have to read the Supreme Court decision to understand the full import of all of its holdings. The provisions of the decision were explained to him in sufficient detail for him to properly consider the provisions of the Supreme Court decision in conducting the review and making his decision in this contested case.

(Parenthetical omitted.)

Based upon Col. Grey's letter, his testimony, and the above findings, it is apparent that Col. Grey "review[ed] the case as if for the first time and ma[de] his decision from the evidence presented." It is not apparent that he considered the factors as directed by the Supreme Court, as we discuss in more detail below. We acknowledge that it is possible for an opinion to be "explained to" someone, but we cannot discern from Col. Grey's letter and testimony he "understood the full import of all of its holdings," since he did not address the factors as directed by the Supreme Court.

The ALJ interpreted the Supreme Court's opinion as requiring consideration of as few as one of the listed factors, based upon the word "or" in one sentence. Those factors, sometimes referred to as the "*Wetherington* factors," as articulated by the Supreme Court are "the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, *or* discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548 (emphasis added).

> 26. It is important to note that the Supreme Court uses the word "or." The usual and customary use of "or" indicates an alternative and oftentimes, as here, alternatives in a listing. If there is a choice between two items, then "or" would mean an alternative choice for either item. While the Supreme Court notes that it is appropriate and necessary to consider those factors, the use of "or" negates any mandatory findings or conclusions based on all of those factors.
>
> 27. Assuming *arguendo* that there is a requirement to give consideration to all of those factors, Col. Grey did, in fact, consider each of the Wetherington factors in reaching his decision to terminate Petitioner.

This interpretation of the "*Wetherington* factors" is not supported the text of *Wetherington I* or by later cases applying it. Although the factors as quoted in ALJ Overby's order are accurate, they are taken out of the context of the sentence in the case. Reading the Supreme Court's

instruction in context, the "or" in this sentence must be read as "and" when applied to the factors which should be considered. The Supreme Court stated:

> *Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors* such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. *We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.*

*Id.* (emphases added). The Supreme Court explained that Col. Glover could not "impose a punishment other than dismissal for any violation" without regard for these factors. *Id.* The Court then directed that "*consideration of these factors is an appropriate and necessary component of a decision* to impose discipline upon a career State employee for unacceptable personal conduct." *Id.* (emphasis added). Other cases from this Court have interpreted *Wetherington I* as requiring consideration of any factors for which evidence is presented. *See Brewington*, 254 N.C. App. at 25, 802 S.E.2d at 131 ("Although the primary holding in *Wetherington* was that public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct, the Court did identify factors that are 'appropriate and necessary component[s]' of that discretionary exercise." (alterations in original)); *accord Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 784 S.E.2d 509 (2016). Thus, Respondent was directed to consider all of these factors, at least to the extent there was any evidence to support them. Respondent could not rely on one factor while ignoring the others.

ALJ Overby determined that "Col. Grey did, in fact, consider each of the Wetherington factors in reaching his decision to terminate Petitioner." But upon examination of his letter, we can find consideration of only two factors. We will address each factor as directed by the Supreme Court. Since we are to review "just cause" for dismissal de novo, we will review the factors based upon the "adjudicated fact" and the "remand facts."[10]

10. By relying on the existing findings, we are essentially viewing the facts in the light most favorable to Respondent. Petitioner has challenged some of the findings on appeal, but we need not consider those challenges based upon our holding.

A. The Severity of the Violation

Although Col. Grey's letter uses more words than Col. Glover's did to describe Petitioner's untruthfulness regarding losing his hat, the basic facts have not changed and were established in 2009, as quoted above. But Petitioner's untruthful statement regarding losing his hat was not a severe violation of the truthfulness policy. It did not occur in court and it did not affect any investigation, prosecution, or the function of the Highway Patrol. It was about a matter—exactly how Petitioner lost his hat—all parties concede was not very important.

Col. Grey considered the very insignificance of the subject matter an indication of the severity of the violation, indicating Petitioner could not be trusted in any context. His letter to Petitioner stated, "Based upon the facts and circumstances of this case, as described above, I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings." ALJ Overby agreed that "Petitioner's lie was neither insignificant nor immaterial. Because the Petitioner chose to continue to lie about an insignificant event, his credibility is called into question all the more." This reading of the truthfulness policy sounds exactly like Col. Glover's "per se" rule—rejected by the Supreme Court—that any untruthful statement, even if the subject matter does not involve an investigation or official business, and no matter how insignificant the subject, requires dismissal, and no discipline short of dismissal will suffice. In fact, based on ALJ Overby's logic, the more "insignificant" the subject matter of the lie, the more Petitioner's credibility is called into question. Thus, a lie about a significant matter, such as untruthful testimony about a criminal investigation in court, would be a severe violation requiring dismissal because untruthfulness in that context obviously undermines the very mission of the Highway Patrol, while a lie about an *insignificant matter* must also result in dismissal because a trooper who would lie about something so insignificant cannot be trusted in any context, according to Col. Grey. This interpretation of the truthfulness policy is functionally indistinguishable from the "per se" dismissal rule applied by Col. Glover in *Wetherington I* and rejected by the Supreme Court.

Respondent made a similar argument seeking to embellish the severity of Petitioner's untruthfulness in *Wetherington I*, and this Court noted:

> Respondent contends in its brief that Petitioner "made up an elaborate lie full of fabricated details" regarding the "specific direction of the wind, the specific color of the truck and the noise he heard when the truck ran

> over his hat." However, neither the ALJ nor the SPC made findings indicating that the wind, truck's color, or "crunch noise" were untruthful. Rather, the lie or "untruth" lay only in the hat's location when Petitioner misplaced it. The ALJ found that Petitioner "didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off." *The findings do not support Respondent's characterization of Petitioner's statements as an "elaborate lie full of fabricated details[.]"*

*Wetherington I*, 231 N.C. App. at 511, 752 S.E.2d at 516 (alteration in original) (emphasis added).

On remand, there are no new facts and no new evidence which would allow us to come to any new conclusion regarding the severity of Petitioner's lie than this Court did in *Wetherington I*. Col. Grey relied only on the existing record. This Court has previously determined "the lie or 'untruth' lay only in the hat's location when Petitioner misplaced it," *id.*, and the Supreme Court did not modify this portion of this Court's opinion but instead affirmed it. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 509.

B. The Subject Matter Involved

Col. Grey's letter notes the subject matter involved, the loss of the hat, but gives no consideration to this particular factor other than the fact that Petitioner lied about the location of the hat. He characterizes the subject matter of the untruthfulness appropriately as "over a trivial matter." Again, this particular violation of the truthfulness policy had no potential effect on any investigation or prosecution. Nor would the subject matter—or even Petitioner's untruthfulness about it—bring the Highway Patrol into disrepute, as some violations may. For example, in *Poarch v. North Carolina Department of Crime Control & Public Safety*, this Court affirmed a trooper's termination for just cause based on unacceptable personal conduct where the trooper was engaged in an extra-marital affair and "admitted to specific instances of sexual relations with Ms. Kirby, including sex in a Patrol car, sex behind a Patrol car, and sex in a Patrol office." 223 N.C. App. 125, 131, 741 S.E.2d 315, 319 (2012). This Court noted the trooper's misconduct, even committed when he was off duty, may harm the Patrol's reputation:

> After reviewing the record, we find the distinction between on duty and off duty based on the Patrol's radio codes to be of little significance in this case where petitioner was in uniform and the use of patrol facilities is

> so intertwined with the acts of misconduct. Furthermore, we find respondent's argument persuasive that if any member of the public would have witnessed petitioner's misconduct, where petitioner was in uniform and using patrol facilities, they would assume that petitioner was on duty to the detriment of the Patrol's reputation.

*Id.*

ALJ Overby appropriately noted the importance of truthfulness by law enforcement officers:

> 36. The world in which we live has become more tolerant and accepting of untruthfulness and outright lies. While it may be acceptable in some comers, it is not acceptable for everyone. With some occupations, there is a higher expectation for honesty and integrity, e.g., the judiciary and law enforcement officers. Those with power and authority have a greater responsibility.
>
> 37. The citizens of North Carolina and the public at large, including anyone visiting our state, deserve and expect honesty from the State Highway Patrol and law enforcement officers in general. It does not require any imagination at all to understand how devastating it would be if the Patrol tolerated and fostered a reputation for lack of honesty among its personnel. Yet it remains of paramount consideration that each case rises and falls on the particular facts and circumstances of this particular case. Not every case of untruthfulness merits termination.

We agree, and our Supreme Court was also well aware in *Wetherington I* that Petitioner had lied and of the importance of truthfulness by law enforcement officers. It was established in *Wetherington I* that (1) "the employee engaged in the conduct the employer alleges," and (2) "the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. The only issue left on remand in this case was whether Petitioner's lie, which is unacceptable personal conduct, "amounted to just cause for the disciplinary action taken. Just cause must be determined based 'upon an examination of the facts and circumstances of each individual case.' " *Id.* (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900).

The facts as to the unacceptable personal conduct—the lie about the hat—are the same now as in *Wetherington I*. The Supreme Court could

have rejected prior cases requiring consideration of various factors and a balancing of equities and adopted the "per se" rule for truthfulness for Troopers with the Highway Patrol as applied by Col. Glover, but it did not. Neither this Court nor the Supreme Court endorses untruthfulness of any sort by a law enforcement officer, but that is not the question presented here. The Supreme Court did not suggest that the Highway Patrol should "tolerate[] and foster[] a reputation for lack of honesty among its personnel" but only that some instances of untruthfulness may call for some discipline short of dismissal. The question is whether this lie, in this context, justifies dismissal, *without consideration of any lesser discipline*, upon consideration of all of the applicable factors. Neither Col. Glover nor Col. Grey actually conducted this full analysis. Col. Grey applied essentially the same "per se" rule as to truthfulness as did Col. Glover; he just used different words to describe it.

C. The Resulting Harm

The third factor is "the resulting harm" from the violation. Col. Grey spends most of his letter discussing the *potential* harm to the agency from any untruthfulness by an officer, including a discussion of the requirements of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972). We agree, as noted above, that law enforcement officers must uphold the highest standards of truthfulness, particularly in the course of their official duties, and we appreciate the legal requirements for law enforcement agencies to disclose exculpatory evidence to defendants. Yet our Supreme Court was also well-aware of the requirements of *Brady* and *Giglio* when it decided *Wetherington I*. In support of its position, which the Supreme Court accurately characterized as a "per se" rule of dismissal for any violation of the truthfulness policy, Respondent made the same argument to the Supreme Court in *Wetherington I*.[11] But even

11. Respondent argued in its brief to this Court in *Wetherington I*, "From this point forward, in every criminal case in which Petitioner is associated, the judicial finding of untruthfulness here and the facts supporting that conclusion must be disclosed to the defendant. The United States Supreme Court in *Brady v. Maryland*, held that the prosecution must turn over all evidence which may favor the defendant." Before the Supreme Court, Respondent argued, "The Court of Appeals next dismissed concerns that in the future every district attorney would have to produce the record of Wetherington's falsehoods in response to any defendants' demands for exculpatory evidence in accordance with their rights under *Brady v. Maryland*. The Court of Appeals did not find that the Patrol's concerns were not legitimate. In fact, there are reported cases in which courts have order[ed] the prosecution to produce officer personnel files in response to *Brady*. However, the Court of Appeals found that Petitioner's history of untruthfulness would not bar him from testifying in court and SPC had not presented any argument that it was likely that defense counsel would use the information to impeach Wetherington or that the impeachment would cause a jury to disregard his testimony." (Citations omitted.)

considering the requirements of *Brady* and *Giglio*, our Supreme Court still rejected a "per se" rule of termination for untruthfulness. Although Col. Grey states he was not applying a per se rule, it is difficult to discern what sort of untruthfulness, in any context, by a trooper would not lead to termination, without even any consideration of lesser discipline. Respondent's counsel at oral argument agreed that a statement of this sort regarding a missing hat does not compare to perjury while testifying in court or dishonesty in the investigation of a crime—the actual issues addressed by *Brady* and *Giglio*. It is easy to understand the resulting harm to the agency from a trooper's intentional lie about substantive facts in sworn testimony or in the course of his official duties. But Respondent has never been able to articulate how this particular lie was so harmful. Respondent failed to develop or present any additional facts on remand which could lead to a different determination.

D. The Trooper's Work History

According to the letter, Col. Grey did give cursory consideration to Petitioner's work history. He stated:

> I have taken into consideration the fact that you had been employed by the Highway Patrol as a Cadet and as a State Trooper from June 2007 until the time of your dismissal on August 4, 2009 that you did not have any disciplinary actions prior to the time of your dismissal and that your overall performance rating and work history since being sworn as a Trooper in November 2007 was "Good."

The ALJ made these findings regarding Petitioner's work history:

> 53. According to that transcript, Wetherington was not previously disciplined by SHP. Wetherington was rated as one of the highest producers while in the field training program. His work and conduct history revealed exemplary service and conduct. In his 2008-2009 evaluation, Trooper Wetherington was rated as good or very good in every rating category. Judge Gray found that Wetherington's overall performance rating in 2008 was "3," which was average. Colonel Grey was aware of Wetherington's work history.
>
> 54. The *Employee Advisory Committee* report found that Wetherington was a very "devoted, dedicated" Trooper, and unanimously recommended reinstatement. Colonel Grey was aware of the Committee report.

> 55. The record of this contested case reflects that several laypersons and some of Wetherington's supervisors testified before Judge Gray in the first hearing at OAH. They testified to Wetherington's excellent work performance, character, and conduct. This Tribunal did not hear their testimony and therefore is unable to assess the credibility of their individual testimonies by taking into account the appropriate factors generally used for determining credibility. Their testimony is considered and given the appropriate weight.

(Parentheticals omitted.)

ALJ Overby goes into more detail than did Col. Grey, but nothing in Petitioner's work history would support termination. He had no prior disciplinary actions and a "good" performance rating and work history. This factor could only favor some disciplinary action short of termination. *See Whitehurst v. E. Carolina Univ.*, 257 N.C. App. 938, 947-48, 811 S.E.2d 626, 634 (2018) ("Whitehurst's discipline-free work history is also relevant to this just cause analysis. . . . . Whitehurst was subject to regular performance reviews by ECU and generally received above average ratings. Jimmy Cannon, an ECU police sergeant who worked with Whitehurst for roughly twelve years, testified that 'He's been an outstanding peer to work with especially when it comes to his knowledge of police procedures and police work in general. He's one of the best . . . that I've worked with[.]' Whitehurst had worked for ECU for twelve years, with no disciplinary action. This factor also mitigates against a finding that just cause existed to dismiss Whitehurst from employment based on his conduct the night of 17 March 2016." (second and third alterations in original)).

E. Discipline Imposed in Other Cases Involving Similar Violations

Col. Grey's letter did not mention any consideration of discipline imposed in other cases for similar violations. In his testimony, he stated he considered only violations occurring during his tenure as Commander, which began in March 2013. ALJ's Overby's order includes several findings regarding disparate treatment:

> 58. Disparate treatment is a factor which may be considered in assessing discipline.
>
> 59. The issue of disparate treatment was raised in the OAH hearing before Judge Gray in 2009. Judge Gray made specific Findings of Fact concerning disparate treatment.

> 60. In 2009, Judge Gray, in Finding No. 43, found that substantial evidence existed that "since at least 2002 all members of the Patrol with substantiated violations of truthfulness have been dismissed."
>
> 61. Judge Gray concluded then that it was not incumbent on the Highway Patrol to look back through history to find a lowest common denominator for assessing punishment from the historical point forward. There is no evidence of cases of disparate treatment more recent in time before this Tribunal for determining the most recent punishment by the Patrol for violation of the truthfulness policy; however, this Tribunal is not going to reach back into history in order to compare Petitioner's case with similar cases from several years ago, without any recent cases for comparison, and especially cases decided by Col. Grey.
>
> 62. This current case was decided by Col. Grey in 2016. It is not fair or reasonable to hold the Highway Patrol to a standard set by disposition of its worse cases from many years before. Col. Grey decided the case based upon his thorough review of the totality of facts and circumstances of this case, including how he had disposed of cases during his tenure as Colonel. Col. Grey acknowledged that he reviewed only cases decided during his tenure.

(Parenthetical omitted.)

We first note that the finding as to discipline since 2002 is not relevant to Col. Grey's decision, as he testified, and the ALJ found, he did not consider any disciplinary actions prior to his tenure which began in 2013. In addition, the findings from the 2009 hearing seem to reflect a per se rule of dismissal for any untruthfulness. ALJ Gray found that "since at least 2002 *all members* of the Patrol with substantiated violations of truthfulness have been dismissed." This finding is consistent with application of the "per se" dismissal rule Col. Glover applied, and our Supreme Court *rejected* in *Wetherington I*. On remand, Col. Grey did not consider this history but acknowledged that he reviewed only cases decided during his tenure, which began in 2013, four years after Petitioner's termination. He did not describe the "untruthfulness" in any of those instances or the discipline imposed. Our record reveals no instances of disciplinary actions for untruthfulness which arose *during*

Col. Grey's tenure before his decision regarding Petitioner in 2016. Col. Grey did not identify any other violations during his tenure he may have compared to Petitioner's situation, and certainly did not identify any *similar* violations of the truthfulness policy.

Based upon the same evidence and facts, this Court analyzed this issue in *Wetherington I*. Regarding discipline imposed in other cases, the unanimous panel of this Court held:

> As the superior court observed in its order, the dissenting member of the SPC concluded that "the dismissal of Petitioner did not fit the violation and was not necessary to uphold the integrity of the truthfulness policy. In short, the punishment did not fit the offense." In view of the commensurate discipline approach described in *Warren* and applied in *Carroll*, we agree. Petitioner's conduct in this case did not rise to the level described in *Kea* and *Davis*. Rather, Petitioner's conduct and the existence of extenuating circumstances surrounding the conduct make this case comparable to Carroll, in which our Supreme Court concluded that the Commission lacked just cause to discipline the petitioner.

*Wetherington I*, 231 N.C. App. at 513, 752 S.E.2d at 517 (citation omitted).

This Court recently affirmed reversal of the Highway Patrol's dismissal of a trooper for unacceptable personal conduct. *Warren v. N.C. Dep't of Crime Control*, ___ N.C. App. ___, 833 S.E.2d 633 (2019). The trooper drove "his Patrol-issued vehicle" to a party at a private residence after consuming alcohol and with an open bottle of vodka in the trunk of his vehicle. *Id*. at ___, 833 S.E.2d at 635. This Court noted this dismissal was based upon disparate treatment.

> Respondent contends that petitioner's conduct was especially egregious so as to warrant termination. However, our review of the disciplinary actions respondent has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, where the conduct was equally or more egregious than that of petitioner (i.e., threats to kill another person, sexual harassment, assault), the employee was generally subjected to disciplinary measures other than termination.
>
> While petitioner certainly engaged in unacceptable personal conduct, termination is inconsistent with

> respondent's treatment of similar conduct and, other factors mitigate just cause for the punishment. Petitioner had an excellent work history and tenure of service, and there was no evidence that petitioner's actions resulted in harm. Thus, taking into consideration all of the factors and circumstances in this case as suggested by *Wetherington*, we conclude the superior court properly determined there is no just cause for petitioner's termination based on his conduct.

*Id.* at ___, 833 S.E.2d at 638.

Again, Respondent had the opportunity on remand to address disciplinary actions of other employees who violated the truthfulness policy, since Col. Glover did not consider this factor in applying the "per se" rule in Petitioner's initial termination. Col. Grey had the opportunity to note factors in other disciplinary cases which support dismissal for Petitioner's violation, but he did not. *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. We agree that Col. Grey need not "look back through history to find a lowest common denominator for assessing punishment" but he must consider if there is some relevant denominator in the Highway Patrol's prior history for comparison. Although there is no particular time period set for this factor, we find no legal basis for relying only upon disciplinary actions during a particular commander's tenure. If this were the rule, during the first week, or month, or any time period of a new colonel's tenure until a disciplinary action based upon a particular violation has occurred, there would be no history at all, and the disparate treatment factor would have no meaning. For a new commander, disparate treatment would by definition be impossible, if he can ignore all relevant prior history for the agency in imposing discipline.

Thus, Col. Grey failed to consider most of the factors our Supreme Court directed were "necessary" in this case. The only factor he clearly addressed was Petitioner's work history, which would favor discipline short of dismissal. The Supreme Court stated: "We emphasize that consideration of these factors is an appropriate *and necessary component of a decision to impose discipline* upon a career State employee for unacceptable personal conduct." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548 (emphasis added). Instead, he considered only his personal assessment of the importance of Petitioner's untruthful statements, and although his letter was longer, his consideration was substantively no different from Col Glover's. As this Court noted in *Wetherington I*: "The findings do not support Respondent's characterization of Petitioner's statements

as an 'elaborate lie full of fabricated details[.]' " *Wetherington I*, 231 N.C. App. at 511, 752 S.E.2d at 516 (alteration in original).

## V. Disposition

Our Courts rarely grant parties in cases two bites at the apple, but Respondent here has already had the opportunity for two bites. There is no basis for further remand other than for the appropriate remedy. Upon our *de novo* review of the existence of just cause, we reverse ALJ Overby's conclusion that "Respondent met its burden of proof and established by substantial evidence that it had just cause to dismiss Petitioner from employment with the State Highway Patrol for unacceptable personal conduct." However, Respondent has established that some disciplinary action short of dismissal should be imposed. We also reverse the ALJ's conclusion that "Respondent has not exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; and has not failed to act as required by law or rule." We hold that Respondent failed to use proper procedure on remand and failed to act as required by law or rule in that it should have considered the factors as directed by the Supreme Court. We therefore remand for the ALJ to enter an order granting Petitioner relief under North Carolina General Statute § 126-34.02. Specifically, the ALJ shall order an appropriate level of discipline, in accord with the law regarding disparate treatment, followed by reinstatement and "other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority." N.C. Gen. Stat. § 126-34.02(a) (2017).

> Under subsection (a)(3) of the statute, the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's de novo review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief."
>
> Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

*Harris*, 252 N.C. App. at 109, 798 S.E.2d at 138 (alterations in original) (citation omitted).

## VI. Conclusion

Upon *de novo* review of the existence of just cause, the ALJ's order affirming Petitioner's dismissal is reversed and we remand to the ALJ for further proceedings consistent with our directive above.

Reversed and Remanded.

Judges BRYANT and DIETZ concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 FEBRUARY 2020)

| | | |
|---|---|---|
| CHERRY CMTY. ORG. v. SELLARS<br>No. 19-695 | Mecklenburg<br>(17CVS16155) | Affirmed |
| McGRATH RENTCORP v. TCI TRIANGLE, INC.<br>No. 19-655 | Wake<br>(17CVS4340) | Affirmed in Part, Dismissed in Part |
| McMASTER v. McMASTER<br>No. 19-234 | Guilford<br>(17CVD1384) | Affirmed |
| REZVANI v. CARNES<br>No. 19-491 | Orange<br>(15CVS808) | Dismissed |
| STATE v. BOYD<br>No. 19-543 | Mecklenburg<br>(17CRS221217) | No Error |
| STATE v. CLARK<br>No. 19-456 | Wake<br>(16CRS222977) | Affirmed |
| STATE v. DAVIS<br>No. 19-663 | Gaston<br>(15CRS64037)<br>(18CRS2028) | No Error in Part, Remanded in Part |
| STATE v. ENGLE<br>No. 19-488 | Cumberland<br>(14CRS62033-34) | No Error |
| STATE v. EVERWINE<br>No. 19-629 | Moore<br>(16CRS52928)<br>(17CRS83) | No Error |
| STATE v. JOHNSON<br>No. 19-489 | Forsyth<br>(16CRS52126)<br>(16CRS52265)<br>(17CRS182) | No Error |
| STATE v. JUAREZ<br>No. 19-545 | Rowan<br>(17CRS50447)<br>(17CRS50450) | Affirmed |
| STATE v. LAIL<br>No. 19-468 | Catawba<br>(13CRS4784-87)<br>(13CRS52508) | No Error |
| STATE v. McDANIEL<br>No. 17-856-2 | McDowell<br>(14CRS50509)<br>(14CRS50512) | No Error |

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|---|---|---|
| STATE v. NEWSUAN<br>No. 19-564 | Cumberland<br>(18CRS52674) | No plain error. |
| STATE v. NYEPLU<br>No. 18-1251 | Mecklenburg<br>(16CRS225460) | No Error in Part;<br>Dismissed in Part. |
| STATE v. ROBINSON<br>No. 19-405 | Henderson<br>(17CRS52480) | Reversed |
| STATE v. WHEELING<br>No. 18-1055 | Mecklenburg<br>(16CRS5813) | No Error;<br>No Prejudicial Error. |
| WALLACE v. GETER<br>No. 19-696 | Rowan<br>(18CVD1014) | Vacated and Remanded |
| WHISNANT v. ABERNATHY LAURELS<br>No. 19-774 | N.C. Industrial<br>Commission<br>(16-011190) | Affirmed |

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