270 N.C. App.—No. 3 Pages 374-639

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 19, 2021

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY

PHIL BERGER, JR.
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG
CHRISTOPHER BROOK

Former Chief Judges

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

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG

PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Eugene H. Soar
Michael W. Rodgers
Lauren M. Tierney
Carolina Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 17 MARCH 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Abandonment of issues—Rule 28(b)(6)—perfunctory argument—In an appeal from a conviction for driving while impaired, in which defendant's appellate brief included a perfunctory argument—fewer than 100 words consisting of conclusory assertions and lacking citations to the record or to any legal authority—against the trial court's denial of his motions to dismiss, defendant's argument was deemed abandoned for failure to comply with Appellate Rule 28(b)(6). **State v. Wiles, 592.**

Interlocutory appeal—substantial right—defamation case—absolute privilege—immunity from suit—Where a mental health area authority hired an attorney and law firm (defendants) to investigate misconduct by their former chief executive (plaintiff) and to represent the authority in a lawsuit against the executive based on that investigation, and where defendants revealed their findings to the media at

a press conference allowed by the authority, defendants' interlocutory appeal from the denial of their motion to dismiss plaintiff's defamation lawsuit against them did not affect a substantial right to immunity from suit, and was therefore dismissed. Defendants could not claim absolute privilege from suit because their statements were not "made in due course of a judicial proceeding," and any legislative immunity afforded to the authority—flowing from the investigation as a quasi-judicial proceeding—did not extend to defendants' statements. **Topping v. Meyers, 613.**

Interlocutory appeal—substantial right—defamation case—denial of Rule 12(b)(6) motion—risk of inconsistent verdicts—After a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, defendants failed to show that an order denying their Rule 12(b)(6)motion to dismiss affected a substantial right, and therefore their interlocutory appeal from that order was dismissed. Although misapplication of the "actual malice standard" for defamation at the summary judgment stage can implicate a substantial right to free speech, the same is not true at the motion to dismiss stage. Further, defendants did not have a substantial right to avoid the risk of inconsistent verdicts between the defamation and negligence claims because the law only recognizes a substantial right to avoid the risk of inconsistent verdicts on the same issues in different trials. **Topping v. Meyers, 613.**

Mootness—juvenile case—permanency planning order—juvenile turning eighteen years old during appeal—A father's appeal from a permanency planning order, which ceased reunification efforts with his daughter, was dismissed as moot where his daughter reached the age of majority while the appeal was pending (thereby terminating the trial court's jurisdiction in the underlying juvenile proceeding and preventing an appellate ruling from having any practical effect) and where the appeal did not fit into any exception to the mootness doctrine. **In re A.K.G., 409.**

Petition for certiorari—showing of good cause—defamation case—Where a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, and where defendants failed to show that an interlocutory order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, the Court of Appeals denied defendants' petition for a writ of certiorari because defendants also failed to show "good and sufficient cause" for allowing certiorari as an alternative to interlocutory jurisdiction. **Topping v. Meyers, 613.**

Preservation of issues—failure to object at trial—In a prosecution for driving while impaired arising from a traffic stop of defendant's car, defendant failed to preserve for appellate review his arguments that an officer unconstitutionally extended the length of the stop and lacked probable cause to arrest him—defendant never raised these arguments at trial. **State v. Wiles, 592.**

Preservation of issues—involuntary commitment order—improper commitment period—Respondent's challenge to an involuntary commitment order on the basis that the commitment period exceeded the maximum statutory period was automatically preserved where the order violated the statutory mandate contained in N.C.G.S. § 122C-271. **In re B.S., 414.**

Preservation of issues—motion to dismiss—different theory argued on appeal—Where defendant's motion to dismiss multiple assaults with a deadly weapon, kidnapping, and other charges hinged on whether his hands could be considered deadly weapons and that the bills of information had incorrect dates of the offenses, he failed to preserve for appellate review his argument that he could not

statute (N.C.G.S. § 14-16.7(a)) for threatening to kill a court officer, the Court of Appeals determined that independent whole record review was the appropriate standard of review for analyzing whether the State met its burden of proving that defendant's communication constituted a "true threat" excluded from First Amendment protection. **State v. Taylor, 514.**

First Amendment—anti-threat statute—true threat—definition—context— In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), jurors must be instructed on the definition of "true threat" as set forth in *Virginia v. Black*, 538 U.S. 343 (2003), how to apply the necessary intent elements for proving a "true threat," and the requirement that they consider the context in which the communication was made. **State v. Taylor, 514.**

First Amendment—anti-threat statute—true threat—elements of offense— In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to include as essential elements of the offense any requirements under the First Amendment, including a certain level of intent and proof beyond a reasonable doubt that a communication is a "true threat." **State v. Taylor, 514.**

First Amendment—anti-threat statute—true threat—intent element—general and specific—In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to require both a general intent (objective reasonable person standard) regarding whether a communication is a "true threat" and a specific intent to threaten another (subjective standard) as part of the essential elements of the offense. **State v. Taylor, 514.**

First Amendment—anti-threat statute—true threat—jury instructions—In case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), the issues of whether a communication constitutes a "true threat" unprotected by the First Amendment and whether defendant specifically intended to threaten the recipient must be submitted to the jury as essential elements of the offense. **State v. Taylor, 514.**

First Amendment—anti-threat statute—true threat—question of fact or law—In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving violations of criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), analysis of whether a communication constitutes a "true threat" not protected by the First Amendment involves consideration of constitutional facts that generally must be determined by a jury or the trial court as trier of fact. However, if the State's evidence is insufficient to prove a "true threat" as a matter of law, the charge must be dismissed. **State v. Taylor, 514.**

First Amendment—threatening to kill court officer—N.C.G.S. § 14-16.7(a)—specific intent—sufficiency of evidence—As an additional basis for vacating defendant's conviction for threatening to kill a court officer, the Court of Appeals held that even if defendant's conviction was obtained in violation of First Amendment principles where his social media posts did not constitute a "true threat" as a matter of law, the State's evidence—including all the surrounding circumstances in which the posts were made—failed to demonstrate the specific intent requirement that

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.

JULIE BERKE, Plaintiff
v.
FIDELITY BROKERAGE SERVICES, the ESTATE OF GARY IAN LAW, and AMAN MASOOMI, Individually and as Sole Heir and Executor of the ESTATE OF SHARON LEE DAY, Defendants

No. COA19-641

Filed 17 March 2020

Estates—beneficiary—motion for directed verdict—genuine question of material fact

After plaintiff initiated an action seeking a declaratory judgment that she was the sole beneficiary of her ex-husband's retirement accounts, the trial court erred by denying plaintiff's motion for directed verdict because there was no genuine question of material fact whether anyone other than plaintiff was the beneficiary of the accounts—the parties' pretrial stipulations acknowledged that plaintiff was the designated beneficiary two days prior to her ex-husband's death and there were no records indicating the beneficiary had been changed.

Appeal by Plaintiff from judgment entered 10 October 2018 by Judge Carolyn J. Thompson in Durham County Superior Court. Heard in the Court of Appeals 4 December 2019.

Tillman, Whichard & Cagle, PLLC, by Willis P. Whichard and Sarah Elizabeth Tillman, for the Plaintiff-Appellant.

Roberti, Wicker, Lauffer & Cinski, P.A., by R. David Wicker, Jr., for the Defendant-Appellees.

BROOK, Judge.

Julie Berke ("Plaintiff") appeals from judgment entered upon a jury verdict finding that the estate of Gary Law, her former husband, is the beneficiary of certain retirement accounts. We hold that the trial court erred by submitting this issue to the jury because there was insufficient evidence that anyone other than Plaintiff was the beneficiary of these accounts at the time of Mr. Law's death. It was therefore error to deny Plaintiff's motion for directed verdict on this issue and her motion for judgment notwithstanding the verdict. Accordingly, we reverse the trial court's judgment and award of costs.

I. Background

Plaintiff was married to Mr. Law on 24 May 1992. The couple separated on 25 January 2014, entered a Separation and Property Settlement Agreement ("the Separation Agreement") on 12 February 2015, and then divorced on 9 April 2015. Mr. Law died on 17 September 2015 and his sister and sole heir, Sharon Day, died on 2 December 2015. When Mr. Law died, he owned three retirement accounts in the custody of Fidelity Brokerage Services LLC ("Fidelity").

On 6 May 2016, Plaintiff initiated an action for a declaratory judgment that she was the beneficiary of Mr. Law's retirement accounts at Fidelity at the time of his death. In a 2 October 2017 answer, Mr. Law's estate admitted that the Separation Agreement entered into by Plaintiff and Mr. Law expressly provided that there was no release of property and estate rights with respect to any beneficiary designations existing at the time of the execution of the Agreement or made thereafter; that Mr. Law never made any changes to the beneficiary designations for his Fidelity accounts after the execution of the Agreement; and that Plaintiff therefore remained the beneficiary of Mr. Law's accounts at Fidelity ending in numbers 4418, 1424, and 2628 at the time of his death. Mr. Law's estate thus conceded in its 2 October 2017 answer that Plaintiff was entitled to a declaratory judgment that she was the beneficiary of the Fidelity accounts at the time of Mr. Law's death.

The executor and sole heir of Mr. Law's sister, however, did not so concede. In answers filed on 23 June 2016, 27 October 2017, and 3 November 2017, the executor and sole heir of Ms. Day, Aman Masoomi, disputed whether Plaintiff was entitled to the assets in the Fidelity accounts in both his personal capacity and as Ms. Day's executor. If the accounts had no beneficiary at the time of Mr. Law's death, Mr. Masoomi had an interest in the accounts: (1) he was Ms. Day's sole heir; (2) Ms. Day was Mr. Law's sole heir; and (3) Ms. Day and Mr. Law had both since passed away.

In an order entered 3 April 2018 denying Plaintiff's partial motion for summary judgment on the issue of whether she was the beneficiary of the accounts, the trial court determined that there was a genuine issue of material fact as to whether Mr. Masoomi had an interest in the accounts. Before the court at this summary judgment hearing were documents that purported to be letters from Mr. Law and Ms. Day to Fidelity. Each of these letters purportedly pre-dated the death of the

respective decedent, and each appeared to attempt to change the beneficiary designations of Mr. Law's retirement accounts.[1]

However, ruling on a motion in limine in August 2018, the court determined that there was a genuine issue as to the authenticity of these documents. And, before trial began, the parties stipulated that (1) "Fidelity ha[d] not been able to locate any records in its custody and control that indicate that Fidelity received any written changes, modifications, or revocations from Gary Ian Law to the beneficiary designation for account #1424, #4418 prior to September 17, 2015"; and (2) "[o]n September 15, 2015, Julie L. Berke-Law was listed in Fidelity's records as the designated beneficiary of Gary Ian Law's account #4418, #1424, and #2628." In granting Plaintiff's motion and excluding the letters from the jury's consideration, the trial court found not only that there was a genuine issue as to the authenticity of the documents, but also that, based on the parties' pretrial stipulations regarding the absence of any record communications changing the beneficiary designations for the accounts and receipt of the same by Fidelity, "the probative value of the letters [was] outweighed by the unfair prejudice they would offer to the jury."

The case came on for trial before the Honorable Carolyn J. Thompson in Durham County Superior Court on 10 September 2018. Judge Thompson presided over a six-day trial. At the close of the evidence, Plaintiff moved for a directed verdict on the issue of whether she was the beneficiary of the retirement accounts, which the trial court denied. On 21 September 2018, the jury returned a verdict in favor of Mr. Masoomi, finding in relevant part that Mr. Law's estate was the beneficiary of the accounts, not Plaintiff. Plaintiff moved for judgment notwithstanding the verdict, which the trial court denied. The trial court entered a judgment upon the verdict on 10 October 2018.

Plaintiff entered timely written notice of appeal on 18 October 2018.

II. Analysis

The dispositive issue in this appeal is whether the trial court erred in concluding that there was sufficient evidence that someone other than Plaintiff was the beneficiary of Mr. Law's retirement accounts when

1. Mr. Masoomi testified at deposition that he wrote the purported letter from Mr. Law at Mr. Law's request, took Mr. Law to get the document notarized, and recalled observing Mr. Law put the document in an envelope after it was notarized. Mr. Masoomi testified further that although he never witnessed Mr. Law put the letter in mail, he did supply Mr. Law with a stamp for the envelope.

it submitted this question to the jury, denying Plaintiff's motion for directed verdict.[2] Viewing the evidence in the light most favorable to Mr. Masoomi, as we are required to do, we hold that the admissible, record evidence at the time Plaintiff moved for a directed verdict was insufficient to support a finding by the jury that anyone other than Plaintiff was the beneficiary of the accounts. The trial court therefore erred in denying Plaintiff's motion for directed verdict on this issue and motion for judgment notwithstanding the verdict after the jury returned a verdict in favor of Mr. Masoomi.

"Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence." *Buckner v. TigerSwan, Inc.*, 244 N.C. App. 385, 390, 781 S.E.2d 494, 498 (2015). The motion is "only [] proper in a jury trial." *Id.* (citation omitted). It "tests the sufficiency of the evidence to go to the jury and to support a verdict for the non-moving party." *McMahan v. Bumgarner*, 119 N.C. App. 235, 237, 457 S.E.2d 762, 763 (1995) (citation omitted). Thus, "[a] motion for a directed verdict presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, is sufficient for submission to the jury." *Smith v. Moody*, 124 N.C. App. 203, 205, 476 S.E.2d 377, 379 (1996) (citation omitted).

Likewise, "[a] motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient for submission to the jury." *Loftis v. Little League Baseball, Inc.*, 169 N.C. App. 219, 221, 609 S.E.2d 481, 483 (2005) (citation omitted). Just as a motion for directed verdict "tests the sufficiency of the evidence to go to the jury," *McMahan*, 119 N.C. App. at 237, 457 S.E.2d at 763, so too, "a motion for judgment notwithstanding the verdict challenges[] whether evidence presented at trial [*was*] legally sufficient to go to the jury," *Hinnant v. Holland*, 92 N.C. App. 142, 144, 374 S.E.2d 152, 154 (1988) (emphasis added). Its resolution requires consideration of this question after the jury has already considered the evidence and rendered a verdict rather than before being charged. *Kaperonis v. Underwriters*, 25 N.C. App. 119, 123, 212 S.E.2d 532, 535 (1975). "[O]ur standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Papadopoulos v. State Capital Ins. Co.*, 183 N.C. App. 258, 262, 644 S.E.2d 256, 259 (2007) (citation omitted).

---

2. In her appellate brief, Plaintiff does not argue that the trial court erred in denying her partial motion for summary judgment, abandoning this issue. *See* N.C. R. App. P. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned.").

In the present case, Paragraph 4 of the Separation Agreement entered into by Plaintiff and Mr. Law on 12 February 2015 provides as follows:

> 4. RELEASE OF PROPERTY AND ESTATE RIGHTS. Except as otherwise provided herein, each party hereby waives, relinquishes, renounces and quitclaims unto the other any and all rights, title, interest and control he or she may now have or shall hereafter acquire under the present or future laws of any jurisdiction, in, to or over the person, property or estate of the other, arising by reason of their marital relationship or under any previously executed instrument or will, made by either of them, including, but not limited to, dower, courtesy, statutory allowance, widow's allowance, homestead rights, right to take in event of intestacy, right to any share as the surviving spouse, any right of election, right to take against the last will and testament of the other or to dissent therefrom, right to act as administrator or executor of the estate of either, and any and all rights, title or interest of any kind in and to any said property or estate of any kind of the other, except as to Wife's marital interest in the Rollover IRA #2628 held with Fidelity in Husband's name as set forth in Paragraph 8.F. *This provision shall not apply to any Social Security benefits the parties may have by reason of their marriage to each other, to any real property retained by the parties as tenants by the entirety so long as said estate by entireties continues, and to* ***any beneficiary designations remaining after the date of the execution of this Agreement which name the other as beneficiary***. In addition, except as otherwise provided herein, each party waives, releases and renounces, and hereby conveys, quitclaims and assigns over to the other party and his or her heirs, executors and administrators, any right of inheritance under a will executed by the other party prior to the date of this Agreement, [and] any beneficial or administrative right arising under any trust created by the other party prior to the date of this Agreement.

(Emphasis added.)

Paragraph 8.F of the Separation Agreement, referenced in Paragraph 4, goes on to provide:

F. Retirement Benefits. The parties have retirement accounts with Fidelity.

The following accounts with Fidelity shall be and belong to the Wife, free from any claim by the Husband: Roth IRA #1416; Deferred Annuity #8739 (Wife's separate property); SRA International Inc. 401(k) Savings Plan #5813; Rollover IRA #4335. Wife also has an account with her current employer through The Standard. This account shall be and belong to the Wife, free of any claim by the Husband.

The following accounts with Fidelity shall be and belong to the Husband, free from any claim by the Wife: Rollover IRA #4418; Roth IRA #1424; Individual Brokerage #6727; VZ Gary Law Stock Options Plan.

The Rollover IRA #2628 held with Fidelity in the approximate amount of $724,589.32 as of January 31, 2014 is in Husband's name and is partially Husband's separate premarital asset and is partly marital; however due to the cost and difficulty of obtaining this information from the original plan administrator, there has been no financial disclosure by Husband of the exact amounts that were earned prior to marriage and each party waives full and complete disclosure beyond what has been provided. The parties agree that in order to accomplish a reasonable and equitable distribution of the marital retirement funds held by both parties, a lump sum amount of $250,000 (Two Hundred Fifty Thousand Dollars), to be valued as of the date of transfer, shall be transferred from Husband's Fidelity Rollover IRA #2628 into a Fidelity IRA in Wife's name, and the remainder of said Husband's Rollover IRA account shall be Husband's sole and separate property. This transfer to Wife shall be accomplished so as to effect a non-taxable trustee to trustee transfer of this sum from Husband's aforesaid Fidelity Rollover IRA to Wife's Fidelity IRA account in accordance with Internal Revenue Code Section 408(d)(6), with said transfer to be incident to the parties' divorce decree and to be effected pursuant to an IRA transfer order to be entered with the court contemporaneously with or promptly following any divorce of the parties. Wife shall bear the cost of the drafting of the Court Order to divide the Account and the Order shall be subject to review by Husband and Husband's attorney.

> The parties shall sign any Order or documents necessary to effectuate the aforesaid transfer, including the full execution of any documents required by Fidelity.

At the time of Mr. Law's death in 2015, however, Plaintiff remained the beneficiary of Mr. Law's accounts at Fidelity, as his estate admitted in its answer to Plaintiff's 29 August 2017 amended complaint. Indeed, the parties stipulated to as much before trial, stipulating as follows:

> h. When Gary Ian Law died, he held three Fidelity IRA accounts: Rollover IRA #2628, #4418 and #1424.
>
> i. When Gary Ian Law created and opened account #1424 in 2006, he designated Julie L. Berke-Law as the primary beneficiary of the account.
>
> j. When Gary Ian Law created and opened account #4418 in April 2008 he designated Julie L. Berke-Law as the primary beneficiary of the account.
>
> k When Gary Ian Law created and opened account #2628 in May 2008 he designated Julie L. Berke-Law as the beneficiary of that account.
>
> l. Fidelity has not been able to locate any records in its custody or control that indicate that Fidelity received any written changes, modifications, or revocations from Gary Ian Law to the beneficiary designation for account #1424, #4418 prior to September 17, 2015 [the date of Mr. Law's death].
>
> m. On September 15, 2015, Julie L. Berke-Law was listed in Fidelity's records as the designated beneficiary of Gary Ian Law's accounts #4418, #1424, and #2628. However, this is not a factual determination of the beneficiary and said issue remains before the trier of fact.
>
> n. The Fidelity IRA Custodial Agreement and the Fidelity Roth IRA Custodial Agreement constitute the agreement between Gary Law and Fidelity regarding his IRAs.

These stipulations were based on Fidelity's responses to written discovery propounded by Plaintiff, in which Fidelity specifically admitted in response to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories and Request for Production of Documents that it had never received "any written communication from Gary Ian Law prior to his death requesting to change the beneficiary of any of his Fidelity accounts."

Thus, the language of Paragraph 8.F of the Separation Agreement suggesting that Mr. Law might have planned to change the beneficiary of the accounts ending in numbers 4418, 1424, and 2628 after entering into the Separation Agreement on 12 February 2015 notwithstanding, no evidence was presented to the jury during the trial that anyone other than Plaintiff was the beneficiary of the accounts. Accordingly, we hold that the evidence that anyone other than Plaintiff was the beneficiary of the accounts was not "sufficient for submission to the jury." *Smith*, 124 N.C. App. at 205, 476 S.E.2d at 379.

Viewing the evidence in the light most favorable to Mr. Masoomi, as we must, we note that testimony was elicited during the course of the trial that certain Custodial Agreements governed Mr. Law's Fidelity accounts and that Massachusetts law was the controlling law under the terms of these Agreements. The Custodial Agreements were published to the jury, as was the Massachusetts statute identified as the applicable one on the present facts, Chapter 190B of the Massachusetts Probate Code, Article II, Section 2-804. The trial court then included the following in its charge to the jury:

> This Court has taken judicial notice of Section 2-804 of the General Laws of Massachusetts, which is Plaintiff's Exhibit Number 25, and the North Carolina General Statute Section 32A in its entirety, which is Defendant's Exhibit Number 2.
>
> The law provides that the Court may take judicial notice of certain facts that are so well known or so well documented that they are not subject to reasonable dispute. When the Court takes judicial notice of a fact, neither party is required to offer proof as to such fact.
>
> Therefore, you will accept as conclusive that: Section 2-804 of the General Laws of Massachusetts provide[s], in part, the following regarding Revocation of Probate and Non-probate Transfers by divorce; no revocation by other changes of circumstances.
>
> In Subsection (a), Sub 4, "governing instrument" refers to a governing instrument executed by the divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse.
>
> Subsection (b), *Except as provided by the expressed terms of a governing instrument, a court order or a contract related to the division of a marital estate made*

> *between the divorced individuals before or after marriage, divorce or annulment*, the divorce or annulment of a marriage revokes, Number 1, revokes any revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

(Emphasis added.) The jury was thus read a judicially noticed provision of a Massachusetts statute, and this statute and a comparable North Carolina statute were published to the jury. Then, in the absence of any evidence that anyone other than Plaintiff was the beneficiary of Mr. Law's Fidelity accounts at the time of his death—and where the parties had essentially stipulated before trial based on Fidelity's discovery responses that the only record evidence not excluded by the trial court's 3 August 2018 order granting Plaintiff's motion in limine was that Plaintiff was the beneficiary—the jury's verdict in favor of Mr. Masoomi appears to reflect an attempt by the jury to apply the Massachusetts statute—though incorrectly—to the facts found by the jury.

"[W]here the facts are controverted, or more than one inference can be drawn from them, it is the province of the jury to pass upon an issue involving it." *Tillett v. Norfolk & W.R. Co.*, 118 N.C. 1031, 24 S.E. 111, 112 (1896). When the applicable legal standard is disputed and the facts are controverted, "it becomes the duty of the judge . . . to tell the jury how to apply the law . . . to the various phases of the testimony, and the office of the jury to make the application of the law, as given by the court, to the facts as found by them." *Id.*

There was no evidence presented during the trial of this case that anyone other than Plaintiff was the beneficiary of Mr. Law's Fidelity accounts at the time of his death; indeed, the parties stipulated to as much before trial. It was not the province of the jury to determine a question of law – whether the effect of a Massachusetts statute was to revoke Mr. Law's beneficiary designations for his Fidelity accounts when the Release of Property and Estate Rights contained in Paragraph 4 of his Separation Agreement with Plaintiff specifically excepted from the Release "beneficiary designations remaining after the date of the execution of [the] Agreement which name the other as beneficiary." We therefore hold that the trial court erred in submitting the issue of whether Plaintiff was the beneficiary of the Fidelity accounts to the jury. We further hold that the Massachusetts statute in question explicitly states it does not override terms such as those found in Paragraph 4 of

the Separation Agreement, specifically excepting from the general rule of revocation upon divorce where "a court order or a contract related to the division of a marital estate made between the divorced individuals before or after marriage, divorce or annulment" provides otherwise. Mass. Gen. Laws ch. 190B, § 2-804 (2016). These holdings entail that the trial court erred both in denying Plaintiff's motions for directed verdict and for judgment notwithstanding the verdict.

III. Conclusion

The trial court erred by denying Plaintiff's motion for directed verdict on the issue of whether she was the beneficiary of her former husband's accounts at Fidelity at the time of his death. The trial court also erred in denying Plaintiff's motion for judgment notwithstanding the verdict, as our holding that the trial court erred in denying Plaintiff's motion for directed verdict entails. We therefore reverse the trial court's judgment and award of costs.

REVERSED.

Judges STROUD and ARROWOOD concur.

MICHAEL STACY BUCHANAN, Plaintiff
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Defendant

No. COA19-887

Filed 17 March 2020

1. Insurance—homeowners—policy terms—appraisal condition precedent to filing suit—motion to stay

In an insurance contract dispute, the trial court properly granted an insurance carrier's motion seeking to stay the proceedings and compel an appraisal of plaintiff's home where the plain language of the policy contract required appraisal prior to filing suit to determine the amount of loss.

2. Unfair Trade Practices—homeowners insurance—issuance and handling of policy—summary judgment

In an insurance contract dispute over the amount of loss from a home fire, plaintiff-homeowner failed to demonstrate the existence

of any genuine issue of material fact in his claim for unfair and deceptive trade practices where he presented no evidence that the carrier made any misrepresentations with regard to issuance of the policy or that the carrier's conduct in settling the claim and making payments were not in accordance with the policy terms or otherwise in violation of N.C.G.S. § 58-63-15.

3. Evidence—expert witness—home value report—exclusion—value of loss from fire already settled

In an insurance contract dispute over the amount of loss after a home fire, there was no error in the exclusion of testimony and a report from plaintiff's expert witness where the witness inspected the home and prepared his report long after the parties settled the amount of loss through an appraisal process conducted in accordance with the insurance policy.

4. Contracts—breach—directed verdict—different judge than one who ruled on summary judgment motion

The Court of Appeals rejected an argument by plaintiff-homeowner in an insurance contract dispute that a second judge could not enter a directed verdict for the insurance carrier on plaintiff's breach of contract claim after the first judge denied the carrier's motion for summary judgment on that claim, because a summary judgment order has no effect on a later order granting or denying a directed verdict on the same issue.

Appeal by plaintiff from orders entered 8 December 2017 and 21 June 2019 by Judges Mark E. Powell and Robert Bell, respectively, in Mitchell County Superior Court. Heard in the Court of Appeals 3 March 2020.

Charlie A. Hunt, Jr. for plaintiff-appellant.

Marcellino & Tyson, PLLC, by Clay A. Campbell, for defendant-appellee.

TYSON, Judge.

Michael Stacy Buchanan ("Plaintiff") appeals from the order granting, in part, North Carolina Farm Bureau Mutual Insurance Company's ("Defendant") motion for summary judgment, and also from the order granting Defendant's motion for a directed verdict. We affirm the trial court's orders.

I. Background

Plaintiff applied for homeowner's insurance with Defendant in December 2012. His application asserted his residence ("the Home") was built in 1957. After Defendant issued Plaintiff a homeowner's policy ("the Policy"), it learned the Home had actually been built in 1933. Defendant sent Plaintiff a letter on 8 February 2013, cancelling the Policy effective as of the end of that month.

Plaintiff submitted a homeowner change application to Defendant on 20 February 2013, requesting a decrease in coverage on the Policy. Defendant reissued the Policy to Plaintiff and backdated coverage to 19 December 2012. Plaintiff renewed the Policy on 19 December 2013.

The Home and some of Plaintiff's personal property were damaged by fire on 10 June 2014. Plaintiff reported the loss to Defendant. An employee of Defendant met with Plaintiff at the Home later that day. Plaintiff informed Defendant's employee he could not enter the Home until the fire investigation was complete. Defendant's employee issued Plaintiff a check for $2,000.00 towards Plaintiff's living expenses.

Todd Kirby, a large-loss adjuster for Defendant, met with Plaintiff and inspected and photographed the damage to the Home on 12 June 2014, and again on 28 June 2014. Kirby prepared an estimate of $76,877.72 to repair the damages. Kirby mailed the estimate to Plaintiff on 1 July 2014. Plaintiff sent Kirby a letter on 5 August 2014, stating he would not be restoring or rebuilding the Home, objecting to Defendant requiring him to inventory his damaged personal property, wishing to conclude the settlement process, and requesting $217,000.00 to settle his claims.

Kirby replied to Plaintiff with a letter sent 18 August 2014, and enclosed a section of the Policy outlining, among other duties, Plaintiff's duty to prepare and submit an inventory after a loss. On 25 August 2014, Defendant mailed Plaintiff a check for $4,800.00 to cover additional living expenses for six months. Plaintiff provided an initial personal property inventory to Defendant in late August 2014.

Kirby reviewed Plaintiff's inventory and sent a letter to Plaintiff on 10 September 2014 explaining the Policy provisions relating to the differences between actual cash value ("ACV") and replacement cost value ("RCV") for losses. The letter included a check to Plaintiff for $9,066.16 for the ACV of the property listed in his inventory. Kirby discussed the estimate with Plaintiff on 15 September 2014 and advised Plaintiff he could submit his own estimate from a contractor of his choice.

Defendant mailed Plaintiff a second living expenses check for $4,800.00 on 20 November 2014.

Defendant mailed Plaintiff a check for the damage to the Home in the amount of $74,377.72, the amount of Kirby's estimate less Plaintiff's deductible, on 13 January 2015. Plaintiff voided and returned that check to Defendant in a letter from his counsel on 22 May 2015, which also included an estimate prepared by a general contractor indicating $147,125.34 would be a reasonable cost for repairs. Defendant replied to Plaintiff's counsel seeking supporting documentation for the estimate. Plaintiff's counsel submitted additional pages of inventory to Defendant on 31 July 2015.

Kirby determined the ACV of the additional inventory was $8,870.82, and Defendant issued a check to Plaintiff for that amount on 28 August 2015. Defendant reiterated its request for supporting documentation in letters to Plaintiff's counsel on 27 October 2015 and 16 February 2016.

Plaintiff filed suit against Defendant on 15 November 2016, seeking damages caused by the fire and alleging breach of the Policy contract and unfair and deceptive trade practices. Defendant filed a motion to stay the proceedings and compel appraisal pursuant to the Policy on 9 December 2016. The trial court granted Defendant's motion to stay and compelled appraisal by order entered on 2 March 2017.

Plaintiff moved to terminate the stay on 30 May 2017, after retaining his own appraiser, alleging dilatory inaction by Defendant. The trial court denied Plaintiff's motion and modified the order granting the stay to set a calendar for the appraisal. The chosen umpire made his appraisal award in September 2017.

Plaintiff appealed the order on 2 October 2017, and also filed a motion to stay the proceedings pending its appeal. Defendant filed three motions with the trial court on 10 October 2017: to dismiss Plaintiff's appeal, for summary judgment, and to confirm the appraisal award. The trial court entered a series of orders on 8 December 2017: denying Plaintiff's motion to stay, dismissing Plaintiff's appeal, and granting partial summary judgment in favor of Defendant on the issue of unfair and deceptive trade practices.

Plaintiff appealed the trial court's grant of partial summary judgment. This Court dismissed his appeal as interlocutory in an unpublished opinion on 16 April 2019. *Buchanan v. N.C. Farm Bureau Mut. Ins. Co.* __ N.C. App. __, 825 S.E.2d 704 (2019) (unpublished). The parties proceeded to trial in May 2019.

Defendant made several motions *in limine* prior to trial, including to exclude any information that arose after the appraisal award, specifically identifying a report by Plaintiff's proposed expert witness, Terry LaDuke, based on his inspection of the Home in September 2018. The trial court preliminarily reserved ruling on the motion.

Defendant's counsel renewed his motion *in limine* prior to LaDuke taking the stand as Plaintiff's final witness. The trial court heard arguments, allowed Defendant's motion, and excluded LaDuke's proposed testimony and report from evidence. Plaintiff rested his case, and Defendant moved for a directed verdict. The trial court granted Defendant's motion for a directed verdict and entered its order on 21 June 2019. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Plaintiff's brief does not include a statement of the grounds for appellate review, as required by N.C. R. App. P. 28(b)(4). "Compliance with the rules . . . is mandatory." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008) (citations omitted).

However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* at 194, 657 S.E.2d at 363 (citation omitted). "Noncompliance with [Appellate Rule 28(b)], while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction." *Id.* at 198, 657 S.E.2d at 365.

Plaintiff's failure to comply with Appellate Rule 28(b)(4) is nonjurisdictional and does not mandate dismissal. *See id.* Counsel is admonished that our Appellate Rules are mandatory, compliance is expected therewith, and sanctions are available for violation. *Id.*; N.C. R. App. P. 28(b)(4). This appeal is properly before us pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

Plaintiff argues the trial court erred by granting: (1) Defendant's motion to stay the trial proceedings and compel appraisal of the Home; (2) Defendant's motion for summary judgment in part, on the unfair and deceptive trade practices claim; (3) Defendant's motion *in limine* to exclude the testimony of his environmental expert; and, (4) Defendant's motion for directed verdict on his breach of contract claim at the close of Plaintiff's evidence.

IV. Appraisal

A. Standard of Review

"A trial court's denial of a motion to stay is subject to an abuse of discretion standard of review." *Park East Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 209, 651 S.E.2d 235, 242 (2007).

B. Analysis

[1] Our Supreme Court has stated, "an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (citation omitted). Plaintiff argues the trial court erred in granting Defendant's motion to stay the trial and compelling an appraisal of the Home. Defendant argued, and the trial court agreed, such appraisal was compelled by the terms of the Policy and this Court's precedent. *See Patel v. Scottsdale Ins. Co.*, 221 N.C. App. 476, 482-83, 728 S.E.2d 394, 398-99 (2012) (interpreting insurance policy language as requiring appraisal process as condition precedent to filing suit against insurer).

Plaintiff argues the reasoning in *Patel* is inapplicable to this case, because the Policy at bar states the amount of loss payment "may be determined by . . . [e]ntry of a final judgment." Plaintiff argues this provision necessarily provides for determining the amount of loss by filing suit. Plaintiff cites two cases, neither of which are binding upon this Court, to distinguish *Patel*.

Plaintiff cites *Hayes v. Allstate Ins. Co.*, as persuasive authority to support its argument. *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332 (7th Cir. 1983). The policy under review in *Hayes* did not expressly provide that no action could be maintained upon it until after the loss was determined by appraisal. *Id.* at 1335.

The Policy before us expressly provides: "No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy." Section I of the Policy includes an appraisal clause: "If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss." Plaintiff's reliance on *Hayes* is unsupported and without merit.

Plaintiff also cites *Otto Indus. N. Am. v. Phx. Ins. Co.*, No. 3:12-CV-717-FDW-DCK, 2013 WL 2124163 (W.D.N.C. May 15, 2013). The federal trial court in *Otto* distinguished the Court's holding in *Patel*, because the interpretation and application of the terms and conditions of

the policy at issue "includ[ed] the number of occurrences, the existence and scope of coverage for equipment breakdowns[,] and whether repair or replacement coverage is appropriate." *Otto*, 2013 WL 2124163, at *2. The court also noted the case before it "involves allegations concerning [the insurer's] bad faith conduct that are not subject to appraisal." *Id.*

Plaintiff argues the trial court erred in following *Patel*, because his allegations against Defendant assert bad faith conduct. Plaintiff failed to allege any issues concerning the interpretation and application of the terms and conditions of the policy, as were raised in *Otto*. Although Plaintiff alleges bad faith conduct by Defendant, such conduct alone does not justify disregarding the plain language of the Policy, which requires appraisal as a condition precedent to suit when the loss amount is disputed.

Plaintiff has failed to show the trial court abused its discretion by granting Defendant's motion to stay. Plaintiff's argument is overruled.

V. Unfair and Deceptive Trade Practices

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted).

When reviewing a trial court's entry of summary judgment, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Id.*

B. Analysis

[2] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment on his unfair and deceptive trade practices claim. Plaintiff alleges Defendant violated N.C. Gen. Stat. §§ 58-63-15(11) and 75-1.1 (2019) in both the issuance and handling of the Policy. Plaintiff alleges Defendant committed six of the unfair claim settlement practices listed in § 58-63-15(11):

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

. . .

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

. . .

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

. . .

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

. . .

l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information

N.C. Gen. Stat. § 58-63-15(11).

Although N.C. Gen. Stat. § 58-63-15(11) (2019) requires a plaintiff show the alleged violations were committed "with such frequency as to indicate a general business practice . . . . unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under N.C. Gen. Stat. § 75-1.1." *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 243-44, 563 S.E.2d 269, 277 (2002) (citations and internal quotation marks omitted).

A violation of N.C. Gen. Stat. § 58-63-15 constitutes a violation of N.C. Gen. Stat. § 75-1.1. *Id.* at 244, 563 S.E.2d at 278 (citation omitted). It is also "unnecessary to determine whether the plaintiffs had established

that the acts occurred with such frequency as to constitute a general business practice" in order to recover against an insurer under N.C. Gen. Stat. § 75-1.1. *Id.* (citation omitted).

1. Issuance

Plaintiff first alleges Defendant violated N.C. Gen. Stat. § 58-63-15(11)(a) by agreeing to insure the Home for $149,000.00 prior to inspecting the property, then cancelling the policy and offering a lower coverage upon learning of the true construction date. Plaintiff argues he was then induced by Defendant's agent to pay an extra premium to get 25% more coverage. Plaintiff does not argue or allege any misrepresentation of pertinent facts or insurance policy provisions by Defendant in this assertion.

Although Plaintiff and Defendant dispute who bears the responsibility for the basis of 1957 being the Home's construction year on the original application, this purported issue does not raise a question of material fact. Reviewing all facts asserted by Plaintiff as true, with all inferences therefrom viewed in the light most favorable to him, Plaintiff failed to show a misrepresentation of "pertinent facts or insurance policy provisions relating to coverages at issue." N.C. Gen. Stat. § 58-63-15(11)(a).

Between December 2012 and June 2014, when the Home burned, Plaintiff had eighteen months to seek either coverage with another insurer or to propose amendments or endorsements to the Policy with Defendant. Defendant informed Plaintiff in February 2013 it was cancelling the Policy, in part because it was "unsure of the year of construction and square footage" of the Home. The record on appeal does not reflect any protest or challenge of this decision by Plaintiff. Instead, Plaintiff submitted a homeowner change policy, which Defendant accepted. Defendant reissued the Policy and backdated coverage to its original issuance date. Plaintiff chose to renew the Policy for an additional year in December 2013.

Plaintiff has not shown a misrepresentation by Defendant of any "pertinent facts or insurance policy provisions relating to coverages at issue." *Id.* Plaintiff has also not shown any inducement by Defendant tending to show unfair and deceptive trade practices. N.C. Gen. Stat. § 75-1.1. Plaintiff's argument concerning Defendant's issuance of the Policy is overruled.

2. Handling

Plaintiff further argues Defendant committed several unfair claim settlement practices listed in § 58-63-15(11) in its interactions with

Plaintiff after the fire. Specifically, Plaintiff alleges Defendant: (1) sent an unlicensed adjustor to conduct its estimate, who (2) "made a very brief examination of the premises and offered [Plaintiff] about half of the replacement cost" of the Home and personal property; (3) forced Plaintiff to obtain at his own expense documentation of the damages; (4) ignored Plaintiff's submitted valuation; and, (5) only requested an appraisal two and a half years after the fire.

Plaintiff asserts Kirby was not a licensed insurance adjuster at the time of his inspection of the Home. Plaintiff proffered as evidence a print-out of a North Carolina Department of Insurance online licensee search showing no results for Kirby as of 15 October 2017. Kirby proffered as evidence a copy of his license from the Department of Insurance and a print-out of an online search result from the North Carolina Licensing Board for General Contractors showing his status as a licensee as of 25 January 2017. Based upon the record before us, Plaintiff does not show Kirby was unlicensed in June 2014.

The remainder of Plaintiff's arguments all arise from Defendant's conduct pursuant to the Policy, and Plaintiff's displeasure with their handling and payments of his claims. While Plaintiff clearly suffered from the fire and loss, he was advanced multiple payments and tenders due for his losses and has failed to forecast evidence Defendant engaged in any of the alleged unfair and deceptive trade practices he asserts as grounds to show the trial court erred in granting Defendant's motion for summary judgment.

Defendant has performed its duties under the provisions of the Policy. Accepting all inferences asserted from Plaintiff's facts in the light most favorable to him, he cannot prove Defendant committed unfair and deceptive trade practices in its handling of his claims under the Policy. *See Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. Defendant's argument is overruled.

VI. Exclusion of Expert Testimony

A. Standard of Review

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial . . . . A trial court's ruling on a motion *in limine* will not be reversed absent an abuse of discretion." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 750, 670 S.E.2d 604, 609 (2009) (citations and internal quotation marks omitted).

B. Analysis

[3] Plaintiff argues the trial court erred in refusing to allow the testimony and report of his expert witness, Terry LaDuke. Plaintiff sought to introduce this evidence to show Defendant should have known possible contamination of the Home posed a potentially dangerous threat to human occupancy, and Defendant should have inspected the damage more thoroughly.

Defendant objected to LaDuke's proposed testimony and report on the grounds that LaDuke had inspected the Home and prepared his report in 2018, long after the loss and appraisal award had been entered. Under the Policy, the parties had already conducted the appraisal process and settled upon the value of the Home without LaDuke's report.

When Defendant renewed its motion *in limine* before LaDuke's testimony, the trial court asked Plaintiff's counsel if Defendant knew about the contamination of the Home when it made an offer to Plaintiff. Plaintiff's counsel admitted he did not know whether Defendant "knew the extent" of the contamination. The trial court further asked if Plaintiff had raised the issue of potential contamination during the appraisal process. Plaintiff's counsel did not directly answer the trial court. Instead, Plaintiff's counsel argued it would be unreasonable for Defendant to spend tens of thousands of dollars to rebuild a home that would be purportedly uninhabitable.

The trial court granted Defendant's motion and disallowed LaDuke from testifying. Considering the sole issue remaining before the court was the breach of contract, and the parties had settled the value of the Home in the appraisal process, LaDuke's testimony would have been irrelevant. Plaintiff has failed to show the trial court erred in granting Defendant's motion for summary judgment. Plaintiff's argument is overruled.

VII. Directed Verdict

A. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citation omitted).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as

> true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (citation omitted).

B. Analysis

[4] Plaintiff does not argue his claim for breach of contract withstands Defendant's motion for a directed verdict. Instead, he argues different superior court judges ruled upon Defendant's motions for summary judgment and directed verdict, and because Defendant had argued in both motions that the appraisal of the Home resolved the contract issues in this case, the judge who entered the directed verdict did not have the authority to overrule the previous judge's summary judgment ruling on this same issue.

This Court has previously rejected this argument. "[A] pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues." *Clinton v. Wake County Bd. of Education*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993).

In *Clinton*, the appellant asserted error in the trial judge's entry of directed verdict on claims, which a different judge had previously denied summary judgment. *Id.* This Court declined to review the appellant's arguments based upon the prior denial of summary judgment. *Id.* The "denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in trial on the merits." *Id.* (quoting *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)). Plaintiff's argument is overruled.

VIII. Conclusion

Plaintiff has failed to show the trial court abused its discretion in granting Defendant's motion to stay the trial proceedings and to compel an appraisal of the Home. The appraisal process was required by the Policy as a condition precedent to Plaintiff filing suit against Defendant.

Accepting all facts asserted by Plaintiff on his unfair and deceptive trade practices claim as true, and viewing all inferences therefrom in the light most favorable to him, Plaintiff failed to show a misrepresentation by Defendant of "pertinent facts or insurance policy provisions relating

to coverages at issue" in the issuance of the Policy. N.C. Gen. Stat. § 58-63-15(11)(a).

Plaintiff failed to show Kirby was an unlicensed contractor when he inspected the Home. All of Plaintiff's other allegations of unfair and deceptive trade practices arise from Defendant's asserted conduct pursuant to the provisions of the Policy. Defendant performed its duties and exercised it rights reserved under the Policy. Plaintiff cannot show a genuine issue of material fact exists to support his unfair and deceptive trade practices claims.

The trial court did not abuse its discretion in granting Defendant's motion *in limine* to exclude Plaintiff's proffered expert witness. The proposed evidence did not and could not relate to the remaining issue of breach of contract at trial.

Denial of a motion for summary judgment is not reviewable on appeal from a directed verdict and judgment rendered after trial on the merits. *Clinton*, 108 N.C. App. at 621, 424 S.E.2d at 694. Plaintiff's argument asserting the trial court erred in directing a verdict in favor of Defendant on the same issue, where a previous superior court judge had denied summary judgment, is precluded by precedent. *See id.*

The trial court's orders are affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge YOUNG concur.

HARPER v. VOHRA WOUND PHYSICIANS OF NY, PLLC

[270 N.C. App. 396 (2020)]

JAMES GARRETT HARPER, M.D., PLAINTIFF
v.
VOHRA WOUND PHYSICIANS OF NY, PLLC; VOHRA WOUND PHYSICIANS MANAGEMENT, LLC; VOHRA HEALTH SERVICES, PA; JAPA VOLCHOK, D.O.; AND AMEET VOHRA, M.D., DEFENDANTS

No. COA18-355

Filed 17 March 2020

1. Contracts—employment agreement—breach—ambiguous terms—judgment notwithstanding the verdict

In a dispute regarding an employment agreement between a physician (plaintiff) and a medical practice (defendant) involving plaintiff's Medicare eligibility, the jury's verdict on defendant's counterclaim for breach of contract in favor of plaintiff was properly left undisturbed after defendant moved for judgment notwithstanding the verdict where the terms of the agreement were subject to more than one interpretation and therefore presented an ambiguity that required resolution by the jury.

2. Pleadings—reply to amended counterclaim—timeliness of filing—trial court's discretion

In an employment dispute between a physician (plaintiff) and a medical practice (defendant), the trial court did not abuse its discretion by allowing plaintiff to file an untimely reply to defendant's amended counterclaim, even though the court failed to consider whether plaintiff showed excusable neglect pursuant to Civil Procedure Rule 6(b), because defendant was not prejudiced by the error. Plaintiff's failure to timely file a new reply did not amount to an admission under Civil Procedure Rule 8(d) where he would have merely been asserting in negative form the allegations he made in the complaint, and the fact that he had already denied the allegations in the first set of counterclaims in a reply put defendant on notice that he would also deny the additional allegations asserted in the amended counterclaim.

3. Damages and Remedies—Wage and Hour Act—liquidated damages—based on gross rather than net pay—statutory interpretation

In a dispute regarding an employment agreement between a physician (plaintiff) and a medical practice (defendant) in which plaintiff asserted a claim for relief under the North Carolina Wage and Hour Act (NCWHA), the trial court properly based its reward

of liquidated damages on plaintiff's gross pay rather than net pay. Although undefined in the NCWHA, the "unpaid amounts" due plaintiff (N.C.G.S. § 95-25.22) for a violation of the Act included "wages" as defined by N.C.G.S. § 95-25.2(16) that should have been paid out to plaintiff or for his benefit.

Appeal by Defendants from Order and Judgment entered 22 June 2017 and Order Denying Defendants' Post-Judgment Motions entered 18 July 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2018.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, Robert H. Edmunds, Jr., and Kip D. Nelson, for defendants-appellants.

MURPHY, Judge.

On appeal, Defendant contends the trial court erred by: (1) denying its motion for judgment notwithstanding the verdict on its breach of contract counterclaim; (2) permitting Plaintiff to file an untimely reply to Defendant's amended counterclaims; and (3) awarding liquidated damages based on gross pay rather than net pay. For the reasons discussed below, we disagree and affirm.

BACKGROUND

Dr. James Garrett Harper ("Dr. Harper") began practicing medicine as a plastic surgeon in Charlotte in 2012. The practice that employed Dr. Harper did not accept Medicare or Medicaid due to the effect on "billing and reimbursements from other insurance companies" and its ability to "get paid more for a [given] surgery" if Medicaid and Medicare were not accepted. As an employee of the practice, Dr. Harper completed a "Medicare Opt-Out Affidavit." The Opt-Out Affidavit allowed Dr. Harper to "provide services to Medicare beneficiaries only through private contracts that meet the criteria of §40.8 for services that, but for their provision under a private contract, would have been Medicare-covered services." However, the Opt-Out Affidavit prevented Dr. Harper from submitting "a claim to Medicare for any service furnished to a Medicare beneficiary during the opt-out period" and receiving "direct or indirect Medicare payment for services . . . furnish[ed] to Medicare beneficiaries with whom [Dr. Harper] privately contracted[.]" Dr. Harper completed

his most recent Opt-Out Affidavit in 2014, and the opt-out period was two years.

Dr. Harper ended his employment with this practice in 2015. While litigating the enforceability of his non-compete agreement with the practice, Dr. Harper decided to apply for a position with Vohra Wound Physicians of NY ("Vohra") until he could return to the field of plastic surgery. Vohra provides wound management services primarily to elderly patients in nursing homes in various states, including North Carolina. In his role with Vohra, Dr. Harper would travel around the state, primarily to "understaffed and undermanned" nursing care facilities.

On his application to Vohra, Dr. Harper was asked to "[d]escribe any past/pending disciplinary/restriction in relation to Medicare/Medicaid." Dr. Harper answered, "None, but I did not accept Medicaid/Medicare at my last job." After multiple subsequent rounds of interviews, Dr. Harper was offered the physician position with Vohra, and the parties entered into an "Employment Agreement" in June 2015. Under "Article II: Duties and Responsibilities" of the employment agreement, the parties agreed to the following provision:

> 2.5 General Professional Qualifications and Obligations. At all times during the term of this Agreement, EMPLOYEE:
>
> . . .
>
> (b) shall be qualified to participate and shall participate in Medicare, Medicaid and other state medical assistance and federal programs, and not be under current exclusion, debarment or sanction by any state or federal health care program, including Medicare and Medicaid;

At the start of his employment, Dr. Harper completed a "Medicare Enrollment Application" and "Reassignment of Medicare Benefits" to Vohra and made Vohra his surrogate for the Medicare enrollment process. Yet, approximately twelve days later, Vohra was informed that Dr. Harper's Medicare enrollment application was denied. The denial cited Dr. Harper's 2014 Medicare Opt-Out Affidavit, stating: "The provider has an active opt-out affidavit effective until 07/23/2016. The provider cannot enroll in Medicare until after this date." The Opt-Out Affidavit could not be withdrawn.

The Vice-President of Vohra Wound Physicians Management, LLC called Dr. Harper upon learning of his ineligibility. Dr. Harper "stated that in his previous job there was no Medicare that was accepted by the practice, they had opted out of Medicare." Dr. Harper stopped

seeing patients, and Vohra decided to "stop all processes related to Dr. Harper[,]" and withhold a portion of Dr. Harper's October 2015 wages for several weeks while it was "doing an investigation[.]" On 30 November 2015, Vohra terminated Dr. Harper's employment[1] and requested that Dr. Harper reimburse the practice for $88,133.43 it claimed the practice incurred "[a]s a result of [Dr. Harper's] failure to disclose this critical information[.]"

Dr. Harper filed suit against Vohra[2], alleging, among other claims, a violation of the North Carolina Wage and Hour Act.[3] Vohra subsequently asserted counterclaims for fraud and breach of contract. After a trial in Mecklenburg County Superior Court, the jury returned a verdict finding that $29,035.50 in wages was owed to Dr. Harper. Regarding Vohra's counterclaims, the jury found that Dr. Harper had not breached his contract and that Vohra was not damaged by any fraud of Dr. Harper. Vohra filed post-judgment motions requesting that the trial court enter a directed verdict on its breach of contract counterclaim and amend the damages award. The trial court denied these motions. Vohra timely appeals.

ANALYSIS

A. Breach of Contract Counterclaim

[1] Vohra first argues the trial court erred in denying its motion for judgment notwithstanding the verdict on the breach of contract counterclaim. We disagree.

We have described our review of trial court rulings on motions for judgment notwithstanding the verdict:

> A motion for a judgment notwithstanding the verdict is, fundamentally, the renewal of an earlier motion for a directed verdict. When a motion for judgment notwithstanding the verdict is brought, the issue is whether the evidence is sufficient to take the case to the jury and to support a verdict for the non-moving party. The evidence is to be considered in the light most favorable to the non-moving party, and the non-moving party is entitled

1. The Employment Agreement signed by the parties listed "EMPLOYEE'S exclusion or debarment from the Medicare or Medicaid programs" as a ground for immediate termination.

2. We refer to all Defendants collectively as "Vohra."

3. The other claims in Dr. Harper's complaint are not relevant to this appeal.

> to all reasonable inferences that can be drawn from that evidence.

Ridley v. Wendel, 251 N.C. App. 452, 458, 795 S.E.2d 807, 812-13 (2016) (citations, alterations, and internal quotation marks omitted). This is a high standard for the party moving for judgment notwithstanding the verdict, and the trial court is required to deny the motion where the verdict for the non-moving party is supported by "more than a scintilla of evidence . . . ." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009). We review a trial court's order ruling on a motion for judgment notwithstanding the verdict de novo. *Austin v. Bald II*, L.L.C., 189 N.C. App. 338, 341-42, 658 S.E.2d 1, 4, (2008).

The elements of a breach of contract claim are well established: (1) existence of a valid contract and (2) breach of the terms of that contract. *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 636, 781 S.E.2d 511, 514 (2016). In determining whether there has been a breach of the terms of a valid contract, we must necessarily look to the language of those terms. "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010) (citation, ellipses, and internal quotation marks omitted). Conversely, if the contract is ambiguous, "interpretation of the contract is a matter for the jury." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001).

Ambiguity exists in a contract's terms "when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012). "Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was." *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690, 564 S.E.2d 641, 643 (2002) (internal citation and quotation marks omitted).

The Employment Agreement signed by both parties contained the following provision:

> 2.5 General Professional Qualifications and Obligations. At all times during the term of this Agreement, EMPLOYEE:
>
> . . .
>
> (b) shall be qualified to participate and shall participate in Medicare, Medicaid and other state medical assistance

> and federal programs, and not be under current exclusion, debarment or sanction by any state or federal health care program, including Medicare and Medicaid;

The provision of the Employment Agreement does not define the term "exclusion" by health care programs.

Dr. Harper argues there is ambiguity in the requirements of Section 2.5(b). Namely, he contends the clause "and not be under current exclusion, debarment or sanction by any state or federal health care program . . . " qualifies the preceding requirement that he be qualified to participate—and shall participate—in the listed health care programs and that the words "current exclusion, debarment or sanction" are vague and ambiguous. He contends these terms suggest *disciplinary* action by a health care program, "which limit the first portion of the provision." Thus, his argument is that the language does not unambiguously cover a voluntary opt-out affidavit. Given the placement of the clause and the absence of a definition for the term "exclusion" in the Employment Agreement, we conclude this to be a reasonable interpretation.

In contrast, Vohra argues the language of Section 2.5(b) contains two distinct requirements of the employee, Dr. Harper, with respect to Medicare: that he (1) shall be qualified to participate in Medicare and shall participate in Medicare and (2) not be under current exclusion, debarment, or sanction. Vohra contends the language that required Dr. Harper to be "qualified to participate" and to participate in Medicare is a stand-alone requirement and that this language is unambiguous – it required Dr. Harper to be qualified to participate and to participate in Medicare, which he could not do because of the Opt-Out Affidavit. Vohra argues the remaining requirement that Dr. Harper "not be under current exclusion, debarment, or sanction" is a separate requirement and does not qualify or describe the first requirement regarding participation. This interpretation is also reasonable.

The existence of more than one reasonable interpretation of the language in Section 2.5(b) is precisely what renders that provision ambiguous. *See Variety Wholesalers, Inc.*, 365 N.C. at 525, 723 S.E.2d at 748. Given this ambiguity, the interpretation of Section 2.5(b) was properly placed before the jury. Moreover, because it is a reasonable inference that Section 2.5(b) did not cover or address a voluntary opt-out affidavit, we cannot conclude the trial court erred in declining to disturb the jury's verdict finding that Dr. Harper did not breach the contract. *See N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) ("[I]t is proper to direct verdict for the party with the burden of proof if the evidence so clearly establishes the fact in issue that no reasonable

inferences to the contrary can be drawn."). We affirm the trial court's decision to deny Vohra's motion for directed verdict on this claim.

B. Reply to Counterclaim

[2] Vohra next argues the trial court abused its discretion in permitting Dr. Harper to file an untimely reply to Vohra's amended counterclaims for fraud and breach of contract. We disagree.

1. Procedural History

In its original answer to Dr. Harper's complaint, Vohra asserted counterclaims for fraud and breach of contract, to which Dr. Harper filed a timely reply. Dr. Harper moved to dismiss these counterclaims approximately two months later, and Vohra filed a motion for leave to amend its counterclaims. The trial court granted that motion, ordering Vohra to file and serve its amended counterclaims within two days and Dr. Harper to reply within thirty days. In its amended counterclaims, Vohra added allegations to support its claims of fraud and breach of contract. Dr. Harper did not file a reply to the amended counterclaims within the thirty-day time period.

Prior to trial, Vohra filed a motion in limine "to exclude evidence in opposition" to the allegations added in the amended counterclaim. The trial court indicated that it agreed with the motion in limine, but held open the question of whether assertions of law in a counterclaim are deemed admitted when no reply is made. When the issue arose again during trial, Dr. Harper sought to file a handwritten reply to the amended counterclaims denying the added allegations. The trial court reversed its initial decision regarding Vohra's motion in limine and allowed Dr. Harper to file the handwritten reply.

2. Discussion

We review the trial court's exercise of discretion in allowing the admission of an untimely reply to a counterclaim for an abuse of that discretion. *Rossi v. Spoloric*, 244 N.C. App. 648, 654, 781 S.E.2d 648, 653 (2016). "An 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.' " *Id.* at 651, 781 S.E.2d at 651-52 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

When a trial court orders a reply to a counterclaim, the plaintiff must serve his or her reply to the counterclaim "within 30 days after service of the order, unless the order otherwise directs." N.C.G.S. § 1A-1, Rule 12(a)(1) (2017). However, Rule 6(b) of the North Carolina Rules of Civil Procedure "gives the trial court wide discretionary authority to enlarge

the time within which an act may be done" and permit an otherwise untimely reply. *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). Rule 6(b) states, "Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." N.C.G.S. §1A-1, Rule 6(b). Thus, the trial court retains "broad authority" to extend the time period for a responsive pleading and permit an otherwise untimely reply "upon a finding of excusable neglect." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (internal quotation marks omitted).

Rule 8(d) governs the effect of a party's failure to deny averments made in a pleading to which a responsive pleading is required. The rule states: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C.G.S. § 1A-1, Rule 8(d) (2017). In limited circumstances, however, we have declined to strictly adhere to Rule 8(d) "in the context of a plaintiff's failure to file a reply to a counterclaim[.]" *Crowley v. Crowley*, 203 N.C. App. 299, 307, 691 S.E.2d 727, 733 (2010) (quoting *Connor v. Royal Globe Ins. Co.*, 56 N.C. App. 1, 5, 286 S.E.2d 810, 814 (1982)). Specifically, we held "that a plaintiff's failure to file a reply re-asserting allegations already made in the complaint in response to averments in a defendant's counterclaim which do no more than present denials in affirmative form of the allegations of the complaint does not amount to an admission pursuant to . . . Rule 8(d)." *Id.* at 307, 691 S.E.2d at 733 (internal quotation marks omitted).

In so holding, we looked to federal decisions for guidance. In *Vevelstad v. Flynn*, 230 F.2d 695 (9th Cir. 1956), *cert. denied*, 352 U.S. 827, 1 L. Ed. 2d. 49 (1956), the defendants filed an answer containing a section entitled "a fourth defense and counterclaim." *Id.* at 703. The plaintiffs failed to reply to the counterclaim, which the defendants argued "constituted an admission of the allegations of that part of the answer." *Id.* The trial court noted, and the Ninth Circuit affirmed:

> Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under rules 7(a) and 8(d) F.R.C.P.

Id. (internal quotation marks omitted). We found this interpretation "persuasive and in line with the spirit of our Court's prior decisions

interpreting . . . Rule 8." We stated, "Because of our general policy of proceeding to the merits of an action when to do so would not violate the letter or spirit of our Rules, this Court has refused to adhere strictly to Rule 8(d) in the context of a plaintiff's failure to file a reply to a counterclaim in *Eubanks v. Insurance Co.* and *Johnson v. Johnson*." Crowley, 203 N.C. App. at 307, 691 S.E.2d at 733 (citation, alterations, and internal quotation marks omitted).

Here, the trial court found *Crowley* applicable and determined Dr. Harper's failure to file a reply to Vohra's amended counterclaim did not amount to admissions under Rule 8(d). Nevertheless, the trial court permitted Dr. Harper to file the untimely reply to Vohra's amended counterclaims denying the amended allegations therein. Since the trial court permitted Dr. Harper to file the untimely reply, rather than simply denying Vohra's motion in limine, it was required to consider whether there was a showing of excusable neglect and exercise its discretion under that standard. *See Chantos*, 21 N.C. App. at 131, 203 S.E.2d at 423 ("If the request for enlargement of time is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect."). We agree with Vohra that the trial court did not consider excusable neglect and did not exercise discretion under that standard, thus his decision to permit an untimely reply was an abuse of discretion. *See State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion."). However, we conclude this procedural error did not prejudice Vohra, as we agree with the trial court that Dr. Harper's failure to file a reply did not amount to an admission under Rule 8(d).

In his complaint, Dr. Harper asserted, among other things, that he was an employee and was owed compensation under the North Carolina Wage and Hour Act for his services rendered during October 2015. In its amended answer to Dr. Harper's claims, Vohra submitted affirmative defenses of fraud and breach of contract. In its affirmative defense for fraud, Vohra stated:

> Second Affirmative Defense: Fraud
>
> The contract upon which this action is based was procured by fraud in that Plaintiff intentionally misrepresented his ability to accept Medicare/Medicaid on his employment application. The contract is thus unenforceable against Defendants and this action is barred.
>
> . . .

Fifth Affirmative Defense: Breach by Plaintiff

> Due to Plaintiff's material misrepresentation on his employment application he was in breach of the contract from the moment the contract was entered into. The contract is thus unenforceable against Defendants and this action is barred.

Vohra asserted counterclaims seeking relief for the same alleged fraud and breach of contract, and the amended counterclaims included additional allegations related to and in support of the counterclaims.

The counterclaims for fraud and breach of contract do no more than present denials of the complaint's allegations in affirmative form. As evidenced by their inclusion as affirmative defenses, Vohra asserted fraud and breach of contract as defenses to Dr. Harper's claim. That is, it argued that Dr. Harper's employment agreement was an unenforceable contract due to fraud and material misrepresentation. The counterclaims for fraud and breach of contract merely reiterated these defenses in affirmative form and sought relief therefrom. As such, Dr. Harper needed not repeat in negative form the allegations of his complaint. Accordingly, the trial court did not err in its determination that Dr. Harper's failure to file a reply to the amended counterclaims did not amount to admissions under Rule 8(d).

Additionally, we note the trial court's decision not to adhere strictly to Rule 8(d) in this context was in line with our "general policy of proceeding to the merits of an action." *Crowley*, 203 N.C. App. at 307, 691 S.E.2d at 733 (citation and internal quotation marks omitted). Dr. Harper filed a reply to Vohra's original counterclaims for fraud and breach of contract. In this reply, he denied the allegations therein. When Vohra amended its counterclaims to include additional allegations supporting the counterclaims, it was on notice that Dr. Harper would similarly deny the additional allegations and suffered no prejudice. We affirm.

C. Damages

[3] In its final argument, Vohra contends the trial court erred in awarding liquidated damages under the North Carolina Wage and Hour Act (NCWHA) to an amount equaling Dr. Harper's gross pay rather than his net pay. It contends that recovery under the NCWHA for "unpaid amounts" must be interpreted as recovery of net pay, or the employee's gross pay less proper withholdings. Accordingly, Vohra argues the liquidated damages award should have been $18,483.76, Dr. Harper's gross pay of $29,035.50 less withholdings.

The question of whether damages awarded under the NCWHA must be gross or net wages is a question of statutory interpretation and requires us to turn to the language of the NCWHA. "We review questions of statutory interpretation de novo." *City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018). "Legislative intent controls the meaning of a statute." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895–96 (1998) (citing *Shelton*, 318 N.C. at 81-82, 347 S.E.2d at 828). "First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Id.* at 522, 507 S.E.2d at 895–96.

N.C.G.S. § 95-25.22 specifically provides for the recovery of unpaid wages based upon a violation of the NCWHA:

> (a) Any employer who violates the provisions of [N.C.G.S. § 95-25.7 (Payment to Separated Employees)] shall be liable to the employee or employees affected in the amount of their . . . unpaid amounts due under [N.C.G.S. § 95-25.7], as the case may be, plus interest at the legal rate set forth in [N.C.G.S.] § 24-1, from the date each amount first came due.
>
> (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C.G.S. § 95-25.22(a)-(a1) (2017). Neither N.C.G.S. § 95-25.22 nor any other provision in the NCWHA defines "unpaid amounts," and we have no caselaw addressing whether such amounts should be calculated as gross or net pay. The NCWHA does, however, define "wages":

> "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

N.C.G.S. § 95-25.2(16) (2017).

Equally informative, N.C.G.S. § 95-25.22 explains that the amounts to be paid are determined by N.C.G.S. §§ 95-25.6-.12, which provide specific provisions for different types of wages. *See generally* N.C.G.S. § 95-25.1 *et seq*. (2017). Here, Dr. Harper's claim for payment was based on N.C.G.S. § 95-25.7, which states:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C.G.S. § 95-25.7 (2017).

The NCWHA authorizes employers to withhold taxes from wages. *See* N.C.G.S. § 95-25.8 (2017) ("An employer may withhold or divert any portion of an employee's wages when: (1) The employer is required or empowered to do so by State or federal law[.]"). Thus, based upon the plain language of the NCWHA, the "unpaid amounts" due under § 95-25.7 were Dr. Harper's "wages" as defined by N.C.G.S. § 95-25.2(16). N.C.G.S. § 95-25.22; *see* N.C.G.S. § 95-25.1 *et seq*. Consequently, the fact that Vohra could "withhold or divert" a portion of Dr. Harper's "wages" in accordance with state and federal law does not change the fact that they are "unpaid amounts" which the employer should have paid out, either directly to the employee or for the employee's benefit, but for the violation of the NCWHA. N.C.G.S. § 95-25.8; *see generally* N.C.G.S. § 95-25.1

et seq. The plain language of N.C.G.S. § 95-25.22 provides that upon violation the employer must pay the "unpaid" amounts to the employee. *See* N.C.G.S. § 95-25.22. Here, the amount left unpaid by Vohra's NCWHA violation was $29,035.50. Moreover, liquidated damages may be awarded in an amount "equal" to the unpaid amount, which is exactly what the trial court did in awarding "liquidated damages to Dr. Harper in the amount of $29,035.50."[4] *Id*.

A plain reading of the NCWHA is sufficient to resolve the issue of damages in this case. The NCWHA does not explicitly define "unpaid amounts" but its definition of "wages" read in concert with the relevant provisions described above demonstrates that the trial court did not err in awarding Dr. Harper liquidated damages based upon his gross pay. The trial court's order is affirmed as it relates to the issue of damages.

CONCLUSION

The trial court did not err in denying Vohra's motion for judgment notwithstanding the verdict on the breach of contract counterclaim where the jury's verdict was supported by more than a scintilla of evidence. The trial court's decision to permit Dr. Harper to file an untimely reply to Vohra's amended counterclaims did not prejudice Vohra. Lastly, the trial court did not err in awarding liquidated damages based upon gross pay. For these reasons, we affirm.

AFFIRMED.

Judges STROUD and DIETZ concur.

4. The trial court could in its discretion award a lesser amount, but Vohra has not argued on appeal the trial court abused its discretion in awarding the maximum liquidated damages award allowed under the statute. *See* N.C.G.S. § 95-25.22 (2017).

IN RE A.K.G.

[270 N.C. App. 409 (2020)]

IN THE MATTER OF A.K.G.

No. COA18-1222

Filed 17 March 2020

Appeal and Error—mootness—juvenile case—permanency planning order—juvenile turning eighteen years old during appeal

A father's appeal from a permanency planning order, which ceased reunification efforts with his daughter, was dismissed as moot where his daughter reached the age of majority while the appeal was pending (thereby terminating the trial court's jurisdiction in the underlying juvenile proceeding and preventing an appellate ruling from having any practical effect) and where the appeal did not fit into any exception to the mootness doctrine.

Appeal by respondent from order entered 26 March 2018 by Judge Lora C. Cubbage in Guilford County District Court. Heard in the Court of Appeals 31 October 2019.

Christopher L. Carr and Taniya Reaves for petitioner-appellee Guilford County Department of Health and Human Services.

Anné C. Wright for respondent-appellant father.

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

DIETZ, Judge.

Respondent appeals a permanency planning order that changed the permanent plan for his daughter Adele.[1] While this appeal was pending, Adele reached the age of majority, thus terminating the trial court's juvenile jurisdiction.

This Court ordered supplemental briefing to address whether the appeal is now moot. After reviewing the parties' submissions, we hold that Respondent's appeal does not fall within any applicable exceptions to the mootness doctrine.

The challenged order, which merely changed Adele's permanent plan, does not create the sort of collateral consequences that exist with

1. We use a pseudonym to protect the juvenile's identity.

an order adjudicating a juvenile as neglected or an order terminating parental rights. Similarly, there is nothing about the trial court's fact-bound permanency planning decision, unique to this particular case, that could warrant application of the public interest exception. Finally, the particularized trial court errors that Respondent asserts in this appeal are not the sort of issues that are "capable of repetition yet evading review" so as to preclude mootness.

We therefore dismiss this appeal as moot. We note, however, that our State's appellate system goes to rather extraordinary lengths to expedite these juvenile cases and it is, and should be, rare for a juvenile case to be rendered moot in this way.

Facts and Procedural History

In 2016, the Guilford County Department of Health and Human Services filed a petition alleging Adele was a neglected and dependent juvenile and took custody of Adele later that day. After a hearing, the trial court entered an order adjudicating Adele to be a neglected and dependent juvenile. The court set Adele's primary permanent plan of care as reunification with a parent and set her secondary plan as guardianship with a relative.

Following this initial adjudication, the trial court conducted a series of permanency planning review hearings. In 2017, the trial court changed the primary permanent plan to guardianship with a relative with reunification as the secondary plan. Then, in 2018, the trial court changed the primary permanent plan to adoption and the secondary plan to guardianship with a relative, thus ceasing reunification efforts with Respondent. The court found Respondent was making some progress on his case plan, but that he failed to address his past issues with domestic violence. Respondent appealed the trial court's order on 25 September 2018. The case was heard by this Court on 31 October 2019. Adele reached eighteen years of age several days later.

Analysis

Respondent appeals the trial court's permanency planning order, arguing that the trial court failed to make sufficient findings and improperly ceased reunification efforts and set Adele's permanent plan as adoption.

While this appeal was pending, Adele reached eighteen years of age. In a juvenile proceeding, "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat.

§ 7B-201(a). Thus, the trial court no longer has subject matter jurisdiction in this proceeding and the permanent plan is no longer in effect. This, in turn, means that even if this Court determined that the trial court erred in its order changing Adele's permanent plan, we could not remand the matter to correct that error and our ruling would have no practical effect. *Id.*; *see also* N.C. Gen. Stat. § 7B-1000(b).

Ordinarily, this Court must dismiss an appeal as moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *In re B.G.*, 207 N.C. App. 745, 747, 701 S.E.2d 324, 325 (2010). But there are a narrow set of exceptions to the mootness doctrine, some of which apply to juvenile proceedings. We asked the parties for supplemental briefing to assess whether this appeal is moot. Respondent offered three arguments against mootness. We address those arguments in turn below.

First, Respondent contends that the challenged permanency planning order might have adverse "collateral consequences" for him. An appeal from a juvenile ruling "which creates possible collateral legal consequences for the appellant is not moot." *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 755 (2006). In other words, although the *juvenile* (now an adult) is no longer affected by the challenged order, the case might not be moot if the order could have future adverse effects on the *parent* who filed the appeal.

For example, our Supreme Court has held that an order adjudicating a child as neglected is not mooted when the juvenile reaches the age of majority because the finding of neglect can be used to support an adjudication of neglect for other children living in the same home. *Id.* at 456–57, 628 S.E.2d at 757–58. Similarly, this Court has held that an order terminating parental rights has possible collateral consequences because it can be used to support termination of the parent's rights to another child. *In re C.C.*, 173 N.C. App. 375, 379, 618 S.E.2d 813, 816–17 (2005).

Respondent concedes that the *legal effect* of an order changing a juvenile's permanent plan, unlike an order adjudicating a juvenile as neglected or terminating parental rights, does not have any collateral consequences. But Respondent contends that the challenged order has collateral legal consequences because it includes unfavorable *findings of fact*, including a finding that Respondent failed to address his ongoing domestic violence issues. Respondent argues that in a future proceeding, such as a custody dispute involving a future child, a court might either take judicial notice of those unfavorable fact findings or rule that Respondent is collaterally estopped from disputing them. We reject this argument.

First, Respondent mischaracterizes the way judicial notice works. A judicially noticed fact is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. R. Evid. 201(b). Findings of fact in a court order from an unrelated legal proceeding are not proper subjects of judicial notice. *See In re K.A.*, 233 N.C. App. 119, 128 n.4, 756 S.E.2d 837, 843 n.4 (2014); *State v. Cooke*, 248 N.C. 485, 493–94, 103 S.E.2d 846, 852 (1958). Thus, Respondent's judicial notice argument is meritless.

Second, Respondent ignores that the challenged findings are duplicative of other unchallenged findings made by the trial court in orders throughout this juvenile proceeding. Thus, even if a court were to permit the highly disfavored use of non-mutual collateral estoppel to bar Respondent from challenging these unfavorable findings in "a custody dispute regarding a later born child"—and that is, at best, an exceedingly remote possibility—other substantially identical findings would still be available even if those in this order were not. Thus, Respondent has not shown that the challenged order exposes him to any adverse collateral consequences that would not exist without it.

Next, Respondent argues that his appeal falls under the public interest exception to mootness. Again, we reject this argument. A court may choose to hear an otherwise moot appeal if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, "this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. North Carolina State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016).

Respondent contends that "[t]he best interests of children and the effect of trial court decisions related to these best interests is of public interest and general importance." But that mischaracterizes the scope of the challenged order. The order is, at most, a fact-bound ruling involving the permanent plan for a particular juvenile in a case with particularized facts. The proper resolution of every juvenile case is important both to the litigants and to society as whole. But this case does not present anything so exceptionally important to the public interest that it should be treated as different from all other juvenile cases.

Finally, Respondent argues that the issues raised in this appeal are capable of repetition, yet evading review. This argument, too, is meritless. The capable-of-repetition exception applies only when "(1) the

challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703–04 (2002). Thus, this exception applies to cases in which the underlying lawsuit involves some action that is capable of repetition. It does not apply in a case like this one, where a litigant argues that the trial court made legal errors in its fact findings and legal conclusions that are particular to the case.

In sum, this appeal is moot and we are unable to adjudicate the merits of Respondent's claims. We note that our State's appellate system has taken a number of steps to ensure that juvenile cases will not be mooted on appeal, including rather extraordinary departures from the usual rules governing preparation of the record, drafting of briefs, and the availability of extensions of time. *See* N.C. R. App. P. 3.1. Juvenile cases that are rendered moot while an appeal is pending are rare. But it can happen and here it did. The challenged order, which did nothing more than change the permanent plan for Adele, was rendered moot when Adele reached the age of majority, depriving the trial court of any further jurisdiction over the matter.

Conclusion

We dismiss Respondent's appeal as moot.

DISMISSED.

Judges STROUD and HAMPSON concur.

IN RE B.S.

No. COA19-789

Filed 17 March 2020

1. Mental Illness—involuntary commitment—sufficiency of evidence—dangerous to self—future danger

The trial court's findings were sufficient to justify respondent's involuntary commitment and supported the court's ultimate determination that respondent was a danger to himself and was likely to suffer harm in the near future. Evidence showed that respondent was unable to care for himself without constant supervision and medical treatment and that he exhibited grossly delusional behavior, including denying his own identity along with the fact that he had ever been diagnosed with or treated for mental illness, despite having been admitted for psychiatric care on eleven prior occasions.

2. Appeal and Error—preservation of issues—involuntary commitment order—improper commitment period

Respondent's challenge to an involuntary commitment order on the basis that the commitment period exceeded the maximum statutory period was automatically preserved where the order violated the statutory mandate contained in N.C.G.S. § 122C-271.

3. Mental Illness—involuntary commitment—split commitment—maximum statutory period

The trial court's involuntary commitment order imposing thirty days of inpatient treatment and ninety days of outpatient treatment was reversed for exceeding the statutory maximum of ninety total days in violation of N.C.G.S. § 122C-271.

Appeal by Respondent from order entered 3 April 2019 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for the Respondent-Appellant.

COLLINS, Judge.

Respondent B.S. appeals from an involuntary commitment order committing him to inpatient treatment, followed by outpatient treatment. Respondent argues (1) that the trial court's findings of fact fail to support its conclusion that Respondent was dangerous to himself and dangerous to others and (2) that the trial court violated N.C. Gen. Stat. § 122C-271(b)(2) when it ordered a split commitment that exceeded the maximum authorized period of 90 days of commitment. As to Respondent's first argument, we affirm. As to the second argument, we remand for entry of a commitment period that complies with the statutory mandate of a maximum of 90 days' commitment.

I. Procedural History

On 15 March 2019, an affidavit and petition for involuntary commitment was presented to a Mecklenburg County magistrate alleging that Respondent was (1) mentally ill and dangerous to self or others and (2) a substance abuser and dangerous to self or others. The affidavit and petition stated that Respondent was (1) abusing alcohol and marijuana; (2) diagnosed with "schizoaffective disorder-bipolar" and was not taking his medications; (3) saying inappropriate things to children and neighbors; (4) breaking into vehicles in his neighborhood; and (5) dragging his dog through the neighborhood causing it injury and telling the dog to bite others. That same day, the magistrate found that both grounds were supported by the factual allegations and ordered Respondent into custody so that an examination could be completed within 24 hours at Behavioral Health Charlotte ("BHC"). On 16 March 2019, Dr. S. Solimon, a psychologist with BHC, conducted an examination of Respondent to determine the necessity for involuntary commitment. Solimon determined Respondent to be dangerous to himself and others, and recommended 30 days' inpatient commitment.

On 3 April 2019, the trial court conducted an involuntary commitment hearing for Respondent. At the conclusion of the hearing, the trial court ordered Respondent committed to inpatient treatment at BHC or Broughton Hospital for a period not to exceed 30 days, followed by a commitment to outpatient treatment at BHC or Broughton Hospital for a period not to exceed 90 days.

Respondent gave verbal notice of appeal in open court on 3 April 2019 and filed written notice of appeal on 22 April 2019.

II. Factual Background

Dr. David Litchford, a psychiatrist with BHC, testified at the involuntary commitment hearing to Respondent's mental health history. He

testified that Respondent has "schizo-affective disorder" and that he was "well-known" at BHC because he had previously been admitted at least six times. Respondent was admitted at least five additional times to Old Vineyard Hospital, Rowan Hospital, and Broughton Hospital. Litchford testified that Respondent had been "very aggressive" during a previous commitment hearing, and "assaultive" after that commitment hearing, and had to be transferred to Broughton Hospital, where he remained for two years. Respondent was discharged from Broughton Hospital in January 2019 but had to be admitted to BHC on 15 March 2019 for medication noncompliance.

Litchford testified that when Respondent was admitted to the BHC emergency room on 15 March 2019, he was very angry. Respondent hit his fists on the walls, exposed himself to hospital staff, threatened to urinate on the floor, claimed that he was raped in the Emergency Room, and claimed that "he [did] not know who [B.S.] is." Respondent claimed to be "Brian Mohammad Allah Gomez." Respondent said that he "has never been aggressive towards people, he's never been assaultive, that he's never been psychiatrically hospitalized before and never been required to take psychiatric medication or had a diagnosis." Litchford explained that Respondent's denial of his identity "persists through today."

Litchford explained that Respondent is "delusional[,] . . . grandiose and paranoid." Respondent told his psychiatrist that he was hospitalized "because the government—the United States government is trying to intimidate him to prevent his political campaign of globalism." He made numerous phone calls to customer care hotlines and claimed that he had been abused and neglected at BHC. He also wrote letters to the customer care hotlines, stating that he was "fearful for [his] life" and claiming that Litchford told him, "You're going to be here a while because I said, and that's all that matters. I own you. You're mine and might as well call me master[.]" Litchford testified that this was "never, ever vocalized" to Respondent.

Respondent had to be forcibly medicated while at BHC due to his anger and aggression towards the hospital staff. He was "manic with pressured speech, high energy, not sleeping. He was intrusive, demanding." Given his "history of volatility," hospital staff placed Respondent on forced injection and forced tablet medications. When Litchford asked Respondent if he would commit to taking the medications after release from BHC, he "ple[]d the fifth" and stated that he does not have a mental illness and does not need the medication. Litchford concluded that, as of the date of the hearing, Respondent "remains very angry, irritated, and defensive[;] . . . [and] extremely psychotic and . . . unpredictable at this time."

Respondent testified at the hearing and requested that federal authorities verify his identity through a DNA test. He explained that he has "three twins. Three identical triplet twins. I am a quadruplet[,]" and asked the trial court to determine the legitimacy of his identity. Respondent testified that he refused medication because he did not believe it was right or medically just to be injected with needles, and stated that he had not been harmful to himself or to others.

III. Discussion

1. Dangerous to Self and Others

[1] Respondent first argues that the facts recorded in the trial court's commitment order do not support its ultimate findings that he is dangerous to himself and dangerous to others.

"To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . ." N.C. Gen. Stat. § 122C-268(j) (2019). Findings of mental illness and dangerousness to self are ultimate findings of fact. *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980). This Court reviews an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence. *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016); *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37 (2014) (citation omitted). On appeal, "[w]e do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent, and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74.

N.C. Gen. Stat. § 122C-3 provides, in relevant part, that a person is dangerous to himself if, within the relevant past, he has acted in such a way as to show:

> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself . . . .

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2019).[1]

Subsection 11(a)(1)(II) prohibits a trial court from involuntarily committing a person based only on a finding that the person had a history of mental illness or behavior before the commitment hearing; the trial court must find that there is a reasonable probability of some harm in the near future if the person is not treated. *In re J.P.S.*, 823 S.E.2d 917, 921 (N.C. Ct. App. 2019). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)).

A person is dangerous to others if,

> [w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. . . .

N.C. Gen. Stat. § 122C-3(11)(b) (2019).

In *In re Zollicoffer*, 165 N.C. App 462, 598 S.E.2d 696 (2004), this Court determined that the trial court's ultimate finding of dangerousness to self was supported by the underlying findings. Based on a treating physician's examination and recommendation, the trial court found

---

1. Subsection 11(a) was amended effective 1 October 2019 to alter pronouns and word choice. 2019 N.C. Sess. Laws ch. 76, § 1. We apply and quote in this opinion the version of the statute extant at the time the trial court conducted the hearing. We note that the 2019 amendment made no substantive change to the relevant portions of the statute.

> that respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him "at high risk for mental deterioration," that respondent does not cooperate with his treatment team, and that he "requires inpatient rehabilitation to educate him about his illness and prevent mental decline."

Id. at 469, 598 S.E.2d at 700. Explaining that "the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self[,]" *id.* (quoting *In re Lowery*, 110 N.C. App. 67, 72, 428 S.E.2d 861, 864 (1993) (internal quotation marks omitted)), we concluded that the findings of fact supported the conclusion of law that respondent was dangerous to himself. *Id.*

In this case, the trial court made the following relevant findings of fact:

> Since respondent presented in the emergency department, he has acted in such a way as to show that he is unable without constant professional 24 hour supervision and medical treatment to exercise self-control, judgment and discretion in the conduct of his daily responsibilities and social relations to satisfy his need for nourishment, personal or medical care, self protection and safety and is likely to suffer debilitation without treatment. His behavior, during his admission, has been grossly irrational and he has demonstrated severely impaired insight and judgment.
>
> Respondent has been admitted to this facility on six prior occasions for acute psychiatric treatment; three times to Broughton Hospital and twice to other facilities for psychiatric treatment. He was admitted to Broughton Hospital after being assaultive during an involuntary commitment hearing. He remained in the hospital for two years and was discharged in January 2019. Since that discharge, over the subsequent two months, Respondent did not engage in treatment or take prescribed medication resulting in a rapid deterioration of his mental status. Respondent is grossly delusional, paranoid and manic. He has been at all times during this admission, angry, agitated and defensive.
>
> Respondent has been intrusive which risks substantial conflict and risk of harm outside the medical facility. Respondent denies his identity. He denies ever being

> diagnosed with a mental illness, being prescribed medication or being treated at this or any other psychiatric treatment facility. Respondent denies he is [B.S.] unless there is DNA evidence to prove this.

The trial court also found as fact and incorporated by reference all matters set out in Solimon's examination report on Respondent and Litchford's testimony, discussed in Section I. *supra*. Solimon conducted an examination of Respondent in order to determine any necessity for involuntary commitment. Solimon concluded that Respondent has schizoaffective disorder, was dragging his dog around the neighborhood and ordering the dog to bite people, was "alleged to be breaking into cars," and that his "loss of touch with reality makes it difficult for him to exercise judgment in the conduct of his daily affairs."

As in *In re Zollicoffer*, these findings of fact are sufficient to support an ultimate finding that Respondent was dangerous to himself and that there was a "reasonable probability" of near-future harm, as required by N.C. Gen. Stat. § 122C-3(11)(a)(1)(I-II). *Zollicoffer*, 165 N.C. App. at 469, 598 S.E.2d at 700. The trial court's findings that (1) Respondent is unable "without constant professional 24 hour supervision and medical treatment" to satisfy his needs for personal or medical care, self-protection, and safety; (2) Respondent is "grossly delusional, paranoid, and manic[,]" and "is likely to suffer debilitation without treatment"; (3) Respondent's "loss of touch with reality makes it difficult for him to exercise judgment in the conduct of his daily affairs"; and (4) Respondent is "at risk of harm outside the medical facility[,]" show that Respondent was dangerous to himself and that there was a reasonable probability that he would suffer imminent harm absent commitment.

Moreover, the trial court's findings that Respondent was "grossly irrational," "demonstrated severely impaired insight and judgment," and was "extremely psychotic" as of the hearing date show that Respondent was unable to care for himself, and thus likely to suffer harm in the near future, without treatment. These findings support that Respondent was unable "to properly care for his[] medical needs . . . and general affairs," and they thus "meet[] the test of dangerousness to self." *Lowery*, 110 N.C. App. at 72, 428 S.E.2d at 864.

Under N.C. Gen. Stat. § 122C-3(11), the trial court need only determine that a respondent is dangerous to themselves *or* dangerous to others to support commitment. Here, the findings sufficiently support the trial court's ultimate determination that Respondent was dangerous to himself, and thus we need not determine whether the findings of fact adequately support that Respondent was dangerous to others.

2. Maximum Commitment of 90 Days

Respondent next argues that the trial court erred by imposing a split commitment that exceeded the maximum statutory period of 90 days.

[2] As a preliminary matter, we first address the State's argument that Respondent's appeal of the commitment period is moot because "the commitment order . . . expired, . . . [and] no longer involves the kind of question challenging the involuntary commitment proceeding[.]" The State claims that Respondent essentially asks for the trial court "to retrieve the original order from the clerk's office, strike out the '90 days' ordered for outpatient commitment, enter some number between 1 and 60 . . . and then store the case file away again." The State further argues that Respondent waived appellate review when he failed to object at trial to the length of the commitment. We determine the State's claims to be meritless.

"When a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review." *In re E.D.*, 372 N.C. 111, 117, 827 S.E.2d 450, 454 (2019) (internal quotation marks and citations omitted). In *In re Carter*, 25 N.C. App. 442, 213 S.E.2d 409 (1975), this Court explained that

> the statute expressly provides that appeal may be had from a judgment of involuntary commitment in the district court to this court, as in civil cases. Since the statute also directs that the initial period of commitment may not exceed 90 days, . . . there would be little reason to provide a right of appeal if the appeal must be considered moot solely because the period of commitment expires before the appeal can be heard and determined in this court.

Id. at 444, 213 S.E.2d at 410. "[I]n order to challenge the improper commitment period contained in the . . . order, [Respondent] was required to appeal that [] order pursuant to N.C. Gen. Stat. § 122C–272 . . . ." *In re Webber*, 201 N.C. App. 212, 222, 689 S.E.2d 468, 476 (2009). Thus, an improper commitment period constitutes reversible error. *Id.* at 218, 689 S.E.2d at 473. ("By statute, the court was only authorized to order commitment . . . for 90 days . . . ."). Respondent's appeal of the length of his commitment is properly before this Court.

[3] N.C. Gen. Stat. § 122C-271 provides that a trial court "may order outpatient commitment for a period not in excess of 90 days[,]" "may order inpatient commitment at a 24-hour facility . . . for a period not in excess of 90 days[,]" or "may order a combination of inpatient and outpatient

commitment . . . for a period not in excess of 90 days." N.C. Gen. Stat. § 122C-271 (2019). Whether a trial court orders inpatient treatment, outpatient treatment, or a combination of both, the maximum commitment period cannot exceed 90 days. *Id.*

Here, the trial court committed Respondent to 30 days of inpatient treatment and 90 days of outpatient treatment, for a total commitment period of 120 days. This it could not do. As the trial court impermissibly ordered a commitment period in excess of the maximum allowed by N.C. Gen. Stat. § 122C-271, we reverse the 120-day commitment period ordered in this case.

III. Conclusion

As the trial court's findings of fact supported the ultimate finding that Respondent was a danger to himself, the trial court did not err in concluding that Respondent was dangerous to himself and ordering commitment. However, because the trial court impermissibly committed Respondent to a term in excess of the statutory maximum, we reverse the trial court's entry of a 120-day commitment period and remand the case to the trial court for entry of a commitment period in compliance with N.C. Gen. Stat. § 122C-271.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges STROUD and BERGER concur.

IN RE K.G.

[270 N.C. App. 423 (2020)]

IN THE MATTER OF K.G.

No. COA19-424

Filed 17 March 2020

Native Americans—Indian Child Welfare Act—notice—no evidence in record

Where a neglected child was removed from her mother's care and the mother indicated that she was of Cherokee ancestry, the trial court had reason to know the child may be an Indian child as defined in 25 U.S.C. § 1903(4). Because the record contained no evidence that the appropriate tribes actually received notice of the proceedings pursuant to the Indian Child Welfare Act, the matter was remanded so that the trial court could ensure that notice was sent and that the trial court did have subject matter over the case.

Appeal by Respondent-Mother from order entered 14 February 2019 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 19 February 2020.

Erika Hamby for petitioner-appellee Wilkes County Department of Social Services.

Steven S. Nelson for respondent-appellant mother.

Nelson Mullins Riley & Scarborough LLP, by Carrie A. Hanger, for guardian ad litem.

MURPHY, Judge.

"The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3. "[T]hrough this [clause] and other constitutional authority, Congress has plenary power over Indian affairs[.]" 25 U.S.C. § 1901(1) (1978). In recognition of that power—and in response to the "wholesale removal of Indian children from their homes"—Congress passed the Indian Child Welfare Act ("ICWA"), "which establishes federal standards that govern state-court child custody proceedings involving Indian children." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642, 186 L. Ed. 2d 729, 736 (2013).

Although the parties to this appeal present arguments on a number of issues, our analysis of this case need not go beyond the first issue

presented: whether the trial court erred in concluding ICWA did not apply to its *Permanency Planning Order* entered 14 February 2019. We hold the trial court erred because "the question of [its] jurisdiction under . . . ICWA cannot be resolved based on the evidence [in the] record." *In re: A.P.*, 818 S.E.2d 396, 400 (N.C. Ct. App. 2018) (internal quotation marks and citation omitted). We remand to confirm notice of these proceedings is provided to the relevant tribes and that the trial court has properly determined whether it has subject matter jurisdiction of this case.

Appellant argues the trial court failed to comply with ICWA's notice provisions because it did not ensure the record included "return receipts or other proof of actual delivery in the record to confirm delivery of the notices in compliance with 25 C.F.R. [§] 23[-]111." This provision, 25 C.F.R. § 23-111(a), is nearly identical to 25 U.S.C. § 1912(a); both describe the measures a state court must take to notice federally recognized tribes of involuntary proceedings that may involve an "Indian child," as that term is defined under 25 U.S.C.§ 1903(4) (2018).[1] Under ICWA:

> In any involuntary proceeding in a State court, where the court knows *or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . .

25 U.S.C. § 1912(a) (2018).

---

1. An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.§ 1903(4) (2018). The determination of whether a child is an Indian child "*is solely within the jurisdiction and authority of the Tribe* . . . ." 25 C.F.R. § 23.108(b) (2016) (emphasis added).

We interpreted ICWA's notice requirement as it is set out in the current federal guidelines most recently in *A.P.*, 818 S.E.2d at 400.[2] As is the case here, in *A.P.* the issue before us was, "[w]hether the evidence presented [to the trial court] should have caused [it] to have reason to know an 'Indian child' may be involved and trigger the notice requirement . . . ." *Id.* at 399. In *A.P.*, we reasoned ICWA:

> proscribes that once the court has reason to know the child could be an "Indian child," but does not have conclusive evidence, the court should confirm and "work with all of the Tribes . . . to verify whether the child is in fact a member." 25 C.F.R. § 23.107(b)(1). Federal law provides: "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary[.]" 25 U.S.C. § 1912(a). Further, a court must "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child.' " 25 C.F.R. § 23.107(b)(2).

Id. We held a trial court has "reason to know the child could be an 'Indian child,' " in instances where "it appears that the trial court had at least some reason to suspect that an Indian child may be involved." *Id.* (*quoting In re A.R.*, 227 N.C. App. 518, 523, 742 S.E.2d 629, 633 (2013)).

In *A.P.*, we also cited with approval our reasoning from *A.R.* that, "[t]hough from the record before us we believe it unlikely that [the juveniles] are subject to the ICWA, we prefer to err on the side of caution by remanding for the trial court to . . . ensure that the ICWA notification requirements, if any, are addressed . . . since failure to comply could later invalidate the court's actions." *A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *see also A.P.*, 818 S.E.2d at 399. We find this approach is consistent with ICWA's overall purpose of protecting "the best interests of Indian children and [promoting] the stability and security of Indian tribes and families[.]" 25 U.S.C. § 1902 (2018). Likewise, such a cautious approach is consistent with the federal guidelines promulgated with the latest major reworking of ICWA, which provides an example of a situation where a state court would be warranted in ceasing to treat a child as an "Indian child":

---

2. *See* 25 C.F.R. § 23.111 (2016) (effective 12 Dec. 2016); *In re L.W.S.*, 255 N.C. App 296, 298, 804 S.E.2d 816, 818-19, n. 3-4 (2017).

> If a Tribe fails to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has repeatedly sought the assistance of BIA in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child . . . based on the information it has available.

U.S. Dept. of the Interior, Bureau of Indian Affairs, RIN 1076-AF25, Indian Child Welfare Act Proceedings 109 (2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-034238.pdf (hereinafter Indian Child Welfare Act Proceedings).

Here, the record shows the trial court had reason to know an "Indian child" may be involved. In its *Order on Need for Continued Nonsecure Custody*, entered 14 August 2017, the trial court noted "The mother indicates that she is of Cherokee ancestry, but did not know a specific tribe. The Department is sending notice to both the Eastern Band Cherokee as well as Cherokee Nation." Although it had reason to know an "Indian child" may be involved in these proceedings, the trial court did not ensure that the Cherokee Nation or the Eastern Band of Cherokee Indians were actually notified.

For example, there is no evidence of multiple repeated requests for verification to the relevant tribes, or that the agency sought the assistance of the Bureau of Indian Affairs ("BIA") in contacting the Tribes. In fact, the record shows DSS sent notice to the Cherokee Nation and Eastern Band of Cherokee Indians, but does not indicate DSS or the trial court ever received confirmation that either Tribe even received the notice, or that DSS sent any additional notices to the Tribes or the BIA. This is, as Appellant notes, inconsistent with ICWA's mandate that trial courts ensure that "[a]n original or a copy of each notice sent . . . is filed with the court *together with any return receipts or other proof of service*." 25 C.F.R. § 23.111(a)(2) (2016) (emphasis added).

"[T]he question of [the trial] court's jurisdiction under . . . ICWA cannot be resolved based on the evidence [in the] record." *A.P.*, 818 S.E.2d at 400 (internal quotation marks and citation omitted). The record does not indicate the trial court ensured ICWA's notification requirements were complied with. For instance, the record does not show "a Tribe fail[ed] to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), [or] the agency ha[d] repeatedly sought the assistance of BIA in contacting the Tribe[s] . . . ." Indian Child Welfare Act Proceedings 109. "We

remand to the trial court to issue an order requiring notice to be sent . . . as required by 25 U.S.C. § 1912(a), and which complies with the standards outlined in 25 C.F.R. § 23.111 . . . ." *Id.*

REMANDED.

Judges DIETZ and COLLINS concur.

IN THE MATTER OF N.U.

No. COA19-652

Filed 17 March 2020

Mental Illness—involuntary commitment—danger to self—sufficiency of evidence and findings

An involuntary commitment order was reversed where neither the evidence nor the trial court's findings of fact supported the conclusion that respondent was dangerous to herself. While evidence of respondent's schizophrenia and prior involuntary commitments showed that she had been a danger to herself in the past, that history alone could not support a finding that she would be a danger to herself in the future, especially where other evidence showed respondent's mental health had recently stabilized.

Appeal by Respondent from order entered 17 January 2019 by Judge Adam S. Keith in Granville County District Court. Heard in the Court of Appeals 19 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for the Respondent-Appellant.

COLLINS, Judge.

Respondent N.U. appeals from an involuntary commitment order committing her to inpatient treatment, followed by outpatient treatment. Respondent argues that the trial court erred because neither the evidence nor the findings of fact supported the trial court's conclusion that

Respondent was dangerous to herself. As neither the record evidence nor the findings support the trial court's conclusion that Respondent was dangerous to herself, we reverse the trial court's involuntary commitment order.

I. Background

On 5 November 2018, Respondent presented in the emergency department at UNC Rex Healthcare. Dr. Jun He, the physician on call in the emergency department on 5 November 2018, observed Respondent's behavior and became concerned for her mental health. Dr. He filed an affidavit and petition for involuntary commitment, affirming that Respondent was "mentally ill and dangerous to self" as she has schizoaffective disorder, presented in the emergency department with "bizarre, disorganized behavior," and stated that Respondent was "aggressive (kicking, spitting, hitting the staff)" and "adamantly refuse[d] to take any medication, . . . [and] has no insight of her mental illness."

That same day, Respondent underwent an "Examination and Recommendation to Determine Necessity for Involuntary Commitment" ("ERIC"). Dr. He found that Respondent "presented with bizarre, aggressive behaviors . . . , she continues to be psychotically paranoid and aggressive, has NO insight, refused all her medication, [and] thus needs to . . . be referred to inp[atient] psych[iatric] hospital." Dr. He recommended that Respondent be committed inpatient for seven days. Following the ERIC, a magistrate judge ordered Respondent to be committed inpatient at Central Regional Hospital.

On 8 November 2018, UNC Rex Healthcare transferred Respondent to the care of Central Regional Hospital. On 8 and 9 November, Respondent underwent two more ERICs. After the 9 November ERIC, Dr. Stephen Panyko, a physician with Central Regional Hospital, determined that Respondent has "multiple past psychiatric admissions, including 3 admissions to N.C. state hospitals within the past year," and that she had "threatened staff [at UNC Rex Healthcare], . . . and required [forced] meds and mechanical restraints. She continues to be paranoid, verbally aggressive, . . . [and] is at high risk of harm to self and others . . . ." Panyko recommended that Respondent be committed for inpatient treatment for 60 days and committed for outpatient treatment for 30 days.

On 15 November 2018, the trial court found that Respondent was mentally ill and dangerous to herself and others, and ordered Respondent committed for inpatient treatment for 60 days and committed for outpatient treatment for 30 days. Respondent did not appeal this commitment order.

On 4 January 2019, Respondent underwent another ERIC at Central Regional Hospital. It was determined that Respondent has "schizophrenia" and that "continued hospitalization is warranted as [she] has little insight and is at risk for decompensation without medication, as she has a history of repeated hospitalizations this past year, as such she represents a danger to herself." On 9 January 2019, Dr. Christina Murray filed the ERIC and recommended that Respondent be committed for inpatient treatment for an additional 30 days and committed for outpatient treatment for an additional 60 days.

The recommitment hearing took place on 17 January 2019. Panyko was admitted as an expert in psychiatry and testified as Respondent's attending physician. Panyko testified to Respondent's history of commitments, her behavior and progress while committed for inpatient treatment, explained that he had completed a petition for guardianship, and that the guardianship hearing would take place in February 2019. Panyko also testified that Respondent was "stable" as of 17 January 2019 and was not experiencing any "acute paranoia or agitation."

Following Panyko's testimony, Respondent's attorney made a motion to dismiss, arguing that Respondent no longer met the criteria listed in N.C. Gen. Stat. § 122C. Respondent then took the stand to testify on her own behalf. She affirmed that she had secure housing, was taking her medication and would continue to take her medication once released, and that she was willing to see a doctor and receive outpatient treatment upon release. She also explained that she had stopped taking her medication in the past due to homelessness and because she did not have a doctor who would prescribe the medications for her. Respondent acknowledged that her past commitments had been based on her failure to take her necessary medications. Respondent's attorney renewed the motion to dismiss and again argued that Respondent no longer met the criteria listed in § 122C because Respondent was "at baseline, she is stable, and she is not acute." The trial court denied Respondent's motion.

The trial court made oral findings of fact that (1) Respondent lacked insight into her mental illness; (2) Respondent had four psychiatric stays within the past two years and which all resulted in readmission; (3) within the relevant past, Respondent had been unable to care for herself and stay on her medication; and (4) there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment is given." The trial court concluded that Respondent was mentally ill and a danger to herself. The trial court incorporated the oral findings of fact into its

written order, and ordered Respondent committed inpatient for 30 days and committed outpatient for 60 days.

That same day, on 17 January 2019, Respondent appealed the recommitment order.

II. Discussion

Respondent argues that the trial court erred by involuntarily committing her when neither the evidence nor the trial court's findings of fact supported the conclusion that she was dangerous to herself.

As an initial matter, we note that Respondent's appeal is not moot although her commitment period has lapsed because " 'the challenged judgment may cause collateral legal consequences for the appellant.' " *In re J.P.S.*, 823 S.E.2d 917, 920 (N.C. Ct. App. 2019) (quoting *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008)). "Such collateral legal consequences might include use of the judgment to attack the capacity . . . of a defendant . . . or to form the basis for a future commitment[,]" and thus the appeal is properly before this Court for review. *Id.*

"To support an involuntary commitment order, the trial court is required to 'find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is dangerous to himself or others.' " *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016) (quoting *In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863-64 (1993)). "These two distinct facts are the 'ultimate findings' on which we focus our review." *Id.* (citation omitted). These ultimate findings, standing alone, are insufficient to support the trial court's order; the trial court must also "record the facts upon which its ultimate findings are based." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980); N.C. Gen. Stat. § 122C-268(j) (2019). We must "determine whether there was any competent evidence to support the facts recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self . . . were supported by the facts recorded in the order." *Id.* (internal quotation marks and emphasis omitted).

N.C. Gen. Stat. § 122C-3(11) provides, in relevant part, that a person is dangerous to himself if, within the relevant past, he has acted in such a way as to show:

> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social

> relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself . . . .

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2019).[1]

Here, the trial court's written findings of fact stated that:

1. The Respondent has had 4 seperate [sic] state psychiatric hospitalizations within the relevant past.
2. She is unable to care for herself for daily responsibilities and taking medications.
3. The Respondent would likely decompensate if discharged today.
4. She has the mental illness of schizophrenia.

The trial court also incorporated by reference any oral findings and facts made during the hearing. The trial court's oral findings were that (1) Respondent lacked insight into her mental illness; (2) Respondent had four psychiatric stays within the past two years and which all resulted in readmission; (3) within the relevant past, Respondent had been unable to care for herself and stay on her medication; and (4) there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment is given."

The findings that Respondent "would likely decompensate if discharged today" and that there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment was given" are not supported by any evidence in the record. Panyko testified about Respondent's

---

1. Subsection 11(a) was amended effective 1 October 2019 to alter pronouns and word choice. 2019 N.C. Sess. Laws ch. 76, § 1. We apply and quote in this opinion the version of the statute extant at the time the trial court conducted the hearing. We note that the 2019 amendment made no substantive change to the relevant portions of the statute.

history of mental illness and prior noncompliance, but stated that as of the hearing date, Respondent "has gotten stable enough we've actually been able to decrease her oral dose a little bit and are in the process of potentially still being able to do that." Panyko then stated, "I believe that she is [at her baseline] . . . . She is stable." Panyko testified that he still recommended 30 days inpatient commitment for Respondent because it would "get us . . . importantly through the guardianship hearing, which . . . is February 7th."

On cross-examination, Respondent's attorney asked Panyko to explain how Respondent was a danger to herself when his testimony was that she was stable and not acute. Panyko replied that, in the past, "[Respondent] has stopped taking medications . . . and become dangerous to herself." When questioned as to whether Respondent was acute or a danger to herself "at this present time," Panyko answered, "[T]he patient's symptoms have been well treated . . . . She's not having acute paranoia or agitation at this time." And that Respondent "[was stabilized] within the past three weeks or so" to the extent that she was "able to start to come down on that dose [of haldol]."

Panyko's testimony shows that, as of the hearing date, Respondent was stabilized, medicated, and not suffering from any acute symptoms. While evidence of Respondent's mental illness and involuntary commitment history show that she had been a danger to herself in the past, that history alone cannot support a finding that Respondent would be a danger to herself in the future. *See In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012) (determining that respondent's history of bipolar disorder and prior involuntary commitments failed to show that she would be a danger to herself within the future). After reviewing Panyko's testimony and Respondent's testimony, there is no record evidence to support the findings that Respondent "would likely decompensate if discharged today" or that there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment was given." Thus, those findings cannot support the trial court's ultimate finding that Respondent was dangerous to herself.

The trial court's findings that Respondent has "had four . . . psychiatric stays" within the past two years and that she "has the mental illness of schizophrenia" do not support the conclusion she would be a danger to herself "within the near future." *Id.* Similarly, the findings that Respondent lacks "insight into her mental illness" and is "unable to care for herself for daily responsibilities and taking medications" are also

insufficient to show that Respondent was a danger to herself as there is "no evidence that Respondent's refusal to take [her] medication creates a serious health risk in the near future." *See W.R.D.*, 248 N.C. App. at 516, 790 S.E.2d at 348 (determining that findings that respondent "refus[ed] to acknowledge his mental illness, and refus[ed] to take his prescription medication" did not demonstrate "that the health risk will occur in the near future . . . .") (internal quotation marks and citation omitted).

III. Conclusion

As neither the record evidence nor the findings of fact support the trial court's conclusion that Respondent was dangerous to herself, we reverse the trial court's involuntary commitment order.

REVERSED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DERRICK CASH, DEFENDANT, AND 1ST ATLANTIC SURETY COMPANY, SURETY

No. COA19-460

Filed 17 March 2020

1. Bail and Pretrial Release—motions to set aside bond forfeitures—signed by corporate officer—unauthorized practice of law

A corporation that posted a bail bond for a criminal defendant engaged in the unauthorized practice of law (pursuant to N.C.G.S. § 84-5) when it allowed one of its corporate officers to sign and file a motion to set aside a bond forfeiture. Because the officer was not authorized to sign the motion, the trial court properly denied the motion.

2. Bail and Pretrial Release—motions to set aside bond forfeitures—sanctions—unauthorized signature

The trial court erred by imposing a sanction upon a corporation for failure to sign a motion to set aside a bond forfeiture (pursuant to N.C.G.S. § 15A-544.5(d)(8)) where the motion was signed—but signed by an unauthorized person.

Appeal by Surety from order entered 11 March 2019 by Judge James Hardin in Granville County Superior Court. Heard in the Court of Appeals 13 November 2019.

Hill Law, PLLC, by M. Brad Hill, and Ragsdale Liggett PLLC, by Mary M. Webb and Amie C. Sivon, for Surety-Appellant.

Tharrington Smith, L.L.P., by Stephen G. Rawson and Colin Shive, for Appellee Granville County Board of Education.

COLLINS, Judge.

1st Atlantic Surety Company ("Surety") appeals from the trial court's order (1) denying its motion to set aside a bond forfeiture and (2) granting the Granville County Board of Education's (the "Board") motion for sanctions. Surety contends that the trial court erred by (1) concluding that an unauthorized party had signed the motion to set aside the bond forfeiture and (2) granting the Board's motion for sanctions based upon that ruling. Because we conclude that signing and filing a motion to set aside a bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5, we affirm the trial court's denial of Surety's motion to set aside the bond forfeiture. However, we reverse the trial court's order imposing a sanction against Surety.

I. Background

Defendant Derrick Cash was arrested and charged with conspiracy to sell or deliver cocaine in early 2018. On 4 June 2018, Defendant was released from custody after Surety—through bail agent Mary E. Faines—posted a bond securing Defendant's release, pending disposition of his criminal charges in Granville County Superior Court.

On 29 August 2018, Defendant failed to appear in court as scheduled, and the trial court issued an order for Defendant's arrest for his failure to appear. On 31 August 2018, the trial court issued a bond forfeiture notice and the clerk of superior court mailed it to Surety.

On 28 January 2019, Surety moved to set aside the bond forfeiture (the "Motion") pursuant to N.C. Gen. Stat. § 15A-544.5(b)(4), which states that a forfeiture "shall be set aside" if "[t]he defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record." N.C. Gen. Stat. § 15A-544.5(b)(4) (2019). The Motion appended a certificate signed by an Oxford Police

Department officer indicating that he served Defendant with the arrest order on 12 September 2018. The Motion was signed on Surety's behalf by Derrick Harrington as a "corporate officer" of Surety.

The Board[1] filed an objection to the Motion on 7 February 2019. In its objection, the Board asked the trial court to deny the Motion "because the [Motion] was not signed as required by N.C. Gen. Stat. § 15A-544.5." The Board also asked the trial court to impose sanctions upon Surety for this purported deficiency.

On 11 March 2018, the trial court entered an order denying the Motion. The trial court concluded that N.C. Gen. Stat. § 15A-544.5(d)(1) establishes which parties can sign an order to set aside a bond forfeiture, and that because Harrington was neither a bail agent nor a licensed attorney, he was not authorized to sign the Motion on Surety's behalf. The trial court accordingly denied the Motion and sanctioned Surety in the amount of $1000.

Surety timely appealed.

II. Discussion

On appeal from an order denying a motion to set aside a bond forfeiture, "the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009). "Questions of law, including matters of statutory construction, are reviewed de novo." *State v. Knight*, 255 N.C. App. 802, 804, 805 S.E.2d 751, 753 (2017).

A. Denial of bond forfeiture motion

[1] The facts are not in dispute. Rather, the parties' arguments concern whether, as a matter of law, it was proper for Harrington, as a corporate officer of Surety, to sign and file the Motion on Surety's behalf. The Board argues that making a motion to set aside a bond forfeiture constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5 and thus Harrington, who was not a licensed attorney, was prohibited from signing and filing the Motion on Surety's behalf. Surety, on the other hand, argues that making a motion to set aside a bond forfeiture is not the practice of law, and that Harrington was therefore authorized as a corporate officer to sign and file the Motion on Surety's behalf.

---

1. The Board, as beneficiary of the forfeiture pursuant to Article XI, section 7, of the North Carolina Constitution, has statutory authority pursuant to N.C. Gen. Stat. § 544.5(d)(3) to appear before the court to contest motions to set aside bond forfeitures.

Article 26 of the North Carolina Criminal Procedure Act contains the statutory framework governing bail bonds in our State. N.C. Gen. Stat. § 15A-544.5, the relevant statute governing how and when bond forfeitures can be set aside, reads as follows:

> (1) At any time before the expiration of 150 days after the date on which notice was given under [N.C. Gen. Stat. §] 15A-544.4, any of the following parties on a bail bond may make a written motion that the forfeiture be set aside:
>
> (a) The defendant.
>
> (b) Any surety.
>
> (c) A professional bondsman or a runner acting on behalf of a professional bondsman.
>
> (d) A bail agent acting on behalf of an insurance company.
>
> (2) The motion shall be filed in the office of the clerk of superior court of the county in which the forfeiture was entered.

N.C. Gen. Stat. § 15A-544.5(d) (2019). "Surety" is defined in Article 26's "Definitions" section as including an "insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company." N.C. Gen. Stat. § 15A-531(8)(a) (2019). While N.C. Gen. Stat. § 15A-544.5(d)(1) expressly authorizes a surety to make a motion to set aside a bond forfeiture, it does not expressly indicate whether such motion may or must be made by an attorney, *see Lexis-Nexis*, *Div. of Reed Elsevier*, *Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002) (adopting the general rule that "in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*"), or made by a corporate officer, *see State v. Pledger*, 257 N.C. 634, 637, 127 S.E.2d 337, 339 (1962) ("A corporation can act only through its officers, agents and employees."). We must thus determine whether signing and filing such motion constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5.

Chapter 84 of our General Statutes governs attorneys-at-law. N.C. Gen. Stat. § 84-5 specifically concerns the "practice of law by corporation[s]" and states, in relevant part, "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . and no corporation shall . . . draw

agreements, or other legal documents . . . .” N.C. Gen. Stat. § 84-5 (2019). “The phrase ‘practice law’ as used in . . . Chapter [84] is defined to be performing any legal service for any other person, firm or corporation, ... specifically including . . . the preparation and filing of petitions for use in any court . . . .” N.C. Gen. Stat. § 84-2.1 (2019).

As “a written motion that a forfeiture be set aside” to be “filed in the office of the clerk of superior court” is, by its plain language, a “legal document” and a “petition for use in” court, signing and filing a motion to set aside a bond forfeiture under N.C. Gen. Stat. § 15A-544.5(d) is the practice of law within the meaning of N.C. Gen. Stat. § 84-5. As a corporation is prohibited from practicing law, and because “a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*[,]” *Lexis-Nexis*, 155 N.C. App. at 209, 573 S.E.2d at 549, Harrington was not authorized to sign and file the Motion on Surety’s behalf.

Surety argues that *State ex rel. Guilford Cty. Bd. of Educ. v. Herbin*, 215 N.C. App. 348, 716 S.E.2d 35 (2011), controls the present case. We disagree. In *Herbin*, this Court held that “filing a motion to set aside a bond forfeiture is not considered an appearance before a judicial body in the manner contemplated by [N.C. Gen. Stat.] § 84-4 and, therefore, does not constitute the practice of law.” *Id.* at 355, 716 S.E.2d at 39. *Herbin* concerned whether an *individual bail agent* was prohibited by N.C. Gen. Stat. § 84-4, which governs the unauthorized practice of law by individuals, from filing a motion to set aside a bond forfeiture. *Herbin* does not apply here where Surety is a corporation that violated N.C. Gen. Stat. § 84-5, which governs the unauthorized practice of law by corporations.

Because we conclude that Harrington’s filing and signing the Motion on Surety’s behalf amounted to the unauthorized practice of law within the meaning of N.C. Gen. Stat. § 84-5, and thus Harrington was not authorized to sign and file the Motion, we affirm the trial court’s order denying Surety’s Motion.

B. Sanctions

[2] Surety next argues that the trial court erred by imposing a sanction for failing to sign the Motion. We agree.

N.C. Gen. Stat. § 15A-544.5(d)(8) provides:

> If at the hearing the court determines that the motion to set aside *was not signed* . . ., the court may order monetary sanctions against the surety filing the motion, unless

> the court also finds that the failure to sign the motion or attach the required documentation was unintentional.

N.C. Gen. Stat. § 15A-544.5(d)(8) (2019) (emphasis added).

There is no dispute that Surety's Motion was signed. The sole issue on appeal is the legal significance and validity of the Motion's signatory. The trial court made no findings to support its conclusion that a sanction be imposed, or its necessarily-implied conclusion that an *unauthorized* signature is the equivalent of *no* signature. We thus conclude that the trial court committed an error of law in making this equivalency and by ordering Surety to pay a sanction, and reverse that portion of the trial court's order.

III. Conclusion

Because we conclude that Surety engaged in the unauthorized practice of law within the meaning of N.C. Gen. Stat. § 84-5 by allowing Harrington, its corporate officer, to sign and file the Motion, we conclude that the trial court did not err by denying the Motion. However, because we conclude that the trial court erred in allowing the Board's motion for sanctions and imposing a sanction against Surety, we reverse that portion of the order.

AFFIRMED IN PART. REVERSED IN PART AND REMANDED.

Judges TYSON and YOUNG concur.

STATE OF NORTH CAROLINA
v.
JUSTIN BLAKE CROMPTON, DEFENDANT

No. COA19-504

Filed 17 March 2020

1. Probation and Parole—probation revocation—absconding—willfulness

The trial court did not abuse its discretion by revoking defendant's probation for willfully absconding where defendant cancelled a meeting with his probation officer via voicemail and missed two additional appointments and where the probation officer was unable to locate or contact defendant by visiting defendant's last known address twice, by calling all of defendant's contact numbers, and by checking to see whether defendant was incarcerated, at the local hospital, or at the vocational program defendant was ordered to attend.

2. Probation and Parole—probation revocation—discretion to order concurrent sentences

After finding that defendant had willfully absconded in violation of the terms of his probation, the trial court did not abuse its discretion by declining to modify defendant's original judgment to have his suspended sentences run concurrently rather than consecutively because the trial court recognized its authority to modify but declined to do so out of deference to the original sentencing judge.

3. Judgments—criminal—clerical error—probation violation—finding of additional violations

After finding that defendant willfully absconded in violation of the terms of his probation in open court, the trial court committed a clerical error by finding two additional probation violations in its written judgment. The trial court's only finding in open court related to absconding, so the matter was remanded for the limited purpose of correcting the written judgment to accurately reflect the finding made in open court.

Chief Judge McGEE concurring in part and dissenting in part.

Appeal by defendant from judgments entered 25 October 2018 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 12 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for the State.

Office of the Appellate Defender, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Sterling P. Rozear, for defendant-appellant.

BERGER, Judge.

On October 25, 2018, Justin Blake Crompton ("Defendant") had his probation revoked and his suspended sentences activated after the trial court found that Defendant had absconded from supervision pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). As a result of his suspended sentences being activated, Defendant was ordered to serve a total of 36 to 102 months in prison for nine separate offenses. On appeal, Defendant argues (1) the trial court abused its discretion when it revoked Defendant's probation and activated his suspended sentences; (2) the trial court abused its discretion when it declined to consolidate Defendant's active sentences upon revocation of probation; and (3) the judgments which revoked probation contained clerical errors regarding the violations found. We conclude that the trial court did not abuse its discretion when it revoked Defendant's probation or required Defendant to serve consecutive sentences. However, we remand for the limited purpose of correcting clerical errors in the written judgments.

Factual and Procedural Background

On April 24, 2017, Defendant pleaded guilty to nine separate charges involving breaking and entering, felony larceny, obtaining property by false pretense, carrying a concealed weapon, and possession of a firearm with an altered serial number. The trial court imposed six judgments with separate sentences totaling 36 to 102 months in prison. The trial court suspended Defendant's sentences and placed him on probation for 36 months.

On June 28, 2017, Defendant's probation officer filed violation reports which alleged several revocation-ineligible parole violations. On September 7, 2017, the trial court found that Defendant violated his probation and entered orders which modified the monetary conditions of Defendant's probation and required Defendant to serve ninety days in prison followed by ninety days of house arrest.

On May 23, 2018, additional violation reports were filed which alleged Defendant "willfully violated," among other things:

> 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 FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CERTIFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/19.

The matter came on for hearing on October 22, 2018. At the hearing, Defendant waived a formal reading of the violation reports and admitted the violations. Defendant's probation officer testified that Defendant had failed to report as directed by the officer, failed to return the officer's phone calls, and failed to provide the officer with a verifiable address.

The officer further testified that on May 14, 2018, he received a voicemail from Defendant informing the officer that he would not be attending an appointment that day. The probation officer returned Defendant's call and left a voicemail informing Defendant to report two days later. Defendant's probation officer subsequently initiated an absconding investigation. During this investigation, the officer went to Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. According to the probation officer, Defendant also failed to report for scheduled appointments on May 16 and May 23 without contacting the probation officer.

After exhausting all available avenues of contacting Defendant, the probation officer entered an absconding violation on May 23, 2018. At the violation hearing, the officer recommended revocation of Defendant's probation and requested that the sentences not be consolidated.

At the close of the hearing, the trial court found that Defendant had "willfully and intentionally violated the terms and conditions of the probationary sentence by absconding." The court revoked Defendant's probation and activated Defendant's suspended sentences as originally entered on April 24, 2017. The trial court entered written judgments against Defendant on October 25, 2018. Defendant timely appeals.

Analysis

On appeal, Defendant argues (1) the trial court abused its discretion when it revoked Defendant's probation and activated his suspended sentences; (2) the trial court abused its discretion when it declined to consolidate Defendant's active sentences upon revocation of probation; and (3) the judgments which revoked Defendant's probation contain clerical errors. We conclude that the trial court did not abuse its discretion when it revoked Defendant's probation or when it declined to consolidate his active sentences. However, we remand for the limited purpose of correcting clerical errors in the written judgments.

I. Revocation of Probation and Activation of Suspended Sentences

[1] This Court reviews the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). The State must produce sufficient evidence "to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant willfully violated a valid condition upon which probation can be revoked." *State v. Newsome*, ___ N.C. App. ___, ___, 828 S.E.2d 495, 498 (2019) (*purgandum*). An 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. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted).

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *Murchison*, 367 N.C. at 463, 758 S.E.2d at 358 (citation and quotation marks omitted). "A probation revocation proceeding is not a formal criminal prosecution," and an "alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citations and quotation marks omitted).

N.C. Gen. Stat. § 15A-1343(b) provides the regular conditions of probation that apply to all defendants absent a specific exemption by the presiding judge. Relevant here, a probationer must:

> (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

> (3a) Not abscond 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-1343(b)(3), (3a) (2019).

A violation of Section 15A-1343(b)(3), *without more*, would not merit revocation of a defendant's probation unless the requirements of Section 15A-1344(d2) have also been met. *State v. Williams*, 243 N.C. App. 198, 204, 776 S.E.2d 741, 745 (2015). Pursuant to Section 15A-1344(d2), a defendant's parole may be revoked following a violation of Section 15A-1343(b)(3) where the defendant has already served two periods of confinement stemming from other parole violations. N.C. Gen. Stat. § 15A-1344(d2) (2019). However, where the trial court finds that a defendant has absconded in violation of Section 15A-1343(b)(3a), then the trial court may revoke probation and activate a defendant's suspended sentence based solely upon this finding. N.C. Gen. Stat. § 15A-1344(a); *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498.

Under the plain language of Section 15A-1343(b)(3a), a defendant "absconds" by either (1) "willfully avoiding supervision" or (2) "willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). Although Section 15A-1343 does not define "willfully," the term is well-defined by our case law. "When used in criminal statutes, 'willful' has been defined as 'the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law.' " *State v. Bradsher*, 255 N.C. App. 625, 633, 805 S.E.2d 191, 196 (2017) (quoting *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982)). Additionally, we note that establishing a defendant's willful intent "is seldom provable by direct evidence and must usually be shown through circumstantial evidence." *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (*purgandum*). In determining the presence or absence of the element of intent, the fact finder may consider the acts and conduct of the defendant and general circumstances existing at the time of the charged probation violation. *See id.* at 332, 536 S.E2d at 634.

Where a probation violation report specifically alleges that a defendant has absconded and the State brings forth competent evidence establishing the violation, then the State has met the burden required of Section 15A-1344(a) to warrant revocation of a defendant's probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 499-500. Once the State has met its burden, the task falls upon the defendant to demonstrate his

inability to comply with the terms of his probation. *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012). Phrased differently, the task falls upon the defendant to demonstrate that his noncompliance was not "willful."

In this case, the probation officer's violation report specifically alleged, and the State presented competent evidence to support the trial court's finding, that Defendant violated the conditions of his probation by absconding. At the revocation hearing, the officer testified that Defendant had failed to report as directed by the officer, failed to return the officer's phone calls, and failed to provide the officer with a verifiable address. Based on these violations of Section 15A-1343(b)(3), the officer initiated an absconding investigation to determine whether Defendant was also in violation of Section 15A-1343(b)(3a).

Pursuant to this investigation, Defendant's probation officer exhausted all available avenues of contacting Defendant. At trial, Defendant's probation officer testified that he went to Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. While the investigation was ongoing, Defendant also failed to report to scheduled appointments on May 16 and May 23 without contacting the officer. Defendant never made contact with his probation officer, and the officer was completely unaware of Defendant's whereabouts from at least May 14, 2018 to May 23, 2018. Based upon Defendant's actions, on May 23, 2018, the probation officer entered an absconding violation.

Importantly, as discussed above, the State does not bear the burden of proving that Defendant absconded beyond a reasonable doubt. *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. Rather, the State is merely required to produce sufficient evidence to satisfy the trial court in the exercise of its sound discretion. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. Cognizant of this burden, we conclude the State presented sufficient competent evidence by which the trial court could find that Defendant absconded by willfully avoiding supervision or willfully making his whereabouts unknown to his probation officer in violation of Section 15A-1343(b)(3a).

Relying on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018), our dissenting colleague contends that the State has failed to present sufficient evidence to support a finding that Defendant absconded in

violation of Section 15A-1343(b)(3a). The dissent's reliance on these cases is misplaced.

In *Williams*, our Court concluded that the State failed to carry its burden of showing a defendant had absconded from supervision where the violation report entered against the defendant failed to specifically allege a violation of Section 15A-1343(b)(3a) and the defendant's probation officer made telephone contact with the defendant on several occasions. 243 N.C. App. at 205, 776 S.E.2d at 746. In fact, in that case, the State did not even argue that the defendant had absconded from supervision. *Id.* at 200, 776 S.E.2d at 743. Accordingly, *Williams* stands for the proposition that a defendant's probation violations, other than violations listed in Section 15A-1344(a), cannot serve as the basis for revocation of the defendant's probation unless the requirements of Section 15A-1344(d2) are also met. This conclusion is plainly consistent with the language of Section 15A-1344(a). N.C. Gen. Stat. § 15A-1344(a) ("The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2).").

However, the dissent would now have us expand the holding of *Williams* to conclude that a violation report alleging *willful* violations of Section 15A-1343(b)(3) which together amount to the defendant "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown to the supervising probation officer" also fail to qualify as "absconding" within the meaning of Section 15A-1343(b)(3a). Such an interpretation of *Williams* runs counter to the plain language of Section 15A-1343(b) and would work to eliminate absconding as a ground for probation revocation in our State.

The distinction between a violation of Section 15A-1343(b)(3) and 15A-1343(b)(3a) is primarily one of *mens rea*. A defendant does not have to act "willfully" or wrongfully "without justification or excuse" to be found in violation of the conditions of Section 15A-1343(b)(3). N.C. Gen. Stat. § 15A-1343(b)(3); *see State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation and quotation marks omitted) (defining "willful"). For instance, in *State v. Johnson*, a defendant asked to reschedule a probation appointment because he lacked transportation, and the probation officer declined the request. 246 N.C. App. 139, 140, 783 S.E.2d 21, 23 (2016). After the defendant failed to appear at the appointment, the officer filed a violation report for absconding and the trial court subsequently revoked the defendant's probation. *Id.* at 140, 783 S.E.2d at 23. On appeal, our Court determined that the defendant's actions "while clearly a violation of [Section] 15A-1343(b)(3), . . . do not rise

to 'absconding supervision' in violation of [Section] 15A-1343(b)(3a)." *Id*. at 145, 783 S.E.2d at 25. According to this Court,

> [a]llowing actions which explicitly violate a regular or special condition of probation other than those found in [Section] 15A-1343(b)(1) or [Section] 15A-1343(b)(3a) to also serve, *without the State showing more*, as a violation of [Section] 15A-1343(b)(1) or [Section] 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in [Section] 15A-1344(d2).

Id. at 146, 783 S.E.2d at 26 (emphasis added).

However, in our case, the State did not merely allege violations of Section 15A-1343(b)(3). Where a violation report alleges that willful violations of Section 15A-1343(b)(3) together amount to the defendant "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown" in violation of Section 15A-1343(b)(3a), and the State subsequently proffers sufficient evidence to establish those willful violations, then revocation of the defendant's probation should be left to the sound discretion of the trial court. *See* N.C. Gen. Stat. § 15A-1344(a); *State v. Mills*, ___ N.C. App. ___, ___ S.E.2d ___, ___, COA 19-597, 2020 N.C. App. LEXIS 142, **7-8 (considering violations of Section 15A-1343(b)(3) in determining a defendant absconded in violation of Section 15A-1343(b)(3a)). In this case, the State undoubtedly made that additional showing required by Section 15A-1343(b)(3a) and contemplated by this Court in *Johnson*. Therefore, this case plainly falls beyond the scope of *Williams*.

Not only would the dissent's expanded reading of *Williams* fail to align with the plain language of Sections 15A-1343(b) and 15A-1344(a), it would also operate to eliminate absconding as a ground for probation revocation. As a practical matter, those conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of "avoiding supervision" or "making [one's] whereabouts unknown." A defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address.

Accordingly, should we adopt a reading of *Williams* that prevents the State from using the language of Section 15A-1343(b)(3) to describe violations of Section 15A-1343(b)(3a), then it is unclear what exactly would continue to constitute "absconding" within the meaning of Section

15A-1343(b)(3a). As a result, violations of Section 15A-1343(b)(3a) would likely cease to be allowed as a ground for probation revocation.

Alternatively, our dissenting colleague relies upon *Melton* to argue that the State has failed to sufficiently show that Defendant acted "willfully" in violation of Section 15A-1343(b)(3a).

In *Melton*, this Court held that the State failed to present competent evidence that a defendant willfully violated Section 15A-1343(b)(3a) where "the probation officer could not testify with any specificity" and "the State's evidence only include[d] that a defendant failed to attend scheduled meetings, and the probation officer [was] unable to reach a defendant after merely two days of attempts, only leaving messages with a defendant's relatives." 258 N.C. App. 134, 140, 811 S.E.2d 678, 682-83 (2018).

Relying on *Melton*, the dissent contends that the evidence produced by the State was insufficient for the trial court to conclude that Defendant willfully violated Section 15A-1343(b)(3a) because the State failed to show that "Defendant[,] in fact[,] knew Defendant's probation officer was attempting to contact him." However, the State's evidence was more than sufficient to allow for the reasonable inference that Defendant was aware his probation officer was attempting to contact him, knew how to contact his probation officer, and willfully failed to make himself available for supervision.

The State was not required to prove beyond a reasonable doubt that Defendant willfully violated Section 15A-1343(b)(3a). *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. In a probation revocation hearing, the State must only provide sufficient evidence "to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant willfully violated a valid condition upon which probation can be revoked." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498 (*purgandum*). Neither was the State required to produce direct evidence of Defendant's willful intent. *Walston*, 140 N.C. App. at 332, 536 S.E.2d at 633. As previously discussed, establishing a defendant's willful intent "is seldom provable by direct evidence and must usually be shown through circumstantial evidence." *Id.* at 332, 536 S.E.2d at 633 (*purgandum*).

In the instant case, the evidence put forth by the State was much more compelling than that found in *Melton*. Defendant's probation officer received a voicemail from Defendant informing the officer that he would not be attending an appointment on May 14, 2018. That same day, the probation officer returned Defendant's call and left a voicemail informing Defendant to report two days later. From this evidence, the

trial court could reasonably infer that Defendant was aware his probation officer was attempting to make contact. As discussed at length above, the officer never again heard from Defendant, even though Defendant knew he was contacted by his probation officer and knew how to contact his probation officer.

Moreover, Defendant's probation officer was completely unaware of Defendant's whereabouts and exhausted all available avenues of contacting Defendant over the course of ten days. During the officer's absconding investigation, the officer visited Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. While the investigation was ongoing, Defendant also failed to report to scheduled appointments on May 16 and May 23 without contacting the officer. From this evidence, the trial court could reasonably conclude that Defendant was attempting to thwart supervision.

Accordingly, the State's evidence was more than sufficient to allow for the reasonable inference that Defendant was not only aware his probation officer was attempting to contact him over the course of ten days, but that Defendant knew how to contact his probation officer and willfully failed to make himself available for supervision. Thus, the evidence was sufficient to reasonably satisfy the trial court, in the exercise of its sound discretion, that Defendant violated Section 15A-1343(b)(3a), a condition upon which probation can be revoked. N.C. Gen. Stat. § 15A-1344(a); *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. Therefore, the conclusion reached by this Court in *Melton* should not be controlling in this case.

Following the State's presentation of competent evidence establishing the absconding violation alleged by Defendant's violation report, the burden then shifted to Defendant to demonstrate his inability to comply with the terms of his probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. At the revocation hearing, Defendant admitted to absconding and failed to put forth any evidence demonstrating that his failure to comply with the requirements of his probation was not willful.

Based on the foregoing evidence, the trial court found that Defendant "willfully and intentionally violated the terms and conditions of the probationary sentence by absconding." Having determined that the State satisfied its evidentiary burden, we conclude that the trial court's conclusion was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Maness*, 363 N.C. at 279, 677 S.E.2d at 808 (citation and quotation marks omitted).

Therefore, the trial court did not abuse its discretion when it revoked Defendant's probation and activated his suspended sentence pursuant to Section 15A-1344(a).

II. Imposition of Consecutive Sentences

[2] Defendant next argues the trial court abused its discretion when it declined to consolidate his active sentences following revocation of his probation. According to Defendant, the trial court imposed consecutive sentences under the mistaken belief that it lacked the authority to modify Defendant's original suspended sentences.

Before activating a suspended sentence, the trial court may reduce the sentence or change the structure of the sentence so that it runs concurrently with other sentences. N.C. Gen. Stat. § 15A-1344(d). The trial court's decision to reduce a prison sentence or modify the structure of a sentence is reviewed for abuse of discretion. *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 551-52 (1993). As previously noted, an abuse of discretion results "when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Maness*, 363 N.C. at 279, 677 S.E.2d at 808 (citation and quotation marks omitted).

In the present case, at the revocation hearing, Defendant requested that the activated sentences run concurrently. Defendant's probation officer requested that the sentences run consecutively. The trial judge then addressed both requests, stating in pertinent part,

> I'm not going to modify Judge Powell's [original] judgment. I mean, he entered the judgment as he saw fit. All I have in front of me is the probation violation. So[,] I'm not going to modify Judge Powell's judgment. I'm going to go [with] exactly what it was. . . . [I]t was a plea agreement, so he knew exactly what the deal was in the time. And I'm not going to second guess Judge Powell's wisdom on it.

From the record, it is clear that the trial court recognized its authority to modify the structure of Defendant's sentences and, in the court's discretion, simply chose not to consolidate the active sentences. The trial court expressly acknowledged its discretionary authority, stating, "I'm not going to modify Judge Powell's [original] judgment." Therefore, Defendant's argument that the trial court imposed consecutive sentences under the mistaken belief that it lacked the authority to modify Defendant's original suspended sentences is meritless. Rather, the record indicates that the trial court refused to modify the original judgment out of deference to the superior court judge who originally

sentenced Defendant and was more familiar with the relevant facts and circumstances of Defendant's case. Such a decision is not manifestly unsupported by reason. Accordingly, we conclude the trial court did not abuse its discretion when it declined to consolidate Defendant's active sentences.

III. Clerical Errors

[3] Lastly, Defendant argues the judgments upon revocation of probation contained clerical errors regarding the violations found. Specifically, Defendant contends that the trial court's only probation violation finding made in open court referred to the absconding violation in paragraph one of the probation officer's violation reports, while the written judgments entered referred to two additional violations in paragraphs two and three of the officer's violation reports. We agree with Defendant that this discrepancy appears to be the result of clerical errors and remand for correction of the written judgments.

When a clerical error is discovered in the trial court's judgment on appeal, it is appropriate to remand the judgment for the limited purpose of correcting the error "because of the importance that the record speak the truth." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 500 (citation and quotation marks omitted). Where the trial court's findings made in open court do not align with the findings made in its written judgment, our Court will remand for correction of the written judgment. *State v. Jones*, 225 N.C. App. 181, 186, 736 S.E.2d 634, 638 (2013).

Here, the trial court's only finding relating to Defendant's probation violations was that "the defendant willfully and intentionally violated the terms and conditions of the probationary sentence by absconding" as alleged in paragraph one of the probation officer's violation reports. However, in the written judgments, the trial court also found that Defendant violated the conditions of his probation by testing positive for an illegal drug (alleged in paragraph two of the violation reports) and failing to report as directed by his probation officer (alleged in paragraph three of the violation reports). Accordingly, we remand for the limited purpose of correcting the clerical errors made in the trial court's written judgments so that these judgments align with the findings made in open court on October 22, 2018.

Conclusion

For the reasons stated herein, we affirm the trial court's judgments. However, we remand for the limited purpose of correcting the clerical errors described above.

AFFIRMED IN PART AND REMANDED IN PART.

Judge BRYANT concurs.

Chief Judge McGEE concurs in part and dissents in part by separate opinion.

McGEE, Chief Judge, concurs in part, dissents in part, with separate opinion.

Because I believe the State did not present sufficient competent evidence to support a finding of willful absconding under the General Statutes and this Court's opinions interpreting them in *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Melton*, ___ N.C. App. ___, 811 S.E.2d 678 (2018), I concur in part and respectfully dissent in part.

The General Assembly enacted the Justice Reinvestment Act ("JRA") in 2011 as "a part of a national criminal justice reform effort which, among other changes, made it more difficult to revoke offenders' probation and send them to prison." *State v. Johnson*, 246 N.C. App. 139, 143, 783 S.E.2d 21, 24 (2016) (citation and quotation marks omitted).

> The enactment of the JRA . . . brought two significant changes to North Carolina's probation system. First, . . . the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2). See N.C. Gen. Stat. § 15A-1344(a). For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation. *Id.*
>
> Second, "the JRA made the following a regular condition of probation: 'Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.' "

State v. Williams, 243 N.C. App. 198, 199-200, 776 S.E.2d 741, 742-43 (2015) (citations omitted).

Prior to enactment of the JRA, the General Statutes did not define the term "abscond." *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 746. Instead, "the term 'abscond' ha[d] frequently been used when referring to violations of the longstanding statutory probation conditions to 'remain within the jurisdiction of the court' or to 'report as directed to the officer.' " *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013) (citing *State v. Brown*, 222 N.C. App. 738, 731 S.E.2d 530 (2012); *State v. High*, 183 N.C. App. 443, 645 S.E.2d 394 (2007); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985)). In a series of cases following the enactment of the JRA, this Court recognized a purpose of the JRA was to place "a heightened burden on the State to establish not only that a probation officer was unable to locate or contact a defendant placed on supervised probation, but that such inability was due to the willful efforts of the defendant." *State v. Whitmire*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 WL 70713, at *3 (citations omitted) (unpublished); *see, e.g.*, *Williams*, 243 N.C. App. 198, 776 S.E.2d 741.

In *Williams*, this Court reversed a trial court order revoking the defendant's probation on the grounds of willful absconding. *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 746. We held that the probation violation report did not support a finding of absconding where the report merely realleged conduct that violated N.C.G.S. § 15A-1343(b)(2), which requires probationers to "remain within the jurisdiction of the Court unless granted written permission to leave." The probation violation report alleged the defendant "[wa]s not reporting as instructed or providing the probation officer with a valid address at th[at] time[,] . . . [wa]s also leaving the state without probation[,] . . . [and] [d]ue to [the d]efendant knowingly avoiding the probation officer and not making his true whereabouts known [the d]efendant ha[d] absconded supervision." *Id.* at 200-01, 776 S.E.2d at 743. This Court reasoned that "[p]rior to the amendment of N.C. Gen. Stat. § 15A-1343(b) to include not 'absconding' as a condition of probation, 'abscond' ha[d] traditionally been used to refer to other conditions of probation[,]" specifically the requirements to " 'remain within the jurisdiction of the court' or to 'report as directed to the officer.' " *Id.* at 205, 776 S.E.2d at 745-46 (citations omitted). We held that, as a result of the JRA amendment to make "absconding" a violation of the conditions of probation, merely re-alleging conduct that violates N.C.G.S. §§ 15A-1343(b)(2) and (3) cannot support finding a violation of N.C.G.S. § 15A-1343(b)(3a), even if the alleged violations are labelled "absconding supervision" in the report. *Id.* at 205, 776 S.E.2d at 745-46. Thus, more is required to support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

In *Melton*, this Court clarified that, in determining whether the allegations support a finding of absconding, this Court is limited to considering support for the specific allegations of absconding made in the violation report. *See Melton*, ___ N.C. App. at ___, 811 S.E.2d at 681 (reviewing whether there was sufficient evidence of absconding based on dates alleged in violation reports). We held the trial court erred in its consideration of evidence from 2 November 2016, "on or about" when the violation report alleged the defendant absconded, until 9 December 2016, when the defendant was arrested, rather than from 2 November 2016 until 4 November 2016, when the reports were filed. *Id.* at ___, 811 S.E.2d at 681. The rationale for this holding was that the probation reports "provide a defendant with notice of the allegations against him, as required by N.C. Gen. Stat. § 15A-1345(e)[.]" *Id.* at ___, 811 S.E.2d at 681 (citation omitted). This Court then held the trial court abused its discretion because the State failed to show willful absconding for the relevant period between 2 November and 4 November 2016 since, although the evidence showed the officer attempted to contact the defendant, "there was no showing that a message was given to [the] defendant or, more generally, that [the] defendant knew [the officer] was attempting to contact her." *Id.* at ___, 811 S.E.2d at 682.

Notably, in addition to holding 2 November to 4 November 2016 was "the only time period [this Court] c[ould] consider under the violation report and the court's written finding," this Court in *Melton* also did not consider allegations of conduct made in the same violation report for other reportable conditions of probation in determining whether the trial court's finding that the defendant absconded was supported by competent evidence. *See id.* at ___, 811 S.E.2d at 679-80 (noting that violation reports alleged violations of N.C.G.S. §§ 15A-1343(b)(3) and (9) in addition to N.C.G.S. § 15A-1343(b)(3a)).

In the present case, the majority did not note this Court's precedent in *Williams* and *Melton*, nor the purpose behind the JRA, in holding that Defendant absconded based on the probation violation report and facts before us. The record shows that the violation report that included absconding, filed on 23 May 2018, contained the following allegation for absconding (hereinafter, allegation 1):

> 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 FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS

> FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CER[T]IFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/18.

As an initial matter, I note that, under *Melton*, the trial court and this Court are limited by the allegations in allegation 1 of the violation report to considering evidence for absconding in the time period between 16 April 2018 and 23 May 2018, the period between when the report alleged the absconding began and the date the violation report was filed. Moreover, although Defendant's probation officer alleged Defendant had absconded since his "last face to face contact" with the probation officer on 16 April 2018, the officer testified he only initiated the investigation for absconding after Defendant "called him on [14 May 2018] and said he got in a fight with his brother and couldn't make his appointment that day," and Defendant's probation officer called Defendant later that day and left him a message saying "let me know what you work out for housing and report two days later." Since Defendant's probation officer acknowledged Defendant affirmatively contacted him on 14 May 2018, I would hold there is no substantial evidence of absconding prior to that date.

Furthermore, although the conduct in allegation 1 of the violation report is characterized as "absconding supervision," the allegations only describe violations of N.C.G.S. § 15A-1343(b)(3). N.C.G.S. § 15A-1343(b)(3) provides the following are regular conditions of probation:

> Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

N.C.G.S. § 15A-1343(b)(3). "Fail[ing] to report as directed by the officer," "fail[ing] to provide the officer with a cer[t]ifiable address," and "fail[ing] to make himself available for supervision as directed by his officer" are only allegations of violations of N.C.G.S. § 15A-1343(b)(3)—a separate condition of probation from absconding. Here, as in *Williams*, "[a]lthough the report alleged that Defendant's actions constituted

'abscond[ing] supervision,' this wording cannot convert violations of N.C. Gen. Stat. §[] 15A-1343(b)[](3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 745. Therefore, even though Defendant admitted to the allegations, allegations that fall within N.C.G.S. § 15A-1343(b)(3) do not support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

Assuming the allegations do not only allege conduct that violates N.C.G.S. § 15A-1343(b)(3), all the alleged acts in allegation 1, taken together, still do not establish a violation of N.C.G.S. § 15A-1343(b)(3a), because they do not adequately allege willfulness by Defendant. In *Melton*, this Court held that "although there was competent evidence that [the probation officer] attempted to contact [the] defendant, there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision . . ." where "there was no showing that a message was given to [the] defendant or, more generally, that [the] defendant knew [the officer] was attempting to contact her." *Melton*, ___ N.C. App. at ___, 811 S.E.2d at 682. Here, as in *Melton*, the allegations in the report, even though admitted by Defendant, as well as Defendant's probation officer's testimony that he attempted to call and to locate Defendant and also called Defendant's contacts, fail to show Defendant in fact knew Defendant's probation officer was attempting to contact him. For instance, although Defendant's probation officer testified he left a message for Defendant, there was no allegation that Defendant in fact received the message.

The majority relies on *State v. Newsome*, ___ N.C. App. ___, 828 S.E.2d 495 (2019), to support its holding that Defendant absconded on the facts before us. In *Newsome*, the defendant received a suspended sentence after pleading guilty to a crime and was placed on probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 497. During the defendant's probationary period, his probation officer filed multiple violation reports and his probation was modified and extended by the trial court for an additional twelve months for his failure to comply with the monetary terms of his probation. *Id.* at ___, 828 S.E.2d at 497. The probation officer filed a violation report for absconding when the defendant failed to make himself available after multiple attempts to contact him and he was arrested and held in custody until he posted bond. *Id.* at ___, 828 S.E.2d at 497. Prior to his release, the defendant "had been instructed to make contact with the probation officer within 72 hours of his release from custody," *id.* at ___, 828 S.E.2d at 497, which he failed to do. *Id.* at ___, 828 S.E.2d at 497. The probation officer then called the defendant and, after seeing him enter his residence, went to the door and spoke

with the defendant's mother, who told the probation officer he was not home. *Id.* at ___, 828 S.E.2d at 497. The probation officer filed an addendum to the prior violation report alleging the defendant absconded by failing to report as instructed and the trial court found the defendant had absconded. *Id.* at ___, 828 S.E.2d at 497.

This Court held the trial court did not abuse its discretion by finding that the defendant had absconded because "[the d]efendant knew or should have known upon being served with the [first absconding] violation report that he was considered to be an absconder by his probation officer[.]" Furthermore, upon his subsequent release from custody, the defendant knew or should have known that the instruction to make contact with the probation officer "was more than a regular office visit," and "[i]t was a special requirement imposed upon defendant because he was considered to be an absconder[.]" *Id.* at ___, 828 S.E.2d at 499. This Court held that "[t]he requirement for [the d]efendant to contact the probation officer within 72 hours of release from custody alerted [the d]efendant that his probation officer was attempting to actively monitor him." *Id.* at ___, 828 S.E.2d at 499. In holding the defendant willfully absconded, this Court specifically noted that he "had not simply missed appointments or phone calls," but that he "knowingly failed to notify his probation officer of his release from custody" and pursued "a willful course of conduct . . . that thwarted supervision." *Id.* at ___, 828 S.E.2d at 500.

The majority's reliance on *Newsome* is misplaced. First, in *Newsome*, the defendant was placed on notice that making contact with his probation officer was "a special requirement imposed upon [him] because he was considered to be an absconder," whereas in this case Defendant had no such notice that he was considered an absconder and subject to a special requirement to contact his probation officer; rather, the appointments Defendant missed were "regular office visit[s]." *Id.* at ___, 828 S.E.2d at 499. Unlike the defendant in *Newsome*, who was specifically instructed, there is no evidence Defendant here in fact heard the voicemail message from his probation officer telling him to report in two days. Second, the defendant in *Newsome* "had not simply missed appointments or phone calls," but had actively avoided the officer by failing to notify him after his release from custody and hiding in his residence while his mother asserted he was not there; here, the only specific acts by Defendant that were alleged by the probation officer in the violation report were missing appointments and failing to return phone calls. *See id.* at ___, 828 S.E.2d at 497, 500. Finally, the defendant in *Newsome* "ma[de] himself unavailable for supervision . . . for almost one month[,]"

while Defendant in this case contacted his probation officer on 14 May 2018, only nine days prior to the filing of the violation report. *Id.* at ___, 828 S.E.2d at 499-500. For these reasons, the present case is distinguishable from *Newsome*.

A primary purpose of the General Assembly in enacting the JRA was to "ma[k]e it more difficult to revoke offenders' probation and send them to prison." *Johnson*, 246 N.C. App. at 143, 783 S.E.2d at 24 (citation and quotation marks omitted). Consistent with the General Assembly's purpose, I would hold that merely failing to contact a probation officer during this brief nine-day period, without more, does not show sufficient evidence of willfulness to support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

Because the State has not shown Defendant "willfully refused to make [him]self available for supervision" during "the only time period we can consider" (between 14 May 2018, when Defendant last contacted his probation officer, and 23 May 2018, when the violation report for absconding was filed), and because the conduct admitted by Defendant only amounts to violations of N.C.G.S. § 15A-1343(b)(3), I would hold the State's evidence was insufficient to support a finding of absconding under N.C.G.S. § 15A-1343(b)(3a) and the trial court abused its discretion by revoking Defendant's probation on that ground. *Melton*, ___ N.C. App. at ___, 811 S.E.2d at 682; *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 745. I would reverse the judgment of the trial court. Therefore, I dissent from the majority on this issue. I concur with the majority's holdings that the trial court did not abuse its discretion when it declined to consolidate Defendant's active sentences and that there were clerical errors in the written judgment.

STATE OF NORTH CAROLINA
v.
JEREMY WADE DEW, DEFENDANT

No. COA19-737

Filed 17 March 2020

1. Appeal and Error—preservation of issues—motion to dismiss—different theory argued on appeal

Where defendant's motion to dismiss multiple assaults with a deadly weapon, kidnapping, and other charges hinged on whether his hands could be considered deadly weapons and that the bills of information had incorrect dates of the offenses, he failed to preserve for appellate review his argument that he could not be convicted of multiple counts of assault where there was evidence of only one assault resulting in multiple injuries because he did not present the trial court with that argument. Even assuming arguendo the issue was properly preserved, the State submitted sufficient evidence to support each assault charged.

2. Assault—with a deadly weapon—hands, feet, and teeth as deadly weapons

In a prosecution for assault with a deadly weapon inflicting serious injury, the State presented substantial evidence from which the jury could determine that defendant used his hands, feet, and teeth as deadly weapons while assaulting his girlfriend over several hours, including the relative size difference between defendant and his girlfriend as well as the manner in which he used his body to inflict multiple injuries.

3. Criminal Law—section 15A-1231—charge conference—material prejudice

Defendant did not demonstrate he was materially prejudiced by the trial court's failure to hold a charge conference pursuant to N.C.G.S. § 15A-1231 where the record showed that the trial court conducted a charge conference and that defendant participated and had multiple opportunities to object to proposed jury instructions.

Appeal by defendant from judgments entered 7 February 2018 by Judge John Nobles in Carteret County Superior Court. Heard in the Court of Appeals 19 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Wes Saunders and Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant-appellant.

BERGER, Judge.

Jeremy Wade Dew ("Defendant") was found guilty of kidnapping, two counts of assault with a deadly weapon inflicting serious injury ("AWDWISI"), one count of assault on a female, and one count of communicating threats. Defendant was sentenced to 75 to 102 months in prison. Defendant appeals, contending that the trial court erred when it (1) denied Defendant's motion to dismiss because the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults; (2) instructed the jury that Defendant's hands, feet, and teeth could be deadly weapons; and (3) failed to conduct a charge conference. We find no error.

Factual and Procedural Background

On the weekend of July 29-31, 2016, Defendant and the victim traveled to Atlantic Beach, North Carolina for a vacation with the victim's parents. At the time, the victim and Defendant were in a relationship and lived together.

On July 30, 2016, Defendant took some form of pain medication, went to the liquor store, and began drinking. Later in the evening, Defendant obtained the victim's car keys, and stated that he was leaving to "get some cocaine and [expletive deleted]." Defendant drove off, and the victim went to a neighbor for help. By the time she got help, Defendant returned to the vacation home and locked the victim out.

When Defendant eventually allowed the victim inside, she went into the bedroom. Defendant hit the victim in the head while she was seated on the bed. Defendant continued to hit the victim with both his hands and fists while calling her a "slut." The victim did not defend herself because she had "never been through a situation like this before" and "was too scared to" hit Defendant. For about two hours, Defendant "punched [her] in the nose," "bit [her] ear and bit [her] nose," "kicked [her] in the chest," "head-butted [her] twice," and "strangled [her] until vomiting." The victim was unable to scream for help "[b]ecause at one point in time he had [her] face down with [her] arms behind [her] back."

The sheets to the bed were covered in the victim's blood, and the victim believed Defendant was going to kill her.

Defendant later forced the victim to get into her car. Defendant drove away from the vacation home. While driving, Defendant threw the victim's cell phone out the window and continued to strike her in the head, ultimately rupturing her eardrum. At various times throughout the drive, Defendant pulled off the road, strangled the victim, and threatened to push her out of the car.

Around 3:00 a.m. on July 31, 2016, they arrived at the victim's house in Sims, North Carolina. Defendant continued to threaten the victim and threatened to harm himself. At this time, the victim was in extreme pain as her head and body hurt, her ears were ringing, and her throat was sore.

Around 6:00 a.m. on July 31, 2016, the victim's mother called Defendant's phone. The victim answered and told her mother that she needed help. Her mother then discovered the blood-stained sheets in the vacation home. Soon after, the victim's sister came to the house in Sims, and the victim told her sister about what Defendant had done the night before.

The victim's sister called 911. When EMS arrived, they determined that the victim's nose was broken. She was transported to the emergency room where it was determined that the victim needed surgery to prevent further hearing loss.

The victim's parents arrived at the emergency room and later took her back to Atlantic Beach where she gave a statement to the Atlantic Beach Police Department. As of September 15, 2016, the victim was still "receiving medical care for [her] headaches and dizziness" and was suffering from anxiety and continued ear pain.

On August 1, 2016, Defendant was arrested. On February 5, 2018, Defendant was tried on the following offenses: (1) first degree kidnapping; (2) assault by strangulation; (3) AWDWISI;[1] (4) AWDWISI;[2] (5) assault on a female for kicking the victim in the chest; (6) assault on a female for head-butting the victim in the forehead; and (7) communicating threats. On February 7, 2018, a Carteret County jury found Defendant guilty of kidnapping, two counts of AWDWISI, one count of assault on

1. The alleged deadly weapons for this assault were Defendant's hands and fists.

2. The alleged deadly weapons for this assault were Defendant's hands, fists, and teeth.

a female for head-butting the victim in the forehead, and one count of communicating threats.

On February 8, 2018, Defendant entered written notice of appeal. Defendant argues on appeal that the trial court erred when it (1) denied Defendant's motion to dismiss because the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults; (2) instructed the jury that Defendant's hands, feet, and teeth could be deadly weapons; and (3) failed to conduct a charge conference. We disagree.

Analysis

I. Motion to Dismiss

[1] "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss is properly denied if there is substantial evidence of (1) each element of the charged offense, and (2) defendant being the perpetrator of the charged offense. *See State v. Earnhardt*, 307 N.C. 62, 65, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(a)(1). Further, "[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citations and quotation marks omitted).

Here, Defendant argued at the close of the State's evidence:

> And then on the assault with a deadly weapon inflicting serious injury. Again, deadly weapon being the hands. We would argue that the case law seems to look at the size difference between the defendant and the victim, the brutality of the attack, what actually – the injuries that occurred.
>
> The State's evidence was that this was an ongoing assault that lasted for two hours within the trailer and then most of the ride home. And we would contend if those hands were deadly weapons as bad as those pictures are and as bad as her injuries are, that they would be a lot worse based on what the State's evidence has been and we would ask that that be — that the deadly weapon part of those be dismissed at this point.

Defendant then renewed his objection at the close of all of the evidence. Defendant also argued at the close of all of the evidence that "the charging documents all put the date of these incidents as July 31st," but did not include July 30th in the dates of offense.

Defendant's arguments on his motion to dismiss for sufficiency of the evidence were directed only to whether his hands could be considered deadly weapons given what his attorney contended was insignificant evidence of injury, and that the bills of information did not include the correct dates of offense. Defendant did not argue, as he does in this appeal, that the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults. Thus, Defendant has failed to preserve this argument for appellate review. *See State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court]." (citation and quotation marks omitted)).

Even if we assume Defendant preserved his new argument, the State presented sufficient evidence of each assault for which Defendant was convicted. "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be "a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action

required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).

In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.

This Court, citing our Supreme Court in Rambert, determined that there was not a single transaction, but rather "multiple transactions," stating, "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman constitutes a separate thought process." *Wilkes*, 225 N.C. App. at 239-40, 736 S.E.2d at 587.

In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254, 263, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018), this Court again applied the "separate-and-distinct-act analysis" from *Rambert*, and found multiple assaults "based on different conduct." *Id.* at 317, 813 S.E.2d at 263. There, the defendant "grabb[ed the victim] by her hair, toss[ed] her down the rocky embankment, and punch[ed] her face and head multiple times." *Id.* at 317, 813 S.E.2d at 263. The defendant also pinned down the victim and strangled her with his hands. This Court determined that multiple assaults had occurred because the "assaults required different thought processes. Defendant's decisions to grab [the victim]'s hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down [the victim] while she was on the ground and strangle her throat to quiet her screaming." *Id.* at 317-18, 813 S.E.2d at 263. This Court also concluded that the assaults were distinct in time, and that the victim sustained injuries to different parts of her body because "[t]he evidence showed that [the victim] suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation." *Id.* at 318, 813 S.E.2d at 263.

In the present case, Defendant had to employ separate thought processes in his decisions to punch, slap, kick, bite, and head-butt the victim. In addition, the assaults which caused the victim's injuries did not occur simultaneously, with one strike, or in rapid succession. Rather, Defendant's actions were at separate and distinct points in time. Each assault also resulted in different injuries to the victim. The victim suffered a ruptured eardrum from Defendant's strikes on her ear, she suffered a concussion from the Defendant's conduct in head-butting her, she suffered a fractured nose from Defendant striking her nose, and she suffered permanent scarring from Defendant biting her nose and ear.

Even if Defendant preserved his argument, which he did not, the trial court did not err when it denied Defendant's motion to dismiss.

II. Motion to Dismiss AWDWISI

[2] Defendant next argues that the trial court erred in denying Defendant's motion to dismiss AWDWISI because there was insufficient evidence that he used his hands, feet, and teeth as deadly weapons. We disagree.

"The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159,164, 538 S.E.2d 917, 922 (2000) (citation omitted). "A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981) (citation omitted).

"An assailant's hands may be considered deadly weapons for the purpose of the crime of assault with a deadly weapon inflicting serious injury depending upon the manner in which they were used and the relative size and condition of the parties." *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 298 (2008). "Only where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." *McCoy*, 174 N.C. App. at 112, 620 S.E.2d at 869 (citation and quotation marks omitted); *see also United States v. Sturgis*, 48 F.3d 784, 788 (4th Cir. 1995) ("The test of whether a particular object was used as a dangerous weapon is not so mechanical that it can be readily reduced to a question of law. Rather, it must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury. This test clearly invites a functional inquiry into the use of the instrument rather than a metaphysical reflection on its nature.").

In the present case, substantial evidence was presented at trial of Defendant's physical advantages over the victim. Defendant is approximately 5 feet 9 inches tall, while the victim is 5 feet 4 inches tall and weighs 140 pounds. Although there is no evidence in the record of Defendant's weight, Defendant was present at trial and the jury observed Defendant in person, along with photographs of Defendant from the incident that were admitted into evidence. Thus, the jury had the opportunity to observe the relative size differences of Defendant and the victim.

Moreover, on the night of the incident, the victim testified that Defendant had been drinking throughout the evening, that he was drunk, and that he was acting "crazed and possessed." For over two hours, Defendant struck the victim repeatedly with his hands and fists in her ear, nose, and head, which resulted in the victim sustaining two black eyes, a fractured nose, and swelling in her face. The victim believed that she was "going to die" and could not defend herself against Defendant because "he was stronger than her." According to the victim's sister, the victim "was unrecognizable . . . [and] she was a zombie" the next morning. It appeared to the victim's sister that "[h]er eyes were swollen. Her nose was very swollen and it looked like blood had come down to the tip. She had a big old gash up here on her head. Blood was in her hair. I could tell her ears -- there was some blood on her ears."

Furthermore, Defendant bit the victim's nose and ear. The victim testified that the bite to her ear was the most painful part of the attack. The victim's doctors were more concerned about the bite marks on her ear than her ruptured eardrum. At the time of trial, the victim had a visible scar from where Defendant bit her on the nose.

Moreover, the trial court provided the following instruction to the jury that "[i]n determining whether fists, hands, and teeth were a deadly weapon, you should *consider the nature of the fists*, *hands and teeth*, *the manner in which they were used*, and *the size and strength of the defendant as compared to the victim*." (Emphasis added).

Thus, when viewed in a light most favorable to the State, we conclude that the State presented substantial evidence of each element of AWDWISI, and that Defendant's hands, feet, and teeth were deadly weapons for the purposes of AWDWISI. Furthermore, we are reminded that the jury is the best determinant of whether, under the circumstances, Defendant's use of his hands, fists, and teeth were likely to cause death or serious bodily injury. *See State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56 (2000) ("When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for

jury consideration, not about the weight of the evidence."). Therefore, the trial court did not err when it denied Defendant's motion to dismiss.

III. Charge Conference

[3] Defendant next argues that the trial court violated N.C. Gen. Stat. § 15A-1231(b) by failing to conduct a charge conference. We disagree.

A charge conference is a recorded conference between the judge and the parties outside the presence of the jury where the judge "must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury" and the judge must also inform the parties of what parts of the parties' tendered instructions will be given to the jury. N.C. Gen. Stat. § 15A-1231(b) (2019). "The purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and reaching the correct verdict." *State v. Houser*, 239 N.C. App. 410, 423, 768 S.E.2d 626, 635 (2015) (*purgandum*).

Mere noncompliance with Section 15A-1231(b) does not automatically entitle Defendant to relief. *State v. Corey*, ___ N.C. ___, ___, 835 S.E.2d 830, 838 (2019) (overruling *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014)). Rather, a defendant must show that he or she was materially prejudiced by the judge's failure to fully comply with the provisions of Section 15A-1231(b). N.C. Gen. Stat. § 15A-1231(b). A defendant is "materially prejudiced" for purposes of Section 15A-1231(b) "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); *Corey*, ___ N.C. at ___, 835 S.E.2d at 834; *State v. Coburn*, ___ N.C. App. ___, ___, 834 S.E.2d 691, 695 (2019) (concluding that the defendant was not materially prejudiced when portions of the charge conference were not recorded, as required by Section 15A-1231, because the trial court summarized, on the record, discussions that were not recorded; the defendant did not object to the trial court's summary of the jury instructions on the record; and the trial court was cognizant of the dangers of discussions held off the record).

The State correctly argues that Defendant could not have been materially prejudiced because a charge conference did *occur* as shown in the record. At the charge conference, the Court asked whether the parties were satisfied with the proposed jury instructions. Defendant

stated that he was satisfied with the instructions to be given to the jury and had the opportunity to draft the proposed jury instructions, as evidence by the following colloquy which occurred outside the presence of the jury:

> THE COURT: All right. Thank you, sir. Give me one minute. I've got to look up an instruction before I bring the jury back in here. Not one you all did. It's one I've got to give before you all get started. (Pause.)
>
> . . .
>
> [THE STATE]: Is Your Honor satisfied with the jury instructions?
>
> THE COURT: I'm satisfied with the jury instructions. I just kind of breezed through them, but I'm satisfied with them if you all are.
>
> [DEFENSE COUNSEL]: *We are*, *Your Honor*.
>
> THE COURT: All right. Now, listen, if I happen to misstate something or misread something, I want you to stop me right then, but I don't want you to -- just stand up and say may I approach the bench and then both of you all step up here and we'll address it.

(Emphasis added). Furthermore, after the trial court instructed the jury, Defendant had a second opportunity to object to the instructions, as evidence by the following discussion:

> THE COURT: All right. For purposes of the record, Madam Court Reporter, both the defendant and the State agreed with the jury charge word-for-word. There's no objection to it.
>
> [DEFENSE COUNSEL]: *No objection to any of it.*

(Emphasis added).

Thus, it is apparent from the record that Defendant participated in a charge conference, and he had multiple opportunities to object. Because the trial court conducted a charge conference, the trial court did not err. Therefore, Defendant cannot show material prejudice, and his argument is without merit.

Conclusion

Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
AARON LEE GORDON

No. COA17-1077-2

Filed 17 March 2020

Satellite-Based Monitoring—lifetime—enrollment upon future release from prison—reasonableness

Reconsidering its prior opinion in light of *State v. Grady*, 372 N.C. 509 (2019), the Court of Appeals once again concluded that the State failed to meet its burden of showing the reasonableness of the imposition of lifetime satellite-based monitoring (SBM) as applied to defendant where defendant would not be subject to SBM until he completed his active sentence of 190-288 months' imprisonment and where the State failed to present sufficient evidence about the scope of the search and the State's legitimate governmental interest at the time of defendant's release.

Judge DIETZ concurring by separate opinion.

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Originally heard in the Court of Appeals 22 March 2018, with opinion issued 4 September 2018. On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019).

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

Defendant Aaron Lee Gordon timely appealed from the trial court's order requiring him to enroll in lifetime satellite-based monitoring following his eventual release from prison. On 4 September 2018, this Court filed a published opinion vacating the trial court's civil order mandating satellite-based monitoring. *See State v. Gordon*, __ N.C. App. __, 820 S.E.2d 339 (2018). The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). Upon reconsideration, we reverse the trial court's civil order mandating satellite-based monitoring.

Background

I. Satellite-Based Monitoring

Our General Assembly enacted "a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor" the locations of individuals who have been convicted of certain sex offenses. N.C. Gen. Stat. § 14-208.40(a) (2019). The present satellite-based monitoring program provides "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." *Id.* § 14-208.40(c)(1). The reporting frequency of an offender's location "may range from once a day (passive) to near real-time (active)." *Id.* § 14-208.40(c)(2).

After determining that an individual meets the criteria for one of three categories of offenders subject to the satellite-based monitoring program, *see id.* § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015) ("*Grady I*"); *State v. Blu*e, 246 N.C. App. 259, 264, 783 S.E.2d 524, 527 (2016). The trial court may order a qualified individual to enroll in the satellite-based monitoring program during the initial sentencing phase pursuant to N.C. Gen. Stat. § 14-208.40A, or, under certain circumstances,

at a later time during a "bring-back" hearing pursuant to N.C. Gen. Stat. § 14-208.40B. For an individual for whom satellite-based monitoring is imposed during the defendant's sentencing hearing pursuant to N.C. Gen. Stat. § 14-208.40A, monitoring shall begin upon the defendant's release from prison.

II. Defendant's Enrollment

In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190-288 months' imprisonment and ordered to submit to lifetime sex-offender registration. After determining that Defendant was convicted of an "aggravated offense" under N.C. Gen. Stat. § 14-208.6(1A), the trial court then ordered that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison.

The State's only witness at Defendant's satellite-based monitoring hearing was Donald Lambert, a probation and parole officer in the Forsyth County sex-offender unit. Lambert explained that the device currently used to monitor offenders enrolled in satellite-based monitoring is "just basically like having a cell phone on your leg." The battery requires two hours of charging each day, which requires that Defendant plug the charging cord into an electric outlet while the device remains attached to his leg. The charging cord is approximately eight to ten feet long. Every 90 days, Defendant must also allow a monitoring officer to enter his home in order to inspect and service the device.

Lambert testified that the device currently in use monitors an offender's location "at all times[.]" Once Defendant is released from prison and enrolled in satellite-based monitoring, "we [will] monitor [him] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he's been." "[T]he report that can be generated from that tracking . . . gives that movement on a minute-by-minute position," as well as "the speed of movement at the time[.]" Under the current statutory regime, a monitoring officer may access an offender's location data at any time without obtaining a search warrant. If Defendant enters a restricted area—for example, if he drives past a school zone—the monitoring system will immediately alert the relevant authorities. Lambert explained that in such an event, monitoring officers typically "contact [the enrollee] by phone immediately after they get the alert, ask where they are."

When asked what would happen if Defendant "had a traveling sales job that covered" a regional territory and required travel to multiple states, Lambert explained that the sheriff's office "would have to approve it." "He would also be monitored through the Raleigh office where the satellite-based monitoring is. He would have to clear that with them as well. And then he would have to notify the state that he's going to if he was going to—and have to decide whether or not he'd have to stay on satellite-based monitoring in another state."

The State introduced Defendant's Static-99 score at his satellite-based monitoring hearing. Lambert explained that Static-99 is "an assessment tool that they've been doing for years on male defendants [convicted of reportable sex offenses] over 18. It's just a way to assess whether or not they'll commit a crime again of this [sexual] sort." Lambert testified that offenders are assigned "points" based on

> whether or not they've committed a violent crime, whether or not there was an unrelated victim, whether or not there was—there's male victims. . . . Other than just the sexual violence, was there another particular part of violence in the crime—in the index crime? Also, [Static-99 assessment] does take their prior sentencing dates into factor too.

Defendant received a "moderate/low" score on his Static-99, which Lambert explained meant there was "a moderate to low [risk] that he would ever commit a crime like this again." Defendant did not have any prior convictions for sex offenses, but he was assessed one point for having prior convictions for violent offenses. Lambert agreed that Defendant's Static-99 score indicated that "it's not likely he's going to [commit a sex offense] again[.]" However, the State failed to present any evidence "as to what the rate of recidivism is during—even during [a] five-year period[.]"

The general purpose of the satellite-based monitoring program is "to monitor subject offenders and correlate their movements to reported crime incidents." N.C. Gen. Stat. § 14-208.40(d). However, Lambert also noted that the satellite-based monitoring program could potentially be beneficial to Defendant. As Lambert explained, "if somebody takes charges out, it will show where [the enrollee was]. So it kind of—it can help them as well, showing that they've been to particular places. If somebody says he was over here doing this at a particular time, . . . it will show, hey, no, he was over here."

After reviewing the evidence presented during the hearing, the trial court announced:

> Let the record reflect we've had this hearing, and the Court is going to find by the preponderance of the evidence that the factors that the State has set forth—his previous assaults, the Static-99 history, the fact that this occurred in an apartment with other children present as well and the relatively minor physical intrusion on [D]efendant to wear the device—it's small. It has to be charged two hours a day. But other than that, it can be used in water and other daily activities—so I am going to find . . . that he should enroll in satellite-based monitoring for his natural life unless terminated.

Defendant timely appealed the trial court's satellite-based monitoring order to this Court. On appeal, Defendant only challenged the constitutionality of the satellite-based monitoring order as applied to him as one convicted of an aggravated offense. He argued that the trial court erred in ordering that he be subjected to lifetime satellite-based monitoring because "[t]he [S]tate failed to meet its burden of proving that imposing [satellite-based monitoring] on [Defendant] is reasonable under the Fourth Amendment."

In a published opinion filed on 4 September 2018, we vacated the trial court's civil order mandating satellite-based monitoring. Relying heavily on *Grady I* and *State v. Grady*, __ N.C. App. __, 817 S.E.2d 18 (2018) ("*Grady II*"), *modified and aff'd*, 372 N.C. 509, 831 S.E.2d 542 (2019), we held that the State had failed to meet its burden of showing that the implementation of satellite-based monitoring of this Defendant will be a reasonable search fifteen to twenty years before its execution. The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. The Supreme Court issued its opinion in *Grady III* on 16 August 2019. Thereafter, on 4 September 2019, the Supreme Court entered an order allowing the State's petition for discretionary review in the instant case for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *Grady III*.

State v. Grady I

In *Grady I*, the United States Supreme Court made clear that its determination that satellite-based monitoring effects a search was only the first step in analyzing the program's constitutionality. *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462. As the Supreme Court reiterated,

"[t]he Fourth Amendment prohibits only *unreasonable* searches." *Id.* The Supreme Court explained that whether satellite-based monitoring constitutes a reasonable Fourth Amendment search of a particular individual will "depend[ ] on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006), and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). However, as our state courts had not yet conducted that analysis, the Supreme Court declined to "do so in the first instance." *Id.* Accordingly, after concluding that satellite-based monitoring effects a search implicating the Fourth Amendment, the Supreme Court reversed and remanded for our courts to determine the "ultimate question of the program's constitutionality." *Id.*

On remand from *Grady I*, the trial court held satellite-based monitoring constitutional, both facially and as applied. Upon the defendant's appeal, however, this Court concluded that because "the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring[,]" *Grady II*, __ N.C. App. at __, 817 S.E.2d at 28, the State had failed to meet its burden of proving that satellite-based monitoring would constitute a reasonable Fourth Amendment search under the totality of the circumstances. *Id.* at __, 817 S.E.2d at 28. Accordingly, we held that the satellite-based monitoring program was unconstitutional as applied to defendant Grady, and we did not address the facial constitutionality of the satellite-based monitoring program. The State appealed to our Supreme Court.

In *Grady III*, our Supreme Court modified and affirmed this Court's decision in *Grady II*, holding satellite-based monitoring unconstitutional as applied to the defendant and all similarly situated individuals. The Court, in "offer[ing] guidance as to what factors to consider in determining whether [satellite-based monitoring] is reasonable under the totality of the circumstances[,]" determined that the defendant's "privacy interests and the nature of [the] . . . intrusion" must be weighed against the State's interests and the effectiveness of satellite-based monitoring. *State v. Griffin*, No. COA 17-386-2, slip op. at 13-14 (N.C. Ct. App. Feb. 18, 2020). The Court concluded that although recidivists have greatly diminished privacy interests, satellite-based monitoring is nevertheless a substantial intrusion; and that by failing to make "any showing . . . that the [satellite-based monitoring] program furthers [the State's] interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public,"

the State did not meet "its burden of establishing the reasonableness of the [satellite-based monitoring] program under the Fourth Amendment balancing test required for warrantless searches." *Grady III*, 372 N.C. at 544, 831 S.E.2d at 568. Thus, the Court held that the satellite-based monitoring of sex offenders is unconstitutional as applied to defendant Grady as well as any unsupervised person[1] who was ordered to enroll in satellite-based monitoring because he or she is a recidivist. *Id.* at 545, 831 S.E.2d at 568.

Notably, the Supreme Court specifically limited its holding to those unsupervised offenders who are subject to satellite-based monitoring because of their classification as recidivists: "[O]ur decision today does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen" may be subject to mandatory lifetime satellite-based monitoring. *Id.* at 550, 831 S.E.2d at 572. In addition, the holding in *Grady III* applies only to unsupervised individuals; thus, supervised offenders—all persons currently subject to a period of State supervision, such as probationers, parolees, and individuals who remain under post-release supervision—remain subject to satellite-based monitoring following *Grady III*. *Id.* at 548, 831 S.E.2d at 572.

Reconsideration of *State v. Gordon*

Upon reconsideration of our original opinion, we again conclude that the State failed to meet its burden of showing that lifetime satellite-based monitoring is a reasonable search of this Defendant. Here, Defendant was ordered to submit to satellite-based monitoring solely due to his conviction of an aggravated offense; however, he will not actually enroll in the program for approximately 15 to 20 years, after he has completed his active prison sentence.

The State filed its satellite-based monitoring application at the time of Defendant's sentencing, in accordance with N.C. Gen. Stat. § 14-208.40A. Because of Defendant's active sentence, the trial court's order granting the State's application will allow the State the authority to search Defendant—i.e., to "physically occup[y] [defendant's person] for the purpose of obtaining information"—upon his release from prison

1. An "unsupervised individual" is a person not on probation, parole, or post-release supervision. *Id.* at 531, 831 S.E.2d at 559.

in approximately 2032.[2] *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Thus, Defendant has yet to be searched.

In considering the reasonableness of subjecting a defendant to satellite-based monitoring, the court must examine the totality of the circumstances to determine "whether the warrantless, suspicionless search here is reasonable when 'its intrusion on the individual's Fourth Amendment interests' is balanced 'against its promotion of legitimate governmental interests.' " *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574). In previous cases, we have considered the characteristics of the monitoring device in use at that time; the manner in which the defendant's location monitoring may be conducted, as well as the purpose for which that information was used according to the current statute; and the State's interest in monitoring that particular defendant in light of his "current threat of reoffending[.]" *Grady II*, __ N.C. App. at __, 817 S.E.2d at 25-26.

In the instant case, however, the State's ability to demonstrate reasonableness is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis. For instance, we are unable to consider "the extent to which the search intrudes upon reasonable privacy expectations" because the search will not occur until Defendant has served his active sentence. *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (citation omitted). The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison. *Cf. Vernonia Sch. Dist. 47J*, 515 U.S. at 658, 132 L. Ed. 2d at 578 ("[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. . . . And finally, the results of the tests . . . are not turned over to law enforcement authorities or used for any internal disciplinary function." (citations omitted)).

Rather than addressing these concerns, the State focuses primarily on the "limited impact" of the monitoring device itself. The State, however, provides no indication that the monitoring device currently

2. The trial court sentenced Defendant to 190 to 288 months' imprisonment. Defendant was given credit for 426 days spent in confinement prior to the date judgment was entered against him in February 2017.

in use will be the same as—or even similar to—the device that will be employed approximately two decades from now. *See State v. Spinks*, 256 N.C. App. 596, 613, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) ("The United States Supreme Court has recognized in recent cases the need to consider how modern technology works as part of analysis of the reasonableness of searches." (citing *Riley v. California*, 573 U.S. 373, 392, 189 L. Ed. 2d 430, 446-47 (2014))), *disc. review denied*, 370 N.C. 696, 811 S.E.2d 589 (2018).

Nor does the record before this Court reveal whether Defendant will be on supervised or unsupervised release at the time his monitoring is set to begin, affecting Defendant's privacy expectations in the wealth of information currently exposed. *Samson*, 547 U.S. at 850-52, 165 L. Ed. 2d at 258-59; *Grady II*, __ N.C. App. at __, 817 S.E.2d at 24 ("[The] [d]efendant is an unsupervised offender. He is not on probation or supervised release. . . . Solely by virtue of his legal status, then, it would seem that [the] defendant has a greater expectation of privacy than a supervised offender."); *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State.").

The State has also failed, at this time, to present evidence adequately estimating the government's need to search—i.e., the other side of the balancing test. *See Grady III*, 372 N.C. at 527, 831 S.E.2d at 557. The State merely asserts that "[i]f, as Defendant acknowledges, the State has 'a substantial interest in preventing sexual assaults,' then the State's evidence amply demonstrated that Defendant warranted such concern in the future despite his Static-99 risk assessment score." However, the State makes no attempt to distinguish this undeniably important interest from the State's "normal need for law enforcement[.]" *State v. Elder*, 368 N.C. 70, 74, 773 S.E.2d 51, 54 (2015) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 717 (1987)); *see also Maryland v. King*, 569 U.S. 435, 481, 186 L. Ed. 2d 1, 41 (2013) (Scalia, J., dissenting) ("Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. *The Fourth Amendment must prevail.*" (emphasis added)).

In addition, to the extent that the current satellite-based monitoring program is justified by the State's interest in deterring future sexual assaults, the State's evidence falls short of demonstrating what Defendant's threat of reoffending will be after having been incarcerated

for roughly fifteen years.[3] *See, e.g.*, *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971) ("One of the principal purposes of incarceration is rehabilitation . . . ."). The only individualized measure of Defendant's threat of reoffending was the Static-99, which the State's witness characterized as indicating that Defendant was "not likely" to recidivate. Lambert, the State's sole witness, was asked whether there was any evidence, besides Defendant's Static-99 score, "that would indicate the reason that the State of North Carolina would need to search his location or whereabouts on a regular basis[.]" Lambert responded, "I don't have any information on that[.]"

It is manifest that the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion to continuously and perpetually monitor Defendant's location information upon his release from prison. *See Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Authorizing the State to conduct a search of this magnitude approximately fifteen to twenty years in the future based solely upon scant references to present circumstances would obviate the need to evaluate reasonableness under the "totality of the circumstances" altogether. "We therefore hold, consistent with the balancing test employed in *Grady III*, that the imposition of [satellite-based monitoring] . . . as required by the trial court's order is unconstitutional as applied to Defendant and must be reversed." *Griffin*, slip op. at 20.

Accordingly, we necessarily conclude that the State has failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison is a reasonable search in Defendant's case. We therefore reverse the trial court's order.

REVERSED.

Judge BROOK concurs.

Judge DIETZ concurs by separate opinion.

---

3. We are cognizant of the fact that Defendant's Static-99 score was partly based upon his age at the likely date of release. However, this factor only accounts for Defendant's age, and not the duration of his active sentence or his potential for rehabilitation while incarcerated.

DIETZ, Judge, concurring in the judgment.

I agree with the outcome of this case because we are bound by this Court's recently re-issued decision in *State v. Griffin*, No. COA17-386-2, __ N.C. App. __, __ S.E.2d __ (2020). I do not join the majority opinion for the reasons discussed in my concurring opinion in *State v. Gordon*, __ N.C. App. __, __, 820 S.E.2d 339, 349–50 (2018), *remanded*, 372 N.C. 722, __ S.E.2d __ (2019).

STATE OF NORTH CAROLINA
v.
JOHN D. GRAHAM

No. COA17-1362

Filed 17 March 2020

1. Evidence—hearsay—child victim's prior statements—corroboration of victim's testimony

In a trial for multiple counts of engaging in a sexual act with a child under thirteen years of age and taking indecent liberties with a minor, the trial court did not abuse its discretion by allowing the admission of the victim's prior statements for the sole purpose of corroboration because the statements indicated a pattern of continuing abuse by defendant and the challenged statements were substantially similar to the victim's testimony at trial. Even assuming error, defendant could not show prejudice where two other witnesses also gave accounts of the victim's prior statements, including a disinterested medical professional.

2. Evidence—detective's testimony—defendant's flight and extradition—Rule 602—sufficient personal knowledge

Where law enforcement was unable to locate defendant for six months after allegations that he engaged in sexual acts with a minor, the trial court did not commit plain error at defendant's trial by allowing a law enforcement officer to testify about defendant's extradition because the officer had sufficient personal knowledge of defendant's extradition from Puerto Rico to testify pursuant to Rule 602 of the Rules of Evidence.

3. Criminal Law—jury instructions—evidence of flight—departure from routine

The trial court did not commit plain error by instructing the jury that defendant's conduct could be considered evidence of flight indicative of guilt where evidence was presented that after he was accused of engaging in sexual acts with a minor he could not be located at his last known addresses and he was apprehended six months later in Puerto Rico, which demonstrated a departure from his usual routine and supported the State's theory that defendant fled to avoid being apprehended.

4. Sentencing—prior record level—calculation—out-of-state conviction—substantial similarity to North Carolina offense

The trial court did not err when it determined defendant's conviction for statutory rape in Georgia involved a substantially similar offense to that found in N.C.G.S. § 14-27.25(a) for purposes of calculating the prior record level during felony sentencing even though the two states' statutes differed in the offender's age requirement, because both states sought to protect individuals under the age of 16 from engaging in sexual activity with older individuals and provided for greater punishment when offenders are significantly older than their victims.

5. Satellite-Based Monitoring—lifetime monitoring—reasonableness—hearing required

During sentencing after defendant's conviction for engaging in a sexual act with a child under thirteen years of age, the trial court erred by summarily finding the imposition of lifetime satellite-based monitoring reasonable without conducting a hearing and allowing the State to meet its burden. Since the State was not given the opportunity to present evidence, the proper remedy was remand for an evidentiary hearing consistent with *State v. Grady*, 372 N.C. 509 (2019).

6. Criminal Law—motion for appropriate relief—recanted testimony—sufficiency of findings of fact

The trial court abused its discretion when it denied defendant's motion for appropriate relief requesting a new trial on the basis of recanted testimony after his conviction for engaging in a sexual act with a minor because the trial court's findings of fact failed to make necessary credibility determinations resolving material conflicts in the evidence which were necessary to support the trial court's ultimate conclusion of law denying the motion. The matter was remanded for entry of a new order with additional findings of fact.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 13 December 2016 by Judge Eric Levinson in Clay County Superior Court and order entered 13 May 2019 by Judge Athena F. Brooks in Clay County Superior Court. Heard in the Court of Appeals 7 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O'Kane Scott and Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

ARROWOOD, Judge.

John D. Graham ("defendant") appeals from judgment entered upon his conviction for sexual offense against a child under age thirteen and order denying his Motion for Appropriate Relief ("MAR"). We find no error in the jury trial phase of defendant's trial. However, we vacate the trial court's order imposing lifetime satellite-based monitoring ("SBM") upon defendant, with remand for the trial court to conduct an evidentiary hearing on its appropriateness pursuant to *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015), and its progeny. Furthermore, we agree that the trial court's order denying defendant's MAR is insufficient, and vacate and remand for entry of an order not inconsistent with this opinion.

I. Background

A. Trial

On 11 September 2012, defendant was indicted on four counts each of engaging in a sexual act with a child under thirteen years of age and taking indecent liberties with a child. Defendant's case came on for trial in the criminal session of Clay County Superior Court before the Honorable Eric Levinson on 5 December 2016.

The State's key witness at trial was the alleged victim, A.M.D.[1] A.M.D.'s testimony was to the effect that defendant had touched the outside and inside of her vagina with his fingers on numerous occasions at four separate residences where she lived with her mother, Cassie

1. Initials are used to protect the identity of the victim and for ease of reading.

D., over a period between one and two years. A.M.D. testified in greatest detail regarding defendant's sexual abuse of her at the residence referred to as "the Ruby Falls house." A.M.D. specifically mentioned three instances in which defendant inserted his finger into her vagina at the Ruby Falls house: on the couch in the living room while the family was watching television, on defendant's bed in the basement while her siblings were playing videogames in the same room, and in her own room while defendant read her a book. A.M.D. also mentioned telling her step-grandmother ("Ms. Hester") that defendant hurt her and gesturing toward her genitals when asked where.

The State also presented three witnesses who testified that A.M.D. had made consistent statements to them on prior occasions. John Tucker, P.A., ("Mr. Tucker") testified that, during his medical examination of A.M.D. in 2012, she told him that defendant hurt her and touched or penetrated her vagina "[w]ith his hand" "[m]ore than one time[,]" but did not "stick a stick inside" of her. A.M.D.'s brother T.D. testified that when he asked her if defendant ever molested her, "she said yes but she never gave the details."

Ms. Hester testified that when A.M.D. was visiting her on 30 May 2012, A.M.D. mentioned that defendant was her mother's boyfriend and was living with the family at the Ruby Falls house. A.M.D. told her that defendant "hurts" her, and when asked where, "she pointed to her private parts." Ms. Hester further testified that, around 2014, A.M.D. provided her with additional details on the molestation. Many of these additional details were consistent with A.M.D.'s trial testimony: "at the basement [of the Ruby Falls] house when they were watching TV . . . [defendant] would always touch her private parts and hurt her there[;]" that her "mommy was present" when defendant molested her while watching TV in the basement of the Ruby Falls house; and "that he used his fingers a lot with her private parts, placing them in her private parts."

However, some of A.M.D.'s prior statements offered by Ms. Hester involved matters to which she did not testify, such as that defendant "made he[r] put his private parts in her mouth and that he had choked her[,]" inserted objects into her private parts, and "had hurt her on her back side." Defense counsel objected to the first instance of such additional information. The trial court gave a limiting instruction that the prior statements could only be considered to assess the credibility of A.M.D.'s trial testimony and allowed questioning to proceed.

Detective Tony Ellis of the Clay County Sheriff's Department testified that he responded to the hospital on 2 June 2012 in response to a

report of child molestation involving A.M.D. He set up a forensic interview for A.M.D. with a local child advocacy specialist on 4 June 2012. This interview was recorded and played for the jury. After ascertaining that the "Roger" A.M.D. alleged sexually abused her was defendant, Detective Ellis set about looking for him. Detective Ellis was unable to locate defendant at the residence of Cassie D., nor at any of his known prior addresses in North Carolina and Georgia. Detective Ellis then enlisted the help of the United States Marshals in locating defendant. After refreshing his recollection with the order for defendant's arrest, Detective Ellis testified that the Marshals subsequently returned defendant to the Clay County Sheriff's Department on 14 November 2012 and communicated to Detective Ellis that defendant had been apprehended and extradited from Puerto Rico.

At the close of its evidence, the State dismissed the four indecent liberties charges against defendant. Defendant's only witness was A.M.D.'s maternal aunt, Holly D. Holly D. testified that A.M.D. told her on two occasions that her accusations against defendant were false and that A.M.D. had falsely accused defendant because her stepmother Lora D. had threatened to kill her mother if she did not, and bribed her with a horse and other gifts if she did.

On 9 December 2016, the jury returned a verdict finding defendant guilty of one count of engaging in a sexual act with a child under thirteen years of age and not guilty of the remaining three counts of the same offense. The charge for which defendant was found guilty corresponded to the alleged events at the Ruby Falls house.

B. Sentencing

The trial court sentenced defendant on 13 December 2016. The court first set about calculating defendant's prior record level for the purpose of structured sentencing. The State introduced evidence of defendant's prior convictions from Georgia, including statutory rape and child molestation, thru a copy of his indictment and plea paperwork for the convictions. Though presented by the State and acknowledged by the court, a copy of the Georgia statute under which defendant had been convicted was never placed in the record.

After some discussion with counsel for defendant and the State, the court found that the Georgia statutory rape offense was substantially similar to North Carolina's own statutory rape law, which is a Class B1 felony. Thus, the court treated defendant's prior conviction as a Class B1 felony and assigned him nine prior record points. The court also assigned defendant one point for escaping the Clay County Detention

Center while awaiting his trial, for a total of ten points corresponding to Prior Record Level IV. The court sentenced defendant to 335 to 462 months' imprisonment and ordered him to register as a sex offender upon his release.

Next, the court considered the State's proposed order subjecting defendant to North Carolina's SBM program for life after his release from prison. Counsel for defendant and the State agreed that the court was required to hold an evidentiary hearing, pursuant to *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459, at which the State must prove that it is reasonable to subject defendant to the SBM program for life. The State offered several times to proceed with such a hearing. The trial court ignored the State's offer to proceed introducing evidence in a *Grady* hearing. Rather, after taking notice of the facts adduced at trial, the court summarily gave its reasons for finding lifetime enrollment in the SBM program reasonable for defendant and entered the order. The court found lifetime SBM reasonable because defendant had been convicted of statutory rape of Cassie D. in Georgia, served eight years in prison, immediately absconded from parole upon his release, assumed a false name, and moved in with his former victim and began sexually abusing her daughter. Defendant gave oral notice of appeal.

C. Motion for Appropriate Relief

During the pendency of his appeal, defendant filed a MAR with this Court on 24 August 2018. The motion claimed that A.M.D. had recanted on her trial testimony and included an affidavit to that effect allegedly written by A.M.D. On 15 October 2018, we remanded defendant's motion to the Clay County Superior Court with instructions to conduct an evidentiary hearing on the motion ("the MAR hearing") pursuant to *State v. Britt*, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987), within sixty days.

Due to scheduling conflicts with the prosecuting attorney and the Clay County Superior Court's failure to hold a criminal session of court between the weeks of 3 September 2018 and 17 December 2018, defendant's hearing was not held until 30 April 2019, over eight months after filing his motion with this Court.

The MAR hearing was held before the Honorable Athena F. Brooks from 30 April to 3 May 2019. At the hearing, A.M.D. testified that she fabricated her accusations of sexual abuse against defendant at trial due to bribes and threats from Lora D. Defendant introduced a letter into evidence that was alleged to have been written by A.M.D. and left on her mother's desk in January of 2018, when A.M.D. was living with her father and stepmother. The letter made admissions consistent with A.M.D.'s

hearing testimony. Cassie D. also testified at the hearing that, prior to trial, A.M.D. had also told her that she was falsely accusing defendant due to threats and bribes from Lora D. Cassie D. further testified that she had regained emergency custody of her children after Lora D. allegedly hurt A.M.D. on several occasions.

The State produced and played several recordings of phone calls between Cassie D. and defendant during his incarceration, which took place from July 2017 to March 2019. Many of these conversations, including those prior to the alleged date of A.M.D.'s letter in January 2018, discussed the romance between Cassie D. and defendant and the potential for A.M.D. to provide a recantation to aid in his appeal. A child specialist investigator with the Clay County District Attorney's Office testified that she had been present when A.M.D. had been interviewed prior to trial, and the child never mentioned any concerns about Lora D.

In its order, the court recited the relevant testimony from trial and the hearing, including that: (a) A.M.D. testified at the hearing in much greater detail about the occasions in which she alleged defendant had abused her, including details such as the movie being watched, but denied that any abuse occurred on these occasions as she had stated at trial; (b) A.M.D. testified that she lied at trial because Lora D. threatened and bribed her; and (c) Holly D. gave testimony at trial to the same effect.

The court found that it was suspicious for A.M.D. to recall additional details at the hearing, many years further removed from the events in question. The court further noted that A.M.D.'s mother and defendant engaged in frequent telephone conversations regarding defendant's appeal, including how a recantation from A.M.D. would aid his appeal, both before and after A.M.D. allegedly wrote her mother a letter admitting she fabricated her accusations. The court found that it did not believe A.M.D.'s testimony regarding the notarization of her affidavit because her testimony on this matter changed between the two days of the hearing, after hearing her mother's testimony.

From these findings, the court in turn found that "the child was feeling some form of pressure to make these statements [at the hearing]." The court declined "to speculate as to whether this was self-induced or from an external source." Based upon this determination, the court concluded as a matter of law that it was "not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false[,]" and thus a finding that "false testimony at the trial would [cause] a different result would not have been possible." Accordingly, the court denied defendant's MAR.

II. Discussion

On appeal, defendant argues that the trial court: (a) erred in admitting impermissible hearsay that did not corroborate A.M.D.'s testimony; (b) plainly erred in admitting testimony regarding his extradition from Puerto Rico and instructing the jury that this could be considered as evidence of flight; (c) erred in the calculation of defendant's prior record level; and (d) erred by ordering that defendant be subjected to lifetime SBM at the expiration of his active sentence. Furthermore, defendant argues that the court abused its discretion in its order denying his MAR. We address each argument in turn.

A. Allowing Prior Statement Testimony of Ms. Hester

[1] Defendant first argues that the trial court erred in allowing Ms. Hester to testify to prior statements A.M.D. made to her. Defendant contends that these statements were inadmissible hearsay, rather than admissible prior statements corroborating a witness's trial testimony. We disagree.

"A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion." *State v. Cook*, 195 N.C. App. 230, 243, 672 S.E.2d 25, 33 (2009) (citation omitted). "Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached." *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986) (citation omitted). In *State v. Johnson*, we summarized the distinction between inadmissible hearsay and admissible prior corroborative statements as follows:

> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2007). . . .
>
> Statements properly offered to corroborate former statements of a witness are "not offered for their substantive truth and consequently [are] not hearsay." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990).

209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (brackets in original). We also summarized the standard for determining whether a prior statement is corroborative:

> Corroborating statements are those statements that tend to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. Nevertheless,

> if the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. . . . Such variations only affect the credibility of the evidence which is always for the jury. . . . [C]orroborative testimony may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates . . . .

Id. (internal quotation marks and citations omitted).

In the instant case, A.M.D. testified at trial that defendant touched the interior and exterior of her vagina with his hands and fingers on numerous occasions at the Ruby Falls house. Three prior statements of A.M.D. were admitted to corroborate her testimony. The prior statements offered by Mr. Tucker and T.D. are unchallenged on appeal.

Defendant only challenges A.M.D.'s prior statement to Ms. Hester. Defendant argues that, even with the limiting instruction, the trial court erred in allowing Ms. Hester's testimony recounting A.M.D.'s prior statements related to fellatio, anal molestation, and the insertion of objects into A.M.D.'s private parts.

During her testimony, A.M.D. did not mention any such acts when asked when, where, and how defendant hurt her. A.M.D. did say that she only saw defendant's penis once when she went into the basement to wake him up, and stated that it did not touch her on that occasion. Thus, A.M.D.'s testimony only indirectly contradicts the challenged prior statement related to fellatio. Her testimony is silent regarding anal molestation and use of objects.

Accordingly, the instant case is different than those in which prior statements were held non-corroborative because they directly contradicted several aspects of a witness's testimony. *See*, *e.g.*, *State v. Frogge*, 345 N.C. 614, 617, 481 S.E.2d 278, 279-80 (1997) (prior statements were not corroborative where: (a) witness testified that defendant procured a knife after victim hit him with metal bar, whereas prior statement indicated witness did not recall whether defendant or victim first wielded weapon; (b) witness testified that defendant went to party after murdering victims and returned to scene of crime and staged robbery, whereas prior statement indicated defendant staged robbery prior to leaving for party; and (c) witness testified that defendant did not tell him why he stabbed victim, whereas prior statement indicated that defendant told witness he stabbed victim because he hated her). Nor is it one in which the challenged prior statement is far removed from its original declarant. *See State v. Stills*, 310 N.C. 410, 416, 312 S.E.2d 443, 447 (1984) (noting

that, where prior statement offered to corroborate another corroborating witness was partially inconsistent with testimony of original declarant, "justify[ing] the admission into evidence of hearsay statements *three* or *four* times removed from the original declarant under the guise of corroborating the corroborative witnesses is unacceptable") (emphasis in original).

Here, A.M.D. did not confirm, deny, or speak of these additional acts in any manner during her testimony. Her testimony that she only saw defendant's penis once and it did not touch her on that occasion indirectly contradicts Ms. Hester's testimony regarding fellatio. However, the vast majority of A.M.D.'s prior statements offered by Ms. Hester conformed with A.M.D.'s testimony that defendant penetrated her vagina with his fingers on numerous occasions at the Ruby Falls house. The excerpts of A.M.D.'s prior statements which do not align with this account of events merely add detail on the differing nature of defendant's abuse of A.M.D.

In *State v. Ramey*, our Supreme Court found that a victim's prior statements were sufficiently similar to his trial testimony to be admitted for corroborative purposes, even though they added more detail to the account of abuse given at trial. 318 N.C. at 470, 349 S.E.2d at 574. The victim testified that the defendant first touched his penis when he was five years old and that defendant had done so more than five times. *Id.* In one of his prior statements, the victim had given this same account of events, but added that the defendant would visit him at his home, buy him ice cream, and tell him not to tell anyone what happened. *Id.* at 469, 349 S.E.2d at 574. In another prior statement, the victim gave a consistent account of events but added that defendant had put both his mouth and hands on his penis. *Id.* at 470, 349 S.E.2d at 574. Our Supreme Court held that:

> [The victim's] testimony clearly indicated a course of continuing sexual abuse by the defendant. The victim's prior oral and written statements . . ., although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence. The jury could not be allowed to consider this evidence for any other purpose, however, and whether it in fact corroborated the victim's testimony was, of course, a jury question.

Id. (internal citations omitted).

Similar to *Ramey*, here A.M.D.'s testimony clearly indicates a pattern of continuing abuse by defendant while her family lived at the Ruby Falls house, consisting of defendant's penetration of A.M.D.'s genitals with his fingers. A.M.D.'s prior statements offered by Ms. Hester substantially conform with A.M.D.'s testimony at trial, save for the addition of other forms of abuse. These statements were sufficiently similar to A.M.D.'s testimony for the trial court to allow the jury to decide their corroborative value for itself, after receiving a limiting instruction to that effect. Therefore, the trial court did not abuse its discretion.

Assuming *arguendo* that the trial court abused its discretion by admitting A.M.D.'s prior statements to Ms. Hester, defendant was not prejudiced thereby. The jury heard two other witnesses give accounts of A.M.D.'s prior statements that conformed with her testimony of abuse given at trial, without providing additional details. Furthermore, one of these witnesses was a disinterested medical professional. *See State v. Smith*, 315 N.C. 76, 99, 337 S.E.2d 833, 848 (1985) (finding corroborative testimony of disinterested rape task force volunteer likely to have greater influence on jury). Defendant has not shown that, without A.M.D.'s prior statements recounted by Ms. Hester, there is a reasonable possibility that the jury would have found A.M.D.'s trial testimony to lack credibility.

The State's brief attempts to further distinguish *Stills* from the instant case by stating that the trial court in *Stills* gave the jury no limiting instruction when it admitted allegedly corroborative, impermissible hearsay over objection. In *Stills*, our Supreme Court did find impermissible some allegedly corroborative statements to which the defendant did not object and the trial court provided no limiting instruction. 310 N.C. at 415, 312 S.E.2d at 446. Our Supreme Court was somewhat ambiguous in identifying the prior statements with which it took issue. However, a careful reading of the case reveals that the Court also found impermissible one allegedly corroborative statement to which the defendant did object, and the trial court provided an adequate limiting instruction. *Id.* at 413, 312 S.E.2d at 445-46.

B. Testimony of Extradition and Instruction on Evidence of Flight

Defendant further argues that the trial court plainly erred by: (1) allowing Detective Ellis to testify regarding defendant's extradition back to North Carolina after his arrest in Puerto Rico, and (2) instructing the jury that this could be considered evidence of flight. Defendant concedes that he failed to preserve these issues at trial, and thus our review is limited to plain error.

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrenc*e, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (internal quotation marks and citations omitted).

1. Testimony of Extradition

[2] Defendant argues that the trial court plainly erred in allowing Detective Ellis to testify regarding defendant's apprehension and extradition from Puerto Rico. Defendant contends that Detective Ellis only learned of his extradition from conversations with the Marshals and the extradition paperwork, and therefore lacked personal knowledge to testify to this matter as required by N.C. Gen. Stat. § 8C-1, Rule 602 (2019). We disagree.

An evidentiary foundation for personal knowledge "may, but need not, consist of the testimony of the witness himself." *Id.* We agree with the State's position that "Detective Ellis's initiation of the involvement of the U.S. Marshals Service and direct oversight of the case as lead detective demonstrate personal knowledge sufficient to satisfy the requirements of . . . Rule 602. Detective Ellis had personal knowledge regarding the inability to locate [d]efendant after visiting all of his known residences since his release from prison in Georgia in 2008. Detective Ellis initiated the conversation with U.S. Marshals regarding assistance [in] locating [d]efendant." This constitutes sufficient personal knowledge to testify concerning defendant's extradition under Rule 602.

Assuming *arguendo* that the trial court erred in allowing this testimony, any such error did not have a probable impact on the jury's verdict. The jury also heard testimony that defendant subsequently escaped from the Clay County Detention Center and was found hiding in the attic of a nearby home. Thus, even without the challenged testimony, the jury heard evidence that defendant attempted to flee before he could be prosecuted for the alleged offenses. Defendant has thus failed to prove that the jury probably would have reached a different verdict without Detective Ellis's testimony on his extradition.

2. Jury Instruction on Flight

[3] Defendant argues that the trial court plainly erred by instructing the jury that his arrest and extradition from Puerto Rico could be considered evidence of flight indicative of guilt. Defendant maintains that the State did not produce evidence that he went to Puerto Rico to avoid apprehension for his crimes. We disagree.

"A trial judge is not required to instruct a jury on defendant's flight unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991) (internal quotation marks and citations omitted).

Evidence that a defendant departed from his usual routine by subsequently leaving the area and staying in another town, county, or state may support an instruction on flight. *See State v. Allen*, 346 N.C. 731, 740-41, 488 S.E.2d 188, 193 (1997) (holding no plain error where defendant "drove away from the scene of the crime and was not apprehended until later that night in another county"); *State v. Shelly*, 181 N.C. App. 196, 209, 638 S.E.2d 516, 526 (2007) ("Defendant left the scene of the shooting and did not return home. Rather, he spent the night at the home of his cousin's girlfriend, an action that was not part of Defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension. Accordingly, the trial court did not err in instructing the jury on flight.").

Here, the jury heard testimony that defendant's normal routine at the time he learned of A.M.D.'s accusations involved residing in the basement of the Ruby Falls home. Immediately after A.M.D. made her accusations in June of 2012, defendant could be found at neither the Ruby Falls home nor any of his other prior known addresses. Nearly six months later in November of 2012, defendant was found and arrested in Puerto Rico. Defendant was nowhere to be found immediately after A.M.D. accused him of sexual abuse, and was apprehended several months later in a territory outside the continental United States. This evidence reasonably supports the State's theory that defendant fled to avoid apprehension for his crimes against A.M.D. Thus, the trial court did not err in instructing the jury on flight.

C. Sentencing

Next, defendant argues that the trial court erred in sentencing him by improperly calculating his prior record level and imposing lifetime SBM after the expiration of his active term of imprisonment. We address each argument in turn.

1. Prior Record Calculation

[4] Defendant contends that, in its calculation of his prior record level, the trial court erroneously determined that one of his prior convictions in Georgia was substantially similar to a Class B1 felony in North Carolina. We disagree.

a. Standard of Review

By default, prior felony convictions from other jurisdictions are treated as Class I felonies when calculating a defendant's prior record level. N.C. Gen. Stat. § 15A-1340.14(e) (2019). However, the prior felony conviction can be treated as a higher class of felony if the State proves by a preponderance of the evidence that it is "substantially similar" to a North Carolina felony of that class. *Id.* When determining substantial similarity, the trial court is tasked with "comparing the elements of [the] out-of-state and North Carolina offenses." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (citations omitted). "[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law" that we review *de novo*. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). In so reviewing, we keep in mind that "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008).

b. Record Sufficient for Review

In the instant case, the State failed to meet its burden of proof. While a copy of the Georgia statute under which defendant had been convicted was given to and reviewed by the trial court in making its determination, it was never introduced into evidence. Nonetheless, the State's failure to meet its evidentiary burden is harmless where the record contains "sufficient information regarding an out-of-state conviction for this Court to determine if it is substantially similar to a North Carolina offense[.]" *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

As defendant concedes, such is the case here. The record evidence before the court during sentencing contained defendant's Georgia

indictment and guilty plea. The relevant counts in the indictment alleged that defendant committed child molestation in violation of Ga. Code Ann. § 16-6-4 (2001) and statutory rape in violation of Ga. Code Ann. § 16-6-3 (2001) between October 1999 and October 2000. Moreover, the court's prior record level worksheet indicates that only the statutory rape offense was used to add nine points to the defendant's prior record level. The transcript reveals that the trial court and counsel for defendant and the State discussed whether the Georgia statute was substantially similar to North Carolina's statutory provision outlawing sexual intercourse with persons under sixteen years of age. Therefore, the record contains enough information for us to review the trial court's determination that the Georgia and North Carolina offenses were substantially similar.

c. Substantial Similarity

The version of the Georgia statute in effect at the time of defendant's prior offense provides that "[a] person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse[.]" Ga. Code Ann. § 16-6-3(a). The court determined this offense was substantially similar to N.C. Gen. Stat. § 14-27.25(a) (2015), which makes it a Class B1 felony "if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person." Such conduct constitutes only a Class C felony where the defendant is between four and six years older than the victim. N.C. Gen. Stat. § 14-27.25(b).

1. Victim Age and Scope of Prohibited Conduct

Defendant maintains that the Georgia offense of statutory rape is not "substantially similar" to N.C. Gen. Stat. § 14-27.25(a), because Ga. Code Ann. § 16-6-3(a) "does not require any particular age difference between the two participants. Unlike its North Carolina counterparts, the Georgia statute applies equally to all [victims] under the age of 16 years, instead of drawing distinctions between victims under the age of 13 and 13, 14 and 15 year-old victims."

We find defendant's attempt to distinguish the Georgia offense from that of North Carolina based on distinctions between the ages of victims unpersuasive. Defendant's argument is based upon a prior version of our statutes that made sexual intercourse with minors under age 13 and those 13 to 15 years old distinct offenses, albeit both Class B1 felonies. *See* N.C. Gen. Stat. §§ 14-27.7A, 27.2(a) (2001). At the time of defendant's sentencing, these two offenses had been consolidated into a single offense by N.C. Gen. Stat. § 14-27.25 (2015).

2. Age Requirements for Offenders

However, defendant correctly notes that the North Carolina and Georgia statutes have differing age requirements for offenders. According to defendant, this puts the offenses beyond the ambit of substantial similarity.

In *State v. Bryant*, we held that the South Carolina offense of criminal sexual conduct with minors in the first degree, *see* S.C. Code Ann. § 16-3-655(1) (1996), was not substantially similar to the North Carolina offenses of statutory rape of a child by an adult and statutory sexual offense with a child by an adult, *see* N.C. Gen. Stat. §§ 14-27.23, 27.28 (2015). 255 N.C. App. 93, 100, 804 S.E.2d 563, 567-68 (2017). In reaching this conclusion, we reasoned that:

> these offenses are not substantially similar due to their disparate age requirements. Although both of the North Carolina statutes require that the offender be at least 18 years of age, a person of any age may violate South Carolina's statute. Moreover, North Carolina's statutes apply to victims under the age of 13 years, while South Carolina's statute protects victims who are less than eleven years of age. The North Carolina and South Carolina statutes thus apply to different offenders and different victims. Therefore, the offenses are not substantially similar.

Id. at 100, 804 S.E.2d at 568 (internal quotations marks, citations, and alterations omitted).

In the instant case, the relevant offenses of North Carolina and Georgia have disparate requirements concerning the difference in age between the victim and offender. The North Carolina statute can only be violated by the older of two participants in sexual intercourse, where at least one is below the age of consent. *See* N.C. Gen. Stat. § 14-27.25(a) (stating that a person has committed the Class B1 felony offense only if he "is at least six years older" than a person under 16 years old with whom he engages in vaginal intercourse). The Georgia statute can be violated by both the younger and older parties to sexual intercourse, where both are under the age of 16 and older than 13. *See* Ga. Code Ann. § 16-3-1 (2001) (setting 13 years as age of criminal responsibility).

Depending on the age of the offender and victim, conduct prohibited by the Georgia statute does not necessarily constitute the Class B1 felony offense in North Carolina. *Cf. Sapp*, 190 N.C. App. at 713, 661 S.E.2d at 312 (holding inverse proposition to suffice for finding of

substantial similarity). There are several hypothetical combinations of victim and offender ages for which the same underlying action violates Ga. Code Ann. § 16-6-3 but does not constitute an offense, or only qualifies as a Class C felony, under N.C. Gen. Stat. § 14-27.25. For example, an offender engaging in sexual intercourse with a 13-year-old victim has committed the Georgia offense whether he is 13 or 19 years old, whereas the offender would not have committed the Class B1 felony offense in North Carolina if he was any younger than 19 years old.

Nevertheless, we hold that *Bryant* does not compel a similar result in the instant case for several reasons. As an initial matter, an analysis of our precedent in applying N.C. Gen. Stat. § 15A-1340.14(e) reveals that *Bryant* represents an outlier in our case law on substantial similarity. Most cases in which our courts have found no substantial similarity between two offenses involved situations where one offense contained an additional, more distinct element than merely a differing age requirement. *See*, *e.g.*, *Sanders*, 367 N.C. at 719-21, 766 S.E.2d at 333-34 (holding North Carolina offense of "assault on a female" not substantially similar to Tennessee offense of "domestic assault" because the latter "does not require the victim to be female or the assailant to be male and of a certain age" and, unlike the former, could only occur inside the home); *State v. Foxworth*, No. COA14-693, 2015 WL 660792, at *3 (N.C. Ct. App. Feb. 17, 2015) (holding two attempted murder statutes not substantially similar where North Carolina offense required additional *mens rea* element of premeditation); *State v. Hogan*, 234 N.C. App. 218, 230, 758 S.E.2d 465, 474 (2014) (holding New Jersey offense of third-degree theft not substantially similar to North Carolina offense of misdemeanor larceny because "[t]here are many elements of third degree theft not found in misdemeanor larceny" and "[s]everal of these possible elements, such as theft from a person, would also make the larceny a felony in North Carolina"); *Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606-607 (holding New York offense of second-degree assault not substantially similar to North Carolina offense of assault inflicting serious injury, due to lack of serious physical injury requirement).

Furthermore, we have overlooked differing statutory requirements far greater than age requirements in finding substantial similarity between two offenses. *See*, *e.g.*, *State v. Johnson*, No. COA16-1170, 2017 WL 2437001, at *3 (N.C. Ct. App. June 6, 2017) (holding North Carolina and Tennessee offenses of resisting arrest substantially similar despite Tennessee's additional requirement of "force," indicating it "is more serious than the same offense in North Carolina[.]"); *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (holding Virginia and

North Carolina offenses prohibiting convicted felons' involvement with firearms substantially similar, despite Virginia statute only prohibiting knowing and intentional possession or transport and North Carolina statute's more extensive prohibition on purchase, ownership, possession, or having a firearm in custody, care, or control).

Having noted the aberrant nature of our holding in *Bryant*, we now turn to our chief consideration in holding the offenses substantially similar: "There may be . . . hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct . . . ." *State v. Riley*, 253 N.C. App. 819, 827, 802 S.E.2d 494, 500 (2017).

We have previously found an out-of-state felony sexual offense against a minor to be substantially similar to our own, *despite* semantic differences in the age requirements for the offender and victim. *See State v. Corey*, No. COA17-1031, 2018 WL 2642772 (N.C. Ct. App. June 5, 2018), *rev'd in part, vacated in part on other grounds*, 373 N.C. 225, 835 S.E.2d 830 (2019). In *Corey*, we held that two sexual offense statutes prohibiting essentially the same conduct with slightly different age requirements were substantially similar. *Id.* at *4. Michigan's offense of fourth-degree sexual misconduct required an offender at least 18 years old and five years older than a 13-, 14-, or 15-year-old victim. *Id.* at *3-4. The statute prohibited engaging in "sexual contact" between an offender and victim. *Id.* at *4 North Carolina's offense of taking indecent liberties with a child required that the offender be at least 16 years old and five years older than a victim under 18 years old. *Id.* (citing N.C. Gen. Stat. § 14-202.1 (2017)). The statute prohibited the taking of "immoral, improper, or indecent liberties with the child . . . for the purpose of . . . arousing sexual gratification." *Id.*

Despite the hypothetical scenarios in which an offender of a certain age would violate the North Carolina statute and not the Michigan statute, we agreed with the trial court that:

> [T]he statutes at issue are substantially similar because *the elements of the statutes target assailants that engage in similar conduct with similar victims*, i.e., assailants who engage in sexual conduct with children for the purpose of sexual arousal. All child victims who meet the age requirement for the Michigan offense of fourth-degree sexual conduct . . . would meet the age requirement and could be classified as victims under N.C. Gen Stat.

> § 14-202.1 (2017). Moreover, the Michigan statute and case law further defining the offense seeks to prevent actions by defendants against children which lead to or arouse sexual gratification. The same is true of our indecent liberties with a child statute. We therefore conclude that the offenses are substantially similar . . . .

Id. (emphasis added).

Although unpublished, we find our reasoning in *Corey* persuasive in the instant case. Both the North Carolina and Georgia statutes seek to protect persons under the age of 16 from engaging in sexual activity with older individuals. Any victim meeting the age requirement of the Georgia offense would meet the age requirement and could be classified as a victim under N.C. Gen. Stat. § 14-27.25.

Moreover, both statutes opt to levy greater punishment on older offenders with greater age discrepancies from their victims. Although it does so in a manner structurally different from our own, the Georgia statute stratifies the severity of punishment based on the age discrepancy between the offender and the victim. Offenders under 21 years old face a minimum punishment of imprisonment for one year, whereas offenders 21 years of age and older face a minimum punishment of imprisonment for ten years. Ga. Code Ann. § 16-6-3(b). The same conduct is only punishable as a misdemeanor if the offender has an age difference of three years or fewer from a 14- or 15-year-old victim. *Id.*

Additionally, we note that defendant's indictment in the instant case reveals he would have been 36 years old when he committed the conduct underlying his Georgia conviction against a person under 16 years of age. Thus, defendant's conduct would constitute the Class B1 felony offense under N.C. Gen. Stat. § 14-27.25(a). Although not dispositive, we find this fact weighs against the various hypothetical technicalities defendant points to in arguing the offenses are dissimilar.

Both N.C. Gen. Stat. § 14-27.25 and Ga. Code Ann. § 16-6-3 seek to protect persons under age sixteen from those who would engage in sexual intercourse with them, and seek greater deterrence for offenders significantly older than their victims by punishing them more severely. Therefore, we hold that the trial court did not err in finding the two offenses substantially similar. The trial court properly treated defendant's prior conviction of the Georgia offense as a Class B1 felony for the purposes of calculating his prior record level.

2. Lifetime Satellite-Based Monitoring

[5] Finally, defendant argues that the trial court erred by entering an order subjecting defendant to lifetime participation in the State's SBM program. Accepting *arguendo* the State's contention that defendant has failed to preserve this issue on appeal, we invoke N.C.R. App. P. 2 (2020) to assess the merits of defendant's argument, which we find controlling. *See State v. Bursell*, 372 N.C. 196, 200-201, 827 S.E.2d 302, 305-306 (2019) (holding this Court erred in finding that defendant preserved constitutional challenge to lifetime SBM order, but permissively invoked Rule 2 in alternative to address issue).

a. Error

An order requiring a defendant to participate in the State's lifetime SBM program per N.C. Gen. Stat. § 14-208.40A(c) (2019) effects a search triggering the Fourth Amendment's protection from unreasonable searches and seizures. *Grady v. North Carolina*, 575 U.S. at 308-309, 191 L. Ed. 2d at 461. This is a substantial right that warrants our discretionary invocation of Rule 2. *Bursell*, 372 N.C. at 200-201, 827 S.E.2d at 305-306.

We first note that defendant does not fall within the category of persons for whom our Supreme Court has ruled mandatory enrollment in the SBM program facially unconstitutional. *See State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 553 (2019) (limiting holding that program was facially unconstitutional as to "individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision") (footnote omitted). While defendant does qualify as a recidivist, the trial court's SBM order also makes findings that defendant's convicted offense was sexually violent, committed against a child, involved the physical, mental, or sexual abuse of a minor, and qualified as an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) (2019). *See* N.C. Gen. Stat. § 14-208.40A (2019) (listing these factors as warranting entry of order enrolling defendant in lifetime SBM program).

Before a trial court may order a defendant to participate in the SBM program for life, the State must prove that the SBM program is reasonable as applied to the defendant, considering the totality of the circumstances, the nature and extent to which it intrudes upon the defendant's reasonable privacy interests, and the extent to which it furthers legitimate governmental interests. *State v. Blue*, 246 N.C. App. 259, 264-65,

783 S.E.2d 524, 527 (2016) (clarifying burden of proof at *Grady* hearing lies with State) (citing *Grady*, 575 U.S. at 310, 191 L. Ed. 2d at 462).

The State concedes that the trial court had insufficient evidence before it to support the SBM order. In particular, the State notes that it presented no evidence on the burdens the program imposes upon participants or any data on the extent to which the program advances legitimate government interests. Rather, after taking notice of the facts and evidence adduced at trial, the trial court ignored the State's offer to proceed introducing evidence in a *Grady* hearing and summarily gave its reasons for finding lifetime enrollment in the SBM program reasonable. *See Blue*, 246 N.C. App. at 264-65, 783 S.E.2d at 527 (finding error where "the trial court simply acknowledged that SBM constitutes a search and summarily concluded it is reasonable, stating that '[b]ased upon [the second-degree rape] conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute.' ") (alterations in original). We agree with defendant and the State. The trial court thus erred by ordering that defendant participate in the SBM program for life.

b. Remedy

Having found for defendant on the issue of error under *Grady* and its progeny, we must now determine the proper remedy.

We disagree with defendant's contention that reversal of the SBM order without remand is appropriate. This would be the proper remedy if the trial court had held a *Grady* hearing, and the State had simply failed to introduce enough evidence to meet its burden. *See*, *e.g.*, *State v. White*, No. COA 18-39, 2018 WL 4200979, at *8 (N.C. Ct. App. Sept. 4, 2018) ("[B]ecause the State presented insufficient evidence to meet its burden, the State is not entitled to a new SBM hearing for the purpose of giving it a 'second bite at the apple.' ") (citation omitted), *remanded*, 372 N.C. 726, 2019 N.C. LEXIS 1175 (2019); *State v. Dravis*, No. COA18-76, 2018 WL 4201041, at *4 (N.C. Ct. App. Sept. 4, 2018), *remanded*, 372 N.C. 721, 2019 N.C. LEXIS 1173 (2019); *State v. Greene*, 255 N.C. App. 780, 783-84, 806 S.E.2d 343, 345 (2017).

Here, the trial court entered a conclusory finding of reasonableness and did not afford the State an opportunity to satisfy its evidentiary burden, despite the State's repeated offers to proceed with a *Grady* hearing and introduce further evidence. Thus, the State has not yet had its "first bite of the apple," and vacatur of the SBM order with remand for an evidentiary hearing consistent with the most recent guidance from our Supreme Court in *State v. Grady*, 372 N.C. 509, 831 S.E.2d

542, is appropriate. *State v. White*, __ N.C. App. __, __, 820 S.E.2d 116, 122-23 (2018).

D. Order Denying Motion for Appropriate Relief

[6] Defendant argues that the trial court abused its discretion in its order denying his MAR requesting a new trial. Specifically, defendant contends that the order's findings of fact, taken as a whole, are insufficient to support the trial court's legal conclusions. We agree, and vacate and remand with instructions to enter an order containing sufficient findings of fact to address the issues raised by the motion and which the trial court believes to support its conclusion of law.

1. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Frogge*, 359 N.C. at 240, 607 S.E.2d at 634 (internal quotation marks and citation omitted). The trial court's findings of fact are binding on appeal if supported by competent evidence, and conclusions of law are reviewed *de novo*. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

Pursuant to a motion for appropriate relief,

> A defendant may be allowed a new trial on the basis of recanted testimony if:
>
> 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and
>
> 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

Britt, 320 N.C. at 715, 360 S.E.2d at 665. The defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2019).

2. Application

Defendant challenges several findings of fact, arguing that they merely recite testimony and do not make necessary credibility determinations between conflicting testimony. We agree. Taken as a whole, the order's findings of fact do not resolve factual issues necessary to reach the trial court's conclusion of law.

Finding of fact 3 is, by itself, fatal to the order. This finding recites A.M.D.'s hearing testimony that she lied at trial due to threats and bribes from Lora D. and Holly D.'s trial testimony that A.M.D. made similar statements to her. Defendant argues that this finding is deficient because it merely recites testimony without resolving any of the factual issues raised by this evidence: namely, whether the court believed it to be true. *See In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) ("[V]erbatim recitations of the testimony . . . *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.") (emphasis in original). We agree.

> A trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. Recitation of testimony is insufficient only where a material conflict actually exists on that particular issue, and does not resolve the conflicts in the evidence and actually find facts. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.

State v. Cody, No. COA18-503, 2018 WL 6318427, at *8 (N.C. Ct. App. Dec. 4, 2018) (alterations, internal quotation marks, and citations omitted), *disc. rev. dismissed*, *cert. denied*, 372 N.C. 100, 824 S.E.2d 417 (2019).

The testimony at the trial and hearing clearly present a material conflict in the evidence. A.M.D. testified at trial that defendant sexually abused her. Holly D. testified at trial that A.M.D. told her she was lying due to threats and bribes from Lora D. A.M.D. testified at the hearing that defendant did not sexually abuse her, and that she lied at trial due to Lora D.'s threats and bribes.

A determinative finding on whether A.M.D. had indeed lied in her trial testimony due to bribes and threats from Lora D. would cut to the core of the first prong of the *Britt* test. An affirmative finding on this issue would have compelled the court to find that it was reasonably satisfied that the testimony of a material witness was false. Moreover, the primary evidence against defendant consisted of A.M.D.'s testimony and the testimony of other witnesses recalling what she said to them on prior occasions. Thus, without A.M.D.'s trial testimony, the second prong of

Britt would likely be satisfied because there is a strong possibility that defendant could not otherwise have been convicted. "[T]he outcome of the matter to be decided is likely to be affected" by the court's resolution of this conflict in the evidence, *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010), therefore the trial court abused its discretion by failing to expressly find which version of events it believed to be true.

The dissent would find the trial court's order adequate under *Britt*, based on the court's findings noting its suspicion regarding the context in which A.M.D.'s recantation arose. The dissent does not explain how such findings can suffice to support the trial court's *Britt* conclusion without running afoul of our mandate to make findings resolving material conflicts in the evidence: in the present circumstances where "evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected[,]" the trial court must make an ultimate determination regarding which version of events raised by the evidence it believes to be true. *Id.* The trial court's findings noting the suspect context in which A.M.D.'s recantation arose, however well-grounded they may be, are no substitute for a finding that directly resolves whether A.M.D. was indeed bribed and threatened to give false testimony at trial. This principle is far from an expansion of our Supreme Court's mandate in *Britt*. Rather, it arises from our general precedent addressing the sufficiency of findings of fact in any order, whether in the MAR context or otherwise.

Furthermore, the trial court's remaining findings of fact, viewed as a whole, do not adequately address other evidentiary issues raised at the MAR hearing. Findings of fact 1, 2, and 4 all contain recitations of A.M.D.'s testimony at the hearing, without expressly determining the veracity of this testimony. The court assesses the credibility of this testimony indirectly in conclusion of law 4, where it makes a finding that it "is convinced that the child was feeling some form of pressure to make these statements[,]" without "speculat[ing] as to whether this was self-induced or from an external source." "Internal pressure" is vague and could equally refer to either A.M.D.'s guilty conscience for falsely testifying at trial, or a desire to make her mother happy after observing her mother's romantic relationship with her incarcerated abuser. The court must make some finding that sets forth its determination, rather than providing a vague reference as detailed above.

A court hearing an MAR must make findings in its order that are unambiguous and assess the credibility of the evidence on key issues presented by the motion. The court failed to do this in the instant case, and therefore abused its discretion in its order denying defendant's

MAR. We therefore vacate the court's order denying defendant's motion and remand with instructions for the court to issue a new order[2] containing findings that resolve the factual issues presented by defendant's motion, the supporting affidavit, and the testimony at the hearing.

III. Conclusion

For the foregoing reasons, we find no error in the evidentiary phase of defendant's trial, and vacate the trial court's orders enrolling defendant in the SBM program and denying defendant's MAR. We remand for entry of a new MAR order consistent with this opinion. If the court's new MAR order does not necessitate a new trial, we direct the court to conduct an evidentiary hearing on the reasonableness of subjecting defendant to the SBM program upon his release.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE concurs.

Judge BRYANT concurs in part and dissents in part in separate opinion.

BRYANT, Judge, concurring in part, dissenting in part.

I fully concur in the majority opinion as it relates to the jury trial and the order on satellite-based monitoring. However, I disagree with the majority's opinion that the lower court abused its discretion by making findings of fact insufficient to support its conclusions of law and denying defendant's motion for appropriate relief (hereinafter "MAR"). Therefore, I respectfully dissent.

Following the evidentiary hearing on defendant's MAR, the lower court entered an order which contained the following:

FINDINGS OF FACT

> 1. On December 5, 2016, a Jury of Clay County found the defendant Guilty of Statutory Sex Offense with a Child. At the trial of the matter [A.M.D.] testified as to various facts and occurrences during a relevant time frame during the year 2012. At the trial, she testified as to basic facts including details of the touching and acts of the

2. We request the court to exercise a degree of expediency not seen in its first treatment of defendant's motion in making these determinations.

defendant which could have constituted the offense. During this hearing on May 1, 2019, [A.M.D.] testified to many more details of the events, including the name of the movie being watched during the "couch" incident (Bobby and the Nutcracker); the book the defendant was reading her during the "bedroom" incident (The Opossum came a Knocking); the video game being played (Halo) during on the basement incidents.

2. During the trial [A.M.D.] testified Roger (the defendant) was play asleep and when she tried to wake him up he pulled his privates out and when she went running upstairs to tell her mom that her mom giggled. During this hearing [A.M.D.] testified she went down and Roger was asleep and he wasn't getting up and [A.M.D.] went and told mom he wasn't waking up but not about privates and she did not remember going to bathroom [sic] to hide or being scared. She testified the defendant didn't show his privates then or any other time. As to the other possible time frames of occurrences which were testified to at the trial, in this hearing [A.M.D.] denied any and all touching. She gave further details as to the names of the movie, book and video game but denials of any touching.

3. When asked why [A.M.D.] lied during the trial she stated she was afraid of her step mother (Lora) as Lora had stated she would hurt or kill [A.M.D.]'s mom. Further the Step mother would get her things she wanted like a horse or get her toys if she testified and said these things. Also [A.M.D.] stated she didn't like liars and hated the lying during the trial. At the trial in December 2016, Holly Dempsey testified to something similar in relating a comment made to her by [A.M.D.] wherein she stated Lora said if she didn't say this she would kill her mom.

4. Defendant's Exhibit 1 is a letter tha[t] [A.M.D.] says she wrote and left for her mother on her desk in January 2018 while [A.M.D.] was living with her dad. [A.M.D.] decided to write the letter because she knows her mom was "torn up" over the truth and not knowing the facts and [A.M.D.] wanted her to be happy again. Also, [A.M.D.] made comments about that's what love is about. This is the letter which led to the affidavit of [A.M.D.]. Upon questioning by both the State and the Defense counsel [A.M.D.] and her

mother, Cassie, stated this letter was written and left in January 2018. Further they both stated it was not discussed between them until March 2018. *However when telephone calls were played by the State which were recorded between the defendant and Cassie reference is made to [A.M.D.] being willing to testify in court and getting an affidavit to send to the lawyer on December 6, 2017. Moreover, the defendant discusses whether [A.M.D.] is willing to testify in court about what she told Cassie. He tells Cassie to tell him about what [A.M.D.] said and to get an affidavit to send to the lawyer to help the appeals case.* He asks when [A.M.D.] is going to be with Cassie and away from Lora and the dad. On December 19, 2017 during another phone call between the defendant and Cassie, the defendant discussed getting [A.M.D.] in touch with a PI to get a statement from her, specifically Teresa Dean, and asks Cassie to look the number up. On January 12, 2018 during a phone call the defendant asks Cassie who else she had told of what [A.M.D.] said.

5. During a phone call on May 7, 2019 [sic] the defendant is told by Cassie that Teresa Dean had been to talk to [A.M.D.]. The Defendant asks what was said and wanted Cassie to ask questions so she could tell him what was said during the interview.

6. During a phone call on May 31, 2018 a voice the Court took to be [A.M.D.] called the defendant Dad to which he responds "aww" when Cassie says [A.M.D.] calls him that. This was overheard on the phone call when there was [sic] several voices clamoring to speak to the defendant on the phone among them Levi (the defendant's son with Cassie) Cassie and [A.M.D.]. There is then a discussion as to how long going to be until get [A.M.D.] gets into court. [sic]

7. During a phone call on June 1, 2018 the defendant and Cassie discuss the MAR. The defendant explains where the testimony from [A.M.D.] comes in and how the MAR is the best chance because then the defendant can talk about the lawyer not doing stuff and [A.M.D.] recanting her testimony.

8. The Affidavit (Defense Exhibit 2) was notarized at a bank in Georgia. During the first testimony of [A.M.D.] at this hearing she stated she signed it and the next day

the lady put the stamp on it. The stamp being the notary seal. Cassie testified [A.M.D.] made some corrections to the affidavit and then they went to the bank and someone notarized it at the bank and then faxed it to the lawyer. When [A.M.D.] testified again two days later, she "remembered" she had signed the affidavit in front of the lady and had shown her an ID, one from her school with her picture on it.

CONCLUSIONS OF LAW

. . . .

3. The Court utilizing the standard as set out in *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987); is charged with deciding the conditions. The first being if the Court is reasonably well satisfied that the testimony given by a material witness if false [sic] and the second being if there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial.

4. *The Court is not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false.* The Court concludes that the child gave surprisingly more details at this hearing than at the trial, some five to six years after the offenses. The trial was closer in time to the events and *it is suspicious that more details would be recalled as time elapses*. The Court heard the additional details the child gave during the affidavit and its signature during the course of this hearing between the two days of testimony and after witnessing the testimony of the mother. *The Court is unconvinced this is accurate testimony*. Further the details of the "recantation" and its use by the defendant as additional help for his appeal was discussed repeatedly between the defendant and the mother *prior* to the alleged time the letter (defendant's exhibit 1) was "left" by the child. The Court is convinced that the child was feeling some form of pressure to make these statements. The Court is not going to speculate as to whether this was self-induced or from an external source.

5. *The Court not finding false testimony at the trial would find a different result would not have been possible.*

(emphasis added).

Our standard of review as to rulings on MARs is to determine whether the trial court's findings of fact are supported by the evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order. *See State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005). This was acknowledged by the majority along with the well-known principle that "the trial court's findings of fact are *binding on appeal* if supported and the conclusions of law are reviewed *de novo*. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted)." It is also a well-known principle that "[w]here trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991) (citations omitted).

As noted by the majority, defendant has the burden of proof on an MAR. Defendant may be allowed a new trial on the basis of recanted testimony if:

> 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and
>
> 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

State v. Britt, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987).

Here, the lower court made a credibility determination based on testimony presented during the December 2016 trial and testimony presented during the May 2019 MAR hearing. The court determined that it "[was] not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false." Further, the court concluded it was "unconvinced" the testimony at the MAR hearing was accurate.

The evidence presented during defendant's December 2016 trial showed that four years after she was abused at the age of eight, then twelve-year-old A.M.D. testified to acts of sexual abuse for which defendant was convicted. In May 2019, the hearing on defendant's MAR was conducted. Per the MAR court's finding of fact 1, the court noted the extent to which A.M.D. provided details at defendant's trial in 2016 versus the extent to which she provided details in 2019, regarding the circumstances surrounding a sex offense which did not occur. During defendant's 2016 trial, A.M.D. testified to basic facts which could have constituted a statutory sex offense with a child, while during the 2019 MAR hearing A.M.D. testified to the name of the movie that was playing

during the "couch" incident, the book defendant was reading during the "bedroom" incident, and the video game being played during the "basement" incident, again testifying to facts surrounding incidents she later said did not occur.

Per finding of fact 2, A.M.D. recanted the testimony she gave during the 2016 trial—when she testified that defendant had "pulled his privates out" as she tried to wake him—and at the MAR hearing, she denied "any and all touching" by defendant. In finding of fact 8, the court noted discrepancies in A.M.D.'s testimony, as well as that of her mother, Cassie, regarding how and when the affidavit A.M.D. signed in support of defendant's MAR was notarized. A.M.D. testified that the impetus for recanting her testimony, a letter she wrote to her mother—Defendant's Exhibit 1—was written and left for her mother in January 2018. A.M.D. knew "her mom was 'torn up' over the truth and not knowing the facts and [A.M.D.] wanted her [mother] to be happy again." Moreover, A.M.D. testified that she and her mother did not discuss the contents of the letter until March 2018. However, the MAR court found that defendant and A.M.D.'s mother, Cassie, were recorded on 6 December 2017, discussing with defendant A.M.D.'s willingness to testify in court and getting an affidavit to send to a lawyer. "[D]efendant discusse[d] whether [A.M.D.] [wa]s willing to testify in court about what she told Cassie. He t[old] Cassie to tell him about what [A.M.D.] said and to get an affidavit to send to the lawyer to help with the appeals case." On 19 December 2017, defendant and Cassie were recorded discussing getting A.M.D. in touch with a PI in order to get a statement. Again, there were clear discrepancies in the testimony of AMD and Cassie as to how, when, and perhaps where the affidavit of recantation was obtained.

In the court order denying defendant's MAR, the court acknowledged the test to grant defendant a new trial on the basis of recanted testimony as set forth in *Britt*, 320 N.C. 705, 360 S.E.2d 660. Therefore, it is clear the MAR court was aware the *Britt* test determined whether defendant's MAR could be granted.

The majority reverses the lower court order solely on the basis that the MAR court did not specifically state whether it found A.M.D.'s 2019 MAR hearing testimony that she was threatened and bribed to submit false testimony during defendant's 2016 trial to be true or false. The majority states that finding of fact 3 is, by itself, fatal to the order because the "finding recites A.M.D.'s hearing testimony that she lied at trial due to threats and bribes from Lora D." The majority accepts defendant's argument that the MAR court did not resolve the factual issue raised by that evidence. On the other hand, the majority does not accept

that the MAR court did just what *Britt* requires as a first step: determine whether "the court is reasonably well satisfied that the testimony given by a material witness is false[.]" *Britt*, 320 N.C. at 715, 360 S.E.2d at 665.

What the majority is interposing is an expansion of the *Britt* test: a court hearing a MAR "must make findings in its order that are unambiguous and assess the credibility of the evidence on key issues presented by the motion." Here, during the MAR hearing, the witness recanted the bare bones of her trial testimony. But upon hearing the evidence, the lower court clearly had serious concerns regarding the circumstances and sequence of events that gave rise to the recantation by the witness—a minor child—as well as the pressure imposed ("either self-induced or from an external source") upon that recanting witness which may have affected her veracity. As such, the court was "unconvinced" the recanting witness's testimony given during the 2019 MAR hearing was "accurate," and therefore, in accordance with *Britt*, the MAR court "[wa]s not satisfied that the testimony given by [A.M.D.] at trial on this matter in December 2016 was false."

The lower court's order was sufficient to satisfy the *Britt* test and denying defendant's MAR was not an abuse of discretion. Defendant merely failed to meet his burden of proof. It is not this Court's responsibility to use a test created by defendant that would require a lower court to make findings of fact on what defendant considers the critical issue. And I urge the majority not to adopt such an unsupportable position.

I will note that going forward, more specificity in the strength of a trial court's findings of fact and conclusions of law is always appreciated by our appellate courts. However, I disagree that, because we do not have what defendant may consider a more perfect order, the order we do have, which makes appropriate findings of fact and conclusions of law pursuant to the *Britt* rule, should be vacated.

For these reasons, I would uphold the lower court's order denying defendant's MAR.

STATE v. NOVA

[270 N.C. App. 509 (2020)]

STATE OF NORTH CAROLINA
v.
VICTOR MANUEL MEDINA NOVA

No. COA19-462

Filed 17 March 2020

Jury—request for transcript of witness testimony—lack of real-time transcript—trial court's discretion

At a trial for taking indecent liberties with a child, the trial court erred by denying the jury's request for a transcript of witness testimony on grounds that a "real-time" transcript was unavailable and would take too long to prepare; under controlling precedent, this was error because it was unclear whether the trial court understood it had discretion to grant the jury's request and wait for the transcript to be prepared. Moreover, the court's error prejudiced defendant where the case turned on the witnesses' credibility and where the jury requested transcripts of defendant's and the alleged victim's conflicting testimonies.

Appeal by defendant from judgment entered 25 October 2018 by Judge Athena Fox Brooks in Gaston County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany Edwards, for the State.

Joseph P. Lattimore for defendant.

DIETZ, Judge.

It is fairly common for jurors, during deliberations, to ask for a transcript of witness testimony. It happened in this criminal case. The trial court responded as follows: "This is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done."

Were this a case of first impression, we would hold that the trial court's statement was an appropriate exercise of the court's discretion. But this is not a new issue. In a series of indistinguishable cases, our State's appellate courts have held that trial court statements like the one

quoted above, denying jury requests for transcripts because there is no "real-time" transcript, is error. This is so, these courts reasoned, because it is unclear whether the trial court understood it had discretion to grant the jury's request and wait for the transcript to be prepared.

We are constrained to follow this controlling precedent here and so we must vacate the judgment and remand for a new trial. But we believe the Supreme Court should review this line of cases. Precedent aside, it readily can be inferred from the trial court's statement that the court understood it had discretion to order a transcript but chose not to do so because it was impractical given the length of time necessary to prepare one.

Facts and Procedural History

A grand jury indicted Defendant Victor Manuel Medina Nova for taking indecent liberties with a child. The case went to trial. The alleged juvenile victim testified at the trial, as did Nova.

During deliberations, the jury sent notes to the trial court asking, "can we read transcript of defendant's testimony" and "can we see [the juvenile's] transcript from his testimony." Outside the presence of the jury, the trial court first informed the parties that "we do not have real-time transcripts, so they will be directed to remember their own memory of the testimony." The trial court then brought the jury into the courtroom and instructed them that "[t]his is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done. You should rely upon your memory of what the testimony was."

The jury convicted Nova of taking indecent liberties with a child. The trial court sentenced Nova to 15 to 27 months in prison and 30 years of sex offender registration. Nova appealed.

Analysis

Nova argues that the trial court committed reversible error because it "failed to exercise the discretion required by statute" in denying the jury's request for a transcript of trial testimony.

Although, for practical reasons, courts rarely order a transcript of trial testimony during jury deliberations, the law permits them to do so. If "the jury after retiring for deliberation requests a review of certain testimony" in a criminal case, the trial court "may direct that requested parts of the testimony be read to the jury." N.C. Gen. Stat. § 15A-1233(a).

Importantly, the statute expressly provides that the decision of whether to read portions of the trial transcript to the jury is one left to the trial court's "discretion." *Id.* This statutory mandate had led our State's appellate courts to vacate many criminal convictions on the ground that the "trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." *State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 365 (2011) (emphasis added). This is so, our appellate courts explained, even if the trial court also stated the *reason* the court was unable to provide the transcript—typically a concern that it would take too long to prepare one.

For example, in *State v. Lang*, after the jury requested a transcript of testimony, the trial court responded that "the transcript is not available to the jury." 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). The Supreme Court held that the trial judge's "comment to the jury that the transcript was not available to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error." *Id.* at 511, 272 S.E.2d at 125.

Later, in *State v. Ashe*, the jury asked the trial court for a transcript of certain trial testimony. 314 N.C. 28, 33, 331 S.E.2d 652, 656 (1985). The court responded by stating "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence." *Id.* at 35, 331 S.E.2d at 656–57. The Supreme Court again held that the trial court erred by failing to exercise its discretion because the trial judge's remark that "there is no transcript at this point" indicated that "the trial judge apparently felt that he could not grant the request." *Id.*

Finally, in *State v. Starr*, the trial court responded to a request for a transcript of witness testimony using language nearly identical to the language at issue here: "In North Carolina we *don't have the capability of realtime transcripts* so we cannot provide you with that. You are to rely on your recollection of the evidence that you have heard in your deliberations." 365 N.C. at 317, 718 S.E.2d at 365 (emphasis in original). The Supreme Court held that this was error because the "trial court's statement 'we don't have the capability . . . so we cannot provide you with that' overcomes the presumption the court exercised its discretion." *Id.* at 318, 718 S.E.2d at 365. The Court emphasized that "[a] trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." *Id.* (emphasis in original).

This Court, relying on *Starr*, *Ashe*, and *Lang*, similarly has found error in a trial court statement identical to the one at issue here. In *State v. Chapman*, the trial court responded to a jury's request for a transcript of a witness's testimony with the following: "Transcripts aren't automatically generated. That's something that takes several weeks sometimes for a court reporter to do. We can't provide that for you because it is not available at this time." 244 N.C. App. 699, 707, 781 S.E.2d 320, 326 (2016). We held that the trial court's "explanation that it was refusing the jury's request because a transcript was not currently available is indistinguishable from similar responses to jury requests that have been found by our Supreme Court to demonstrate a failure to exercise discretion." *Id*. at 707–08, 781 S.E.2d at 326.

The trial court's statement in this case is substantively identical to those in *Starr* and *Chapman*. Here, the trial court said: "This is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done." Under *Lang*, *Ashe*, *Starr*, and *Chapman*, we are constrained to hold that the trial court erred.

We note that there is some logical tension in these decisions. When a trial court observes, as was the case here, that it "takes us a couple of weeks at the fastest" to prepare a transcript of witness testimony and thus it is "just not able to be done," this necessarily implies that the trial court understands it has discretion to order a transcript and to then "direct that requested parts of the testimony be read to the jury." N.C. Gen. Stat. § 15A-1233(a). After all, if the court thought it did not have the discretion to order a transcript and have excerpts read to the jury, what difference would it make how long it would take to prepare that transcript? What this language instead implies is that the trial court understands its discretionary authority but is unwilling to delay deliberations for several weeks while waiting for a transcript to be prepared.

As an intermediate appellate court, we can do nothing more than observe this tension. We are bound by both our own precedent and the Supreme Court's, and thus are constrained to find error. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We therefore turn to whether that error is prejudicial.

A trial court's failure to exercise its discretion in this context "constitutes prejudicial error when the requested testimony (1) is material to the determination of defendant's guilt or innocence; and (2) involves issues of some confusion or contradiction such that the jury would want to review this evidence to fully understand it." *Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327.

Both this Court and our Supreme Court have found that an error was "so prejudicial as to entitle defendant to a new trial" in sex offense cases where the jury requested "transcripts of the testimony of the victim and defendant," the victim's testimony was "the only evidence directly linking defendant to the alleged crimes," and the testimony of the victim and defendant was contradictory. *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997); *State v. Long*, 196 N.C. App. 22, 40–41, 674 S.E.2d 696, 707 (2009). In these particular circumstances, the victim's "credibility was the key to the case" and thus conflicting testimony concerning the victim's account "was material to the determination of defendant's guilt or innocence." *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377.

Here, as in *Johnson* and *Long*, there was no physical evidence linking the defendant to the alleged offense and the State's case relied entirely on witness testimony. *See Johnson*, 346 N.C. at 126, 484 S.E.2d at 377; *Long*, 196 N.C. App. at 23, 674 S.E.2d at 697. To be sure, there was testimony from another witness that, when he was a juvenile, Nova touched him inappropriately as well. But Nova testified that he never touched either juvenile inappropriately and that the allegations were "cooked up" by adults at the juveniles' church who were concerned after learning that Nova had a consensual homosexual relationship with an adult friend.

Because this case turned on the credibility of the defendant and the accusing witnesses, because the key trial testimony—that of Nova and of the alleged juvenile victim—was conflicting, and because the jury asked to review transcripts of that conflicting testimony, there is a reasonable possibility that the trial court's error affected the outcome of the jury's deliberations. *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377; *Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327. We therefore vacate the trial court's judgment and remand the case for further proceedings. Because we vacate the judgment on this ground, we need not address Nova's remaining arguments, which may be mooted in a new trial. *See State v. Moore*, 362 N.C. 319, 328, 661 S.E.2d 722, 727 (2008).

Conclusion

We vacate the trial court's judgment and remand for further proceedings.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID WARREN TAYLOR, DEFENDANT

No. COA18-810

Filed 17 March 2020

1. Constitutional Law—First Amendment—anti-threat statute —true threat analysis—standard of review

In a case of first impression involving a prosecution under an anti-threat statute (N.C.G.S. § 14-16.7(a)) for threatening to kill a court officer, the Court of Appeals determined that independent whole record review was the appropriate standard of review for analyzing whether the State met its burden of proving that defendant's communication constituted a "true threat" excluded from First Amendment protection.

2. Constitutional Law—First Amendment—anti-threat statute —true threat—elements of offense

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to include as essential elements of the offense any requirements under the First Amendment, including a certain level of intent and proof beyond a reasonable doubt that a communication is a "true threat."

3. Constitutional Law—First Amendment—anti-threat statute —true threat—intent element—general and specific

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to require both a general intent (objective reasonable person standard) regarding whether a communication is a "true threat" and a specific intent to threaten another (subjective standard) as part of the essential elements of the offense.

4. Constitutional Law—First Amendment—anti-threat statute —true threat—question of fact or law

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving violations of criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), analysis of whether a communication constitutes a "true threat" not protected by the First Amendment involves

consideration of constitutional facts that generally must be determined by a jury or the trial court as trier of fact. However, if the State's evidence is insufficient to prove a "true threat" as a matter of law, the charge must be dismissed.

5. Constitutional Law—First Amendment—anti-threat statute —true threat—definition—context

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), jurors must be instructed on the definition of "true threat" as set forth in *Virginia v. Black*, 538 U.S. 343 (2003), how to apply the necessary intent elements for proving a "true threat," and the requirement that they consider the context in which the communication was made.

6. Constitutional Law—First Amendment—anti-threat statute —true threat—jury instructions

In case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), the issues of whether a communication constitutes a "true threat" unprotected by the First Amendment and whether defendant specifically intended to threaten the recipient must be submitted to the jury as essential elements of the offense.

7. Constitutional Law—First Amendment—anti-threat statute —N.C.G.S. § 14-16.7(a)—as-applied challenge—true threat analysis

The Court of Appeals vacated defendant's conviction for threatening to kill a court officer (N.C.G.S. § 14-16.7(a)) after determining that it was obtained in violation of constitutional First Amendment principles where defendant's social media posts referring to the local district attorney were too vague and nonspecific to rise to the level of a "true threat" as a matter of law. The matter was remanded for entry of a judgment of acquittal.

8. Constitutional Law—First Amendment—threatening to kill court officer—N.C.G.S. § 14-16.7(a)—specific intent—sufficiency of evidence

As an additional basis for vacating defendant's conviction for threatening to kill a court officer, the Court of Appeals held that even if defendant's conviction was obtained in violation of First Amendment principles where his social media posts did not constitute a "true threat" as a matter of law, the State's evidence—including

all the surrounding circumstances in which the posts were made—failed to demonstrate the specific intent requirement that defendant intended for his posts to cause the local district attorney to believe he was going to kill her.

9. Constitutional Law—First Amendment—threatening to kill court officer—true threat—jury instructions

In a prosecution for threatening to kill a court officer (N.C.G.S. § 14-16.7(a)), the trial court's failure to instruct the jury that the State must prove defendant's social media posts constituted a "true threat" along with related intent requirements pursuant to First Amendment principles was prejudicial and not harmless beyond a reasonable doubt where the intent and "true threat" issues were necessary constitutional elements of the offense that needed to be properly submitted to the jury for resolution.

Judge DIETZ concurring in part in a separate opinion.

Appeal by Defendant from judgment entered 23 January 2018 by Judge Gary M. Gavenus in Superior Court, Macon County. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Solicitor General Fellow Matthew C. Burke, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

McGEE, Chief Judge.

David Warren Taylor ("Defendant") was convicted on 23 January 2018, pursuant to N.C.G.S. § 14-16.7(a) (2017) ("N.C.G.S. § 14-16.7(a)" or "the statute"), of "Threatening to Kill a Court Officer," Macon County District Attorney Ashley Welch ("D.A. Welch"). In *Watts v. United States*, the United States Supreme Court held the First Amendment required that, in order to constitutionally convict a defendant pursuant to an anti-threat statute, the government had to prove that the "threat" alleged constituted a "true threat":

> [T]he [anti-threat] statute . . . requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by [the defendant] fits

> within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The language of the political arena . . . is often vituperative, abusive, and inexact.

Watts v. United States, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 667 (1969) (citation omitted).

In this case, the alleged threats were included in several Facebook comments Defendant posted to his personal Facebook page on 24 August 2016, between approximately 5:30 p.m. and 6:30 p.m. These posts were visible to Defendant's Facebook friends for one to two hours until Defendant deleted them. However, one of Defendant's Facebook friends, Detective Amy Stewart ("Detective Stewart") of the Macon County Sheriff's Office, who was also a friend of D.A. Welch, saw Defendant's comments and took screenshots of some of the posts before they were deleted by Defendant. Detective Stewart shared the screenshots with the Macon County Sheriff (the "sheriff") and D.A. Welch. The sheriff contacted the North Carolina State Bureau of Investigation ("SBI") that evening, and the SBI became the investigative body in this matter. Based primarily upon a comment Defendant made in one of his posts that "[i]f our head prosecutor won't do anything then the death to her as well[,]" Defendant was charged with threatening a court officer pursuant to N.C.G.S. § 14-16.7(a). At trial, Defendant requested a jury instruction on the First Amendment requirement, as determined by the Supreme Court in *Watts* and subsequent opinions, that a person cannot be charged or convicted under an anti-threat statute unless the State proves that the alleged threat constituted a "true threat." Defendant's motion was denied, and he was convicted.

Defendant appealed and makes an "as applied" constitutional challenge to N.C.G.S. § 14-16.7(a), alleging "the trial court erred in failing to dismiss the charge" because the State failed to prove the "true threat" element of the statute as required by the First Amendment. In addition, Defendant argues that "the trial court erred in failing to instruct the jury on the definition of a true threat[,]" also in violation of the First Amendment. Because we find that N.C.G.S. § 14-16.7(a) was applied to Defendant in violation of his First Amendment rights, we vacate his conviction.

I. Factual and Procedural Background

Defendant was indicted on 19 September 2016 for violation of the statute, which states in relevant part: "Any person who knowingly and willfully makes any threat . . . to kill any . . . court officer . . . shall be guilty of a felony[.]" N.C.G.S. § 14-16.7(a). The indictment included five quotes from Defendant's Facebook comments:

> [D]efendant . . . did knowingly and willfully make a threat to kill [D.A. Welch], . . . by posting the following on Facebook: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go. . . . I will give them both the mtn justice they deserve . . . [.] If our head prosecutor won't do anything then the death to her as well. . . . [I]t is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! . . . It is time for old Time mtn justice!"[1]

Defendant was tried on 23 January 2018. Detective Stewart testified at trial that Defendant and D.A. Welch were friendly acquaintances prior to the events of 24 August 2016, which led to Defendant's conviction. Defendant worked for an investment and insurance company in an office next to the Macon County Courthouse. Defendant and D.A. Welch saw each other daily in a common outdoor smoking area shared by employees at Defendant's office building and the courthouse. Detective Stewart also used the same smoking area. Defendant's interactions with both women were always polite, and D.A. Welch testified that Defendant's favorite topic of conversation seemed to be politics. Detective Stewart testified that she and Defendant "had some of the same political beliefs and so we were friends on Facebook." She testified that on the evening of 24 August 2016, between 5:00 p.m. and 6:00 p.m., she signed on to Facebook and noticed some posts by Defendant that troubled her. Detective Stewart testified that Defendant's "initial post was about him being upset about a decision by the D.A.'s office with a case regarding a baby [(the 'child')] that had died. [T]here were no charges being brought [by D.A. Welch] against the parents [(the 'parents')], so he was upset about that."

---

1. The Facebook posts contain some common messaging shorthand substitutes for words, as well as loose punctuation and capitalization. We include them as they were written, taken from the State's screenshot exhibits, instead of reproducing them from the transcription of Detective Stewart's testimony. The posts from Defendant's Facebook friends were not read by Detective Stewart, so they are also quoted from the screenshots.

Defendant's first post referenced the fact that the parents were not going to be prosecuted by D.A. Welch, addressed his belief that the "judicial system" was not working, and expressed his frustration that "[w]ith this [decision not to prosecute] people question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go, period and point made." Some of Defendant's Facebook "friends" responded to this post, and a "conversation" between Defendant and these friends ensued, which included disparaging remarks about D.A. Welch, politicians, the local justice system, and law enforcement officers. This Facebook conversation occurred in the time period between 5:30 p.m. and 6:30 p.m. Detective Stewart testified that she saw this conversation no later than 6:00 p.m. and, approximately an hour and a half later, she decided to take screenshots of some of the comments. The screenshots indicate that they were taken at approximately 7:30 p.m. Along with screenshots of some of the exchange between Defendant and his Facebook friends regarding the decision not to prosecute the parents, Detective Stewart also took screenshots of Defendant's Facebook profile, which included a large picture of John Wayne and a quote attributed to John Wayne stating: "Life is hard; it's harder if you're stupid." A smaller picture of Defendant's profile consisted of an American flag background with part of the "Gadsden" flag which includes a coiled snake and the first two words of the "Don't Tread on Me" slogan. Defendant's profile information also indicated that Defendant had attended Franklin High School, and that he was an Army veteran.

Detective Stewart testified that, after taking the screenshots, she called D.A. Welch and the sheriff to inform them about the comments. Detective Stewart also forwarded the screenshots to D.A. Welch and the sheriff. D.A. Welch contacted her office and informed her Chief Assistant D.A. of Detective Stewart's concerns; the matter was referred to the SBI that evening. Detective Stewart went back on Facebook an "hour or two" after capturing the screenshots, and Defendant's posts were no longer there, having been deleted by Defendant.

The following day, at approximately 1:25 p.m., SBI Special Agent Joel Schick ("Agent Schick") and another agent went to Defendant's workplace to interview him about his Facebook posts. Following the interview, Agent Schick left Defendant at Defendant's workplace, then returned to Defendant's office at approximately 3:20 p.m. with a warrant for Defendant's arrest, which stated there was probable cause to believe Defendant "knowingly ma[de] a threat to kill . . . [D.A. Welch], by posting 'If our head prosecutor won't do anything then the death to her as well' " on his Facebook page.

Early in Defendant's trial, Defendant objected as the State was attempting to introduce five of Defendant's Facebook comments through the testimony of Detective Stewart. Detective Stewart and Agent Schick were questioned on *voir dire*, and Defendant argued (1) that none of the Facebook posts should be admitted due to authentication issues and, (2) in the alternative, if any of the posts were admitted, all of the posts should be admitted to provide context. The State argued that only the five posts it had chosen should be admitted, and the rest should be suppressed as hearsay, and because they were "irrelevant" to Defendant's charges. The trial court ruled against Defendant on the authentication argument, and the discussion then centered on whether to admit some or all of the posts captured by Detective Stewart's screenshots. The State argued the additional posts should not be admitted, dismissing Defendant's argument that the alleged threat had to be proven based upon its context: "We believe those are the five relevant texts. It's the State's position that the other texts . . . are not relevant."

> [THE STATE:] I don't think the other conversations are relevant. There's no exception to the statute for communicating threats if you're involved in a conversation with other people that are equally upset. The question is under the elements and under the statute did [D]efendant threaten to kill [D.A. Welch]. The context of that conversation is not relevant[.] And the State would argue that . . . it's not relevant. There is no, like I said, justification for your threat to kill[.]

Defendant responded that the other posts were "clearly relevant to [Defendant's] [free] speech" argument:

> [The additional posts] are relevant on the issue of whether or not this is a true threat under various United States Supreme Court decisions[.] I know the District Attorney characterizes this as a threat, but when you look at all these things, you don't see anything where my client said, "I'm going to kill the District Attorney." So . . . it falls under the definition of a true threat as to whether or not it's even a threat. And when you look at the definition of a true threat, there has to be a communication showing a serious intent to cause harm to [D.A. Welch]. That's the standard. And without seeing what these other posts are saying, there's no way for the jury to get a full view of what's going on here.

At trial, the State had Detective Stewart read the five Facebook posts that it had selected, which were marked as State's Exhibits 1 through 5 ("State's Exhibits 1 – 5"), which Detective Stewart described as "parts of the screen shots that I took with just [Defendant]'s posts and comments without the other people that responded." Two of the five posts introduced by the State did not include any statements contained in Defendant's indictment, and the post including the "old Time mtn justice!" comment was not included in State's Exhibits 1 – 5. From the record and statements of Defendant's attorney, it does not appear that Detective Stewart took screenshots of all the posts and comments from the Facebook discussion relevant to this case. Further, according to *voir dire* testimony, there were seven people, in addition to Defendant, whose comments *were* included in Detective Stewart's screenshots, but the comments of only four of them are included in the record. An eighth person, J. Drake, is identified as having "liked" Defendant's initial post.

At trial, Detective Stewart was asked to read the five selected posts, State's Exhibits 1 – 5, one immediately after the other, without discussing any of the additional comments. On cross-examination, Detective Stewart read at least some of the additional posts contained in Detective Stewart's screenshots. During direct examination, Detective Stewart was asked to read State's Exhibits 4 and 5 out of the chronological order in which they were posted by Defendant. We present State's Exhibits 1 – 5, along with the additional comments captured in Detective Stewart's screenshots, in the proper chronological order of their posting. The comments in State's Exhibits 1 – 5 that were included in Defendant's indictment are underlined. State's Exhibit 1, which was Defendant's initial post, stated:

> So I learned today that the couple Who brought their child Into that er whom had been dead to the point that the er room had to be closed off due to the smell of the dead child Will face no Charges. I regret the day I voted for the new DA with this outcome. This is totally sickening to know that a child, Whether by [D.A.] Ashley Welch's decision or not is not granted this type of Protection in our court system. Im tired of standing back and seeing how our judicial system works. I voted for it to change and apparently it never will. With this <u>people question why a rebellion against our government is coming? I hope those that are friends with her share my posts because she will be the first to go</u>, period and point made

(Emphasis added). This post had six "emoji" responses and thirteen comments at the time Detective Stewart took the screenshot. All of the emoji responses and comments by Defendant's Facebook friends in the record expressed some level of agreement with Defendant's statements. Detective Stewart then testified that Defendant "continued posting about how he was upset about that decision and negative things about" D.A. Welch.

Detective Stewart next read State's Exhibit 2:

> Sick is not the word for it. This folks is how the government and the judicial System works, Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise was. When the deputy ask me is it worth it. I would say with a Shotgun Pointed at him and a ar15 in the other arm was it worth to him? Who cares what happens to the person I meet at the door. I'm sure he won't. I would open every gun I have. I would rather be carried by six than judged by twelve. This folks is how politicians want u to believe is okay. I'm tired of it. What I do Training wise from this point is ur fault. And yes I know I have friends on fb whom see this. I hope they do! Death to our so called judicial system since it only works for those that are guilty! U want me come and take me

This post had two "likes" at the time of the screenshot. Nothing from this post was included in Defendant's indictment. In response to this comment, someone named R. Burch ("Burch") responded "vigilante justice !!!!!!!!!!!!!!!!!!!!!!!![,]" which had one "like." A man identified as D. Sammons commented: "I wouldn't expect that from Franklin but maybe Asheville." Defendant responded: "**D[.] Sammons** she doesn't serve the Asheville city, only west of there. Haywood county to the tn state line. This is how politics works. That's why my harsh words to her and any other that will Listen and share it to her fb page."[2] A woman identified as J. Crossman posted: "Poor little guy, he didn't get any justice. Ashley [(D.A. Welch)] can you give your County Citizens that you represent any answers? Please."[3]

---

2. Names included in a post that show up in bold mean that person was "tagged" in the post. When a person is tagged in a post, that person will get a notification informing them of this fact and be provided a link directly to the associated post.

3. Again, these additional posts were not included in State's Exhibits 1 – 5, and the State did not have Detective Stewart read these posts into evidence; Defendant had Detective Stewart read them to the jury on cross-examination.

Immediately following State's Exhibit 2, Detective Stewart read State's Exhibit 3:

> If that what it takes **R[.] Burch**. I will give them both the mtn justice they deserve. Regardless of what the law or courts say. I'm tired of this political bullshit. If our head prosecutor won't do anything then the death to her as well. Yeah, I said it. Now raid my house for communicating threats and see what they meet. After all those that flip Together swim together. Although this isn't a house or pond they want to fish in.

(Emphasis added). This post had one "like." Burch then posted: "I'm still waiting." Detective Stewart next read State's Exhibit 4, even though it was posted after State's Exhibit 5. Therefore, we quote State's Exhibit 5 next:

> For what **R[.] Burch**? Her to reply? She won't because she is being paid a 6 digit income standing Outside the courthouse smoking a cigarette. She won't try a case unless it gets her tv time. Typical politician. Notice that none of them has responded yet? Although I'm sure My house is being Monitored right about now! I really hope They are ready for what meet them at the front door. Something tells Me they aren't!

This post did not include any comments that were in Defendant's indictment. Burch then posted: "I'm waiting on you boys to say it's time to go!!!!!!!!!!!!!!!" This post was followed by a large "laughing" emoji also posted by Burch. These posts were not read by Detective Stewart on direct examination. Detective Stewart read State's Exhibit 4 last, in which Defendant stated:

> It can start at my house. Hell this has to start somewhere. If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! Maybe you need to learn what being free is verse being a puppet of the government. If u did u might actually be happy! I think we both know of someone who will like this Comment Or Like this post.

(Emphasis added).

On cross-examination, Defendant asked Detective Stewart to read the posts not introduced in her direct examination, being the non-State's

Exhibit posts included above, as well as the posts that follow. A woman identified as S. Marion commented: "I know people who said the ER room had to be shut down because the smell of the dead kid stunk up the entire ER room. Our DA and police department chose not to press charges. Yea that's the facts. Welcome to America. The once great great nation." Defendant responded to this post with the following two comments:

> Don't get me started on this. The court system and Most importantly western nc justice system is useless. It's all about money to the courts than it is about justice. It is time for old Time mtn justice! Yes **R[.] Burch** I said it. Now let Them knock on my door
>
> **R[.] Burch** don't get me Started about The Tony Curtis killing. Of Course No charges will Be brought against him. He is what the county considers to be a upstanding citizen of the community. Typical politics at its best. What he did was no different to the killing On 411 North over a year ago. What was his name? Fouts?

(Emphasis added). Although this second mention of "mountain justice" is included in the indictment, it was not included in State's Exhibits 1 – 5. Detective Stewart testified that "Tony Curtis" and "Fouts" referenced homicide cases handled by the D.A.'s office. This last post appears to be in response to a comment not included in the record.

Detective Stewart testified she knew Defendant had an office next to the courthouse. She and Defendant would see each other on a regular basis in a common smoking area outside the offices, and that D.A. Welch also frequently smoked in the same area. Detective Stewart never noticed any problems between Defendant and D.A. Welch.

D.A. Welch testified that she saw Defendant "pretty frequently on a daily basis" because they worked in adjacent buildings and both used the smoking area. She testified that Defendant "[n]ever said anything that [she] considered to be threatening" and that he was "always polite with" her. D.A. Welch also stated that Defendant was "real political," so their conversations were "usually political speech." D.A. Welch testified that she did not change her smoking habits or the location of her smoke breaks as a result of Defendant's Facebook posts. She testified that she did request that her real estate agent take down a video tour of her home "so that it wasn't so easy to figure out where I lived." However, she declined the sheriff's offer to have "somebody come out" that night to watch her house, and neither "the Sheriff's Department [n]or the SBI

[] dispatch[ed]" officers "out to [her] house to sit[.]" The next morning, 25 August 2016, D.A. Welch went to the courthouse as usual. She testified the only difference she noticed was more "sheriff officers from civil process" around the courthouse than was normal, so she "apologized to them" and "kept telling them I'm okay, you know, you don't have to –[,]" at which point the State asked a different question. She was unaware of any security provided for her outside the courthouse, and she had not "heard from [D]efendant since that night[.]"

Agent Schick, the first law enforcement officer to contact Defendant about the Facebook posts, arrived at Defendant's office on 25 August 2016 at approximately 1:25 p.m. He testified that Defendant was "polite" and "courteous" and answered all his questions. Defendant told Agent Schick that he started cooking hamburgers for his family around 5:00 p.m.; drank approximately six beers during the evening; made the post about D.A. Welch's decision not to prosecute the parents of the child who had died, and engaged in the resulting Facebook conversation; but that he deleted the posts between 7:00 p.m. and 8:00 p.m. Defendant told Agent Schick that "he could not believe no charges were brought against the parents for neglect and felt this was sickening[,]" and that "[i]f it were me, charges would have been brought against me." Defendant stated that "he would not threaten to kill a public official and knew this was against the law[.]"

Defendant "told [Agent Schick] that he took the Facebook [posts] down because he did not want people to think he was threatening anyone or taking things the wrong way[,]" and he also would not want his posts to somehow get back to the "child's parents." Defendant had deleted his posts within a couple of hours of having posted them. Defendant then told Agent Schick that he would never threaten anyone unless "they threatened my kids or family or trespass on my property." Defendant emphatically stated to Agent Schick that "he knew . . . for sure" that he did not "threaten to kill someone"; "nor did he mean to threaten anyone"; and "that he had no intention of making anyone feel threatened and that was the last thing that he wanted to do[.]" Defendant asked Agent Schick to apologize to D.A. Welch when he next saw her, and to let her know Defendant had not intended to make her feel threatened.

As far as Agent Schick knew, no law enforcement agency was "keeping an eye on [Defendant] because of the[] posts[,]" and no search was ever conducted of Defendant's house, office, or car. Defendant was left unsupervised after Agent Schick questioned him until Agent Schick returned with a warrant for Defendant's arrest at approximately 3:20 p.m., when Defendant was taken into custody without resistance.

There is no record evidence that any attempt was made to confiscate Defendant's firearms during the nearly one-and-a-half-year period between when Defendant posted the above comments and when he was convicted for having done so.

Defendant moved to dismiss at the close of the State's evidence, and Defendant did not present any evidence. Defendant's motion to dismiss was based on the requirement of the First Amendment that an anti-threat statute such as N.C.G.S. § 14-16.7(a) must be read as requiring proof of a "true threat" as defined by the United States Supreme Court. Defendant argued: "When you look at the cases concerning free speech, the test is [considering] the context . . . is this a true threat. The definition of that is, is this a statement in which the defendant means to communicate a serious intention of committing an act of unlawful violence against a particular person[.]" The State contested Defendant's argument that First Amendment "true threat" jurisprudence placed any additional burden on the State, contending: "Your Honor, the elements of the charge . . . [are] did [D]efendant threaten to kill [D.A. Welch]. Is [D.A. Welch] a court official, and did he know she was the District Attorney. The State through its evidence has presented evidence as to all three of those matters." The trial court then ruled: "I have considered the motion and certainly taken in the light most favorable to the State, there's evidence of each and every element of the crime. The motion is denied."

At the charge conference, Defendant requested an instruction on "true threat," arguing that the First Amendment required such an instruction. The State objected to the requested instruction, arguing that the First Amendment did not require any "true threat" or intent elements be added to the plain language of the statute: "The State would object to all these instructions[.] The pattern jury instructions are clear that there are three and only three elements to this charge. Now with regards to the threat, the only element is that the defendant knowingly and willfully made a threat to kill the victim." The State further argued that the First Amendment did not apply to Defendant's case: "I get that the defendant is raising First Amendment objections to that statute as it's written, but I think the proper venue to take that up would be if upon conviction to take that up on appeal." "Therefore, it is the legislature's intent . . . that there be no requirement of proof to show that the threat was made in a manner and under circumstances which would cause a reasonable person to believe it is likely to be carried out." "[M]aking any threats towards . . . court officials . . . is unacceptable to the legislature, regardless of whether they were made in a manner that a reasonable person would believe they would be carried out." The trial court denied Defendant's requested instruction, and Defendant

was found guilty of threatening to kill D.A. Welch pursuant to N.C.G.S. § 14-16.7(a) on 23 January 2018. Defendant was sentenced to six to seventeen months' imprisonment, which was suspended, and Defendant was placed on twenty-four months' supervised probation. Defendant appeals. Additional facts will be included in our analysis.

II. First Amendment

Defendant's arguments are based upon allegations that his conviction was in violation of the First Amendment, which generally "prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). The Supreme Court's interpretation of the First Amendment "has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Id.* at 382–83, 120 L. Ed. 2d at 317 (citations omitted). Although the Court has referred to the categories of speech that may be restricted without implicating the First Amendment as constitutionally "unprotected" speech and said that "the 'protection of the First Amendment does not extend' to them," *id.* at 383, 120 L. Ed. 2d at 317 (citations omitted), the Court has clarified

> that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (["true threat,"] obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 383–84, 120 L. Ed. 2d at 318 (citations omitted) (emphasis in original). "The government may not regulate use [of traditionally proscribable speech] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386, 120 L. Ed. 2d at 320 (citations omitted). There are a limited number of categories of potentially proscribable speech, "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words;' child pornography; fraud;

[and] true threats[.]" *United States v. Alvarez*, 567 U.S. 709, 717–18, 183 L. Ed. 2d 574, 586–87 (2012) (citations omitted); *see also Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012). For simplicity, we will refer to these categories of speech as proscribable, or "unprotected" speech, even though that characterization is not entirely accurate. As will be discussed below, "true threats" are a subset of "threats," as defined through First Amendment jurisprudence, which are of such a clearly "threatening" nature that their criminalization is not prohibited by the First Amendment, despite their normally expressive nature. *R.A.V.*, 505 U.S. at 382, 120 L. Ed. 2d at 317.

Defendant argues that in order for him to have been constitutionally prosecuted and convicted pursuant to N.C.G.S. § 14-16.7(a), the State was required to prove his Facebook posts constituted not just "threats," but "true threats." Defendant further argues that the trial court was required to instruct the jury in accordance with First Amendment "true threat" jurisprudence. However, review of Defendant's arguments is difficult because relevant issues regarding "true threats," and appellate review of issues involving "true threats," have yet to be settled by the courts of this State. We have only been able to locate four opinions by North Carolina appellate courts that mention "true threats" in the context of First Amendment protections: *State v. Bishop*, 368 N.C. 869, 787 S.E.2d 814 (2016), *State v. Shackelford*, __ N.C. App. __, __, 825 S.E.2d 689, 703 (2019) (mentioning that "true threats" are one of the recognized "unprotected" categories of speech), *State v. Mylett* __, N.C. App. __ 822 S.E.2d 518 (2018) (currently before our Supreme Court on appeal of right due to dissent),[4] and *State v. Benham*, 222 N.C. App. 635, 731 S.E.2d 275, 2012 WL 3570792 (2012) (unpublished). Therefore, we look first to general First Amendment principles.

A. *As-Applied Challenge and General Principles*

Defendant makes only an as applied constitutional challenge to N.C.G.S. § 14-16.7(a): "An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, __ U.S. __, 198 L. Ed. 2d 273 (2017). Therefore, we do not address whether N.C.G.S. § 14-16.7(a) is facially constitutional.

4. *Mylett* includes some issues that are related to those currently before this Court.

> The basic distinction is that an as-applied challenge represents a [defendant's] protest against how a statute was applied in the particular context in which [the defendant] acted or proposed to act, while a facial challenge represents a [defendant's] contention that a statute is incapable of constitutional application in any context. . . . Only in as-applied challenges are facts surrounding the [defendant's] particular circumstances relevant.

Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citations omitted), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017). In order for the statute to have been constitutionally applied to Defendant, it must have been applied in accordance with the limitations set by the First Amendment, *i.e.*, the trial court must have treated the statute as containing all required constitutional limitations, even if they were not contained in the plain language of the statute. *State v. Summrell*, 282 N.C. 157, 167, 192 S.E.2d 569, 575 (1972), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989) (citations omitted) ("[A] statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech, cannot be upheld in the absence of authoritative judicial limitations."); *see also Stromberg v. California*, 283 U.S. 359, 369, 75 L. Ed. 1117, 1123 (1931).

On appeal, the State acknowledges that in order for N.C.G.S. § 14-16.7(a) to conform to the requirements of the First Amendment, it must be construed as limiting the term "threat" to "true threat."[5] *See United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) ("*White I*") (citation omitted) ("[B]oth [the defendant] and the government agree that § 875(c) can only be violated if the interstate communication contains a 'true threat' to injure a person."). This is because the statute "restricts speech and not merely conduct." *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818; *see also id.* at 876, 787 S.E.2d at 819 (defining a statute as "content based" if it "criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication").

The freedom of citizens to express dissatisfaction with government action is at the core of the First Amendment. " '[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless' " his speech crosses over into the realm of "unprotected speech." *Dennis v. United States*,

5. This position is contrary to the State's position at trial.

341 U.S. 494, 508, 95 L. Ed. 1137, 1152 (1951) (alteration in original) (citation omitted). "Government may cut [speech] off only when [the speaker's] views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 395, 94 L. Ed. 925, 942 (1950).

> The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."

Virginia v. Black, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 551 (2003) (citation omitted).

Therefore, courts can, and must, if possible, read constitutional requirements into a statute when they are not expressly included, because " 'impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to *interpret and administer* it uniformly, constitutional requirements are fully met.' " *State v. Strickland*, 27 N.C. App. 40, 42–3, 217 S.E.2d 758, 760 (1975) (emphasis added) (citation omitted). However, in any individual prosecution, if a statute is not interpreted in accordance with constitutional requirements, or is not administered in accordance with those requirements, that statute will be considered unconstitutional as applied to the defendant in that prosecution. *Id.*; *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22, 80 L. Ed. 2d 772, 785 n.22 (1984) ("The fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied to [a particular defendant]."). We are guided by the requirement that "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.' " *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327, 175 L. Ed. 2d 753, 773 (2010) (citation omitted).

The Supreme Court and North Carolina courts have developed a more comprehensive body of law in relation to other "unprotected" categories of speech than for "true threats." Because the Court regularly borrows from its reasoning and holdings concerning different "unprotected" categories of speech when deciding an issue concerning a particular "unprotected" category of speech, we will do the same. For

example, in *Ashcroft v. Free Speech Coalition*, while reviewing an issue arising from a prosecution under an anti-child pornography statute, the Supreme Court looked to settled law from another "unprotected" category of speech, incitement to violent action:

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. *See Bartnicki v[.] Vopper*, [532 U.S. 514, 529, 149 L. Ed. 2d 787, 803 (2001)] ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it[.]"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 152 L. Ed. 2d 403, 423 (2002) (citations omitted); *see also Black*, 538 U.S. at 359–60, 155 L. Ed. 2d at 552 (looking to incitement to violent action jurisprudence in support of the Court's "true threat" determination); *United States v. Bly*, 510 F.3d 453, 457–58 (4th Cir. 2007) (relying on standard of review set by the Supreme Court in a defamation case to determine standard in a "true threat" case).

In addition, the Supreme Court construes statutes that regulate speech narrowly, and proof of some level of intent is required for prosecution pursuant to an anti-threat statute. *Id.* In fact, First Amendment rights are often given *greater* protection than other constitutional rights:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right

> of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech . . . may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639, 87 L. Ed. 1628, 1638 (1943) (citations omitted). Therefore, a statute like N.C.G.S. § 14-16.7(a), "which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind[,]" *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667, and "the commands of the First Amendment" are particularly strict. *Id.*; *Barnette*, 319 U.S. at 639, 87 L. Ed. at 1638; *see also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the . . . test set forth in *Black* must be read into all threat statutes that criminalize pure speech."). If state-law standards conflict with constitutional requirements, the state law must give. The Supreme Court has held: "The standards that set the scope of [First Amendment] principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with state lines.' " *Rosenblatt v. Baer*, 383 U.S. 75, 84, 15 L. Ed. 2d 597, 605 (1966) (citation omitted).

Our Supreme Court also recognizes the principle that statutes which criminalize speech must be construed in accordance with the commands of the First Amendment. *See State v. Brooks*, 287 N.C. 392, 401, 215 S.E.2d 111, 118 (1975) (construing anti-incitement statute to conform to First Amendment requirements by holding that only speech constituting advocacy of "imminent lawless action," as defined in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434 (1969), is proscribed by that statute); *see also Lewis v. Rapp*, 220 N.C. App. 299, 302–03, 725 S.E.2d 597, 601 (2012); *Varner v. Bryan*, 113 N.C. App. 697, 703, 440 S.E.2d 295, 299 (1994) (stating rule that the First Amendment requires proof of "actual malice" element in a case of defamation against a public official).

The right of citizens to criticize public officials is at the heart of First Amendment protections: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech." *Citizens United*, 558 U.S. at 349, 175 L. Ed. 2d at 788.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

> *Cohen v. California*, [403 U.S. 15, 24, 29 L. Ed. 2d 284, 293 (1971) (and many additional cases cited)]. . . . Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, [376 U.S. 254, 270, 11 L. Ed. 2d 686, 701 (1964)].

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212 (1972) (citations omitted). For this reason, review "of content restrictions must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights." *Id.*

In addition, the freedom to associate with like-minded people and exchange ideas, as well as the freedom to express unpopular ideas in a public forum, are fundamental rights under the First Amendment:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622, 82 L. Ed. 2d 462, 474 (1984) (citations omitted); *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 279 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."). Particularly relevant to Defendant's case: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.*

In *Alexander v. United States*, the court discussed how *Watts*, the first Supreme Court opinion recognizing the First Amendment's "true threat" requirement for anti-threat statutes, served to limit the expansive reach that federal circuit courts had given to anti-threat statutes:

> *Watts* represented the Supreme Court's first construction of [an anti-threat statute—18 U.S.C. § 871(a)], an endeavor

> in which various other federal courts had engaged. Some of these courts, on whose holdings the majority of [the D.C. Circuit opinion in *Watts*] relied, had expanded the concept of a "threat" so broadly as to include utterances employing violent words intended and understood as mere jokes or political hyperbole. The Supreme Court, however, admonished that "we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " Thus, ruled the Court, to support a conviction under the statute, "the Government [must] prove a true 'threat.' "

Alexander v. United States, 418 F.2d 1203, 1205 (D.C. Cir. 1969) (footnotes omitted). However, although *Watts* mandated than no anti-threat statute could be constitutionally applied unless its proscription of "threats" was limited to only "true threats," the Court left many important questions unanswered. The definition of "true threat" currently in use comes primarily from *Black*:

> Although the State cannot criminalize constitutionally protected speech, the First Amendment does not immunize "true threats." The Court held in [*Black*] that under the First Amendment the State can punish threatening expression, but only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

Bagdasarian, 652 F.3d at 1116 (citations omitted). A "true threat" as defined in *Black* must be determined by looking at the context in which the alleged threat was made. *Id.* at 1119 (citation omitted) ("This . . . test requires the fact-finder to 'look[] at the entire factual context of [the] statements including: the surrounding events, the listeners' reaction, and whether the words are conditional.' It is necessary, then, to determine whether [the defendant's] statements, considered in their full context, 'would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm on or to take the life of [the person allegedly threatened].' ").

Finally, it is not the defendant, but the government that bears "the burden of proving that the speech it seeks to prohibit is unprotected."

Illinois ex rel. Madigan v. Telemar. Assoc., Inc., 538 U.S. 600, 620 n.9, 155 L. Ed. 2d 793, 810 n.9 (2003) (citations omitted). "Where the First Amendment is implicated, *the tie goes to the speaker*, not the censor." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474, 168 L. Ed. 2d 329, 349 (2007) (emphasis added) (footnote omitted).

B. *Unsettled Issues*

Beyond these general principles, there remain a number of issues relevant to this case that have not yet been decided by North Carolina appellate courts, including the following:[6] **(1) Review:** Does review of a defendant's conviction pursuant to an anti-threat statute require this Court to conduct "independent whole record" review. If yes, what does that review require. **(2) Elements:** Does "true threat" constitute an *element* of a criminal anti-threat statute, by inference if not expressly included, that must be alleged in an indictment, proven beyond a reasonable doubt, and properly instructed to the jury; and is the requisite "intent," discussed below, whether specific, general, or both, also a necessary element of the anti-threat statute. **(3) Intent:** Does the First Amendment require the State to prove "objective intent," *i.e.*, that a defendant's alleged threat would be understood objectively, by a reasonable person familiar with the context, being all the surrounding circumstances, as an expression of the defendant's serious intent to injure or kill and, if so, what is the proper manner by which to make the "general intent" determination; does the First Amendment require proof of a defendant's "subjective intent," *i.e.*, proof that the defendant communicated a "true threat" *for the purpose of* threatening to injure or kill a person or persons;[7] or does the First Amendment require *both* proof that an objective "reasonable person" would understand a defendant's communication in context as a "true threat" to injure or kill, *as well as* proof of the defendant's subjective intent; that the defendant communicated a "true threat" for the purpose of threatening a specific person or group. **(4) Fact or Law:** As argued by the State, does the trial judge decide whether a defendant's conduct rose to the level of a "true threat" as a matter of law; or is that decision generally a question for the jury,

---

6. Some of these issues have been decided by the Supreme Court, but whether state courts, or even federal circuit courts, are bound by certain "true threat" related decisions of the Supreme Court is not always clear as application of these principles has not been universal.

7. The Supreme Court has held that proof of a specific intent to *commit* the threatened action is not required: "The speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60, 155 L. Ed. 2d at 552.

or the trial court acting as trier of fact, to decide in the first instance. **(5) Proof of a "True Threat":** What is sufficient in order for the State to meet its burden of proving a defendant's communication was a "true threat," including (a.) the definition of "true threat," (b.) the correct "intent" requirement, and (c.) consideration of the context within which the alleged "true threat" was made. **(6) Instructions:** Must the trial court, contrary to the State's position, instruct the jury in accordance with First Amendment "true threat" requirements.

1. Standard of Review

[1] Generally, " '[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). However, " '[t]he standard of review for alleged violations of constitutional rights is *de novo*.' Under the *de novo* standard, this Court 'considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Shackelford*, __ N.C. App. at __, 825 S.E.2d at 695 (citations omitted). In addition, the Fourth Circuit has stated: "Whether a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law and fact that we review de novo." *Bly*, 510 F.3d at 457–58 (citing *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 506–11, 80 L. Ed. 2d 502, 520–24 (1984)); *see also Matter of N.D.A.*, __ N.C. __, __. 833 S.E.2d 768, 772–73 (2019) (citations omitted) ("As the Supreme Court of the United States has stated, an 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' ").

Our review of issues related to jury instructions is also *de novo*:

> A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. When a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance. Arguments challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. A trial court's failure

> to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby.

Desmond v. News & Observer Publ'g Co., __ N.C. App. __, __, 823 S.E.2d 412, 434 (2018) (citation omitted), *disc. review allowed*, __ N.C. __, 824 S.E.2d 400 (2019). "[T]he Supreme Court of the United States [has] held that the trial court's unconstitutional failure to submit an essential element of the crime to the jury was subject to harmless error analysis." *State v. Bunch*, 363 N.C. 841, 844, 689 S.E.2d 866, 868–69 (2010) (citation omitted). However,

> Considering the importance of "safeguarding the jury guarantee," the Supreme Court of the United States requires "a reviewing court [to] conduct a thorough examination of the record" before finding the omission harmless. "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant [1] contested the omitted element and [2] raised evidence sufficient to support a contrary finding—it should not find the error harmless." Thus, the harmless error analysis . . . is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless.

Id. at 845, 689 S.E.2d at 869 (citations omitted).

The Supreme Court has "determined that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' " *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 111 L. Ed. 2d 1, 17 (1990) (citing *Bose*, 466 U.S. at 499, 80 L. Ed. 2d at 515). "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact[-]finding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 516–17. In *Watts*, the first "true threats" opinion, the Court conducted an independent review and reversed the jury's determination that the defendant had threatened the President, holding that, when viewed in context, the defendant's comments did not constitute a "true threat" as a matter of law. *Watts*, 394 U.S. at 706–08, 22 L. Ed. 2d at 666–69. This obligation applies to all cases where liability or guilt relies in part on whether the defendant's

speech falls into one of the recognized "unprotected" categories, such as "true threats":

> In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category *and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.*

Bose, 466 U.S. at 505, 80 L. Ed. 2d at 519 (emphasis added); *see also id.* at 505–08, 80 L. Ed. 2d at 521–22; *Miller v. Fenton*, 474 U.S. 104, 114, 88 L. Ed. 2d 405, 413 (1985); *Hurley v. Irish-Am. Gay Grp.*, 515 U.S. 557, 567–68, 132 L. Ed. 2d 487, 499–500 (1995). It is the duty of the reviewing court to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold[.]" *Bose*, 466 U.S. at 511, 80 L. Ed. 2d at 523; *see also id.* at 503–10, 80 L. Ed. 2d 502 at 518–22. Federal circuit courts have generally followed the *Bose* independent review standard:

> Following *Bose*, this court, like other [federal] courts of appeal, has extended the independent review rule well beyond defamation claims. We have stated that "where the trial court is called upon to resolve a number of mixed fact/law matters which implicate core First Amendment concerns, our review, at least on these matters, is plenary."

Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 106–07 (1st Cir. 2000) (citation omitted); *Bly*, 510 F.3d at 457–58 (4th Cir. 2007) (citing *Bose*, 466 U.S. at 506–11, 80 L. Ed. 2d at 520–24) ("Whether a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law and fact that we review de novo."); *Nor-West Cable Commc'ns v. City of St. Paul*, 924 F.2d 741, 746 (8th Cir. 1991) (citations omitted) ("*Bose* clearly holds that certain first amendment issues in addition to 'actual malice' must be reviewed *de novo* on appeal. *See Bose*, 466 U.S. at 504–08 (requiring independent review as to whether speech falls in [an] 'unprotected category' such as fighting words, incitement of lawless action, obscenity, and child pornography)."); *see also Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 105 L. Ed. 2d 562, 589 (1989); *Edwards v. South Carolina*, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 701–02 (1963).[8]

8. However, despite the seemingly clear language used by the Supreme Court in *Bose* and other opinions, not all federal circuit courts apply independent review to cases involving "true threats" or other categories of "unprotected" speech. *See Wheeler*, 776 F.3d at 742.

This Court has also adopted independent whole record review when reviewing a jury's determination that a defendant's speech fell into one of the "unprotected" categories: defamation. *Desmond*, __ N.C. App. at __, 823 S.E.2d at 422–23. This Court in *Desmond* cited extensively from *Harte-Hanks*:

> [T]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"—and, more particularly, "reckless disregard"—however, is not readily captured in one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. (quoting *Harte-Hanks*, 491 U.S. at 685–89, 105 L. Ed. 2d at 587–89 (citations, quotation marks, and brackets omitted)). However, "credibility determinations are reviewed under the clearly-erroneous standard, because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses[.]' " *Harte-Hanks*, 491 U.S. at 688, 105 L. Ed. 2d at 589 (citation omitted). Independent review is certainly no less of a necessity for protecting an individual's First Amendment rights in criminal cases than it is in civil cases, and it has been adopted by a number of state appellate courts for review of anti-threat convictions:

> Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. However, . . . a rule of independent appellate review applies in First Amendment speech cases. An appellate court "must 'make an independent examination of the whole record, . . .' so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." . . . Thus, whether a statement constitutes a true threat is a matter subject to independent review.

Washington v. Johnston, 127 P.3d 707, 712–13 (Wash. 2006) (alteration in original) (citations omitted); *see also*, *e.g.*, *Connecticut v. Krijger*, 97 A.3d 946, 955 (Conn. 2014).

In light of the weight of precedent in the federal courts, other state courts, and this Court's opinion in *Desmond*, we hold that this Court should apply independent whole record review, as set forth in *Bose*, *Harte-Hanks*, and *Desmond*, whenever a defendant's conviction is based in part on a determination that the State met its burden of proving the existence of a "true threat."

2. Elements

[2] "Much turns on the determination that a fact is an element of an offense, . . . given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 319 (1999) (citations omitted); *see also State v. Guice*, 141 N.C. App. 177, 189, 541 S.E.2d 474, 482 (2000), *modified on reh'g*, 151 N.C. App. 293, 564 S.E.2d 925 (2002). It appears that certain issues are occurring at the trial court level in part because the relevant First Amendment requirements are not treated as *essential elements* of the underlying anti-threat statutes. In this case, the State repeatedly argued that it did not have to prove a "true threat" in order to convict Defendant under N.C.G.S. § 14-16.7(a), and that the trial court should not instruct the jury in accordance with "true threat" jurisprudence. The State argued that N.C.G.S. § 14-16.7(a) contained only three elements: "The pattern jury instructions are clear that there are three and only three elements to this charge. Now with regards to the threat, the only element is that the defendant knowingly and willfully made a threat to kill the victim." The State further argued: "I get that [D]efendant is raising First Amendment objections to that statute as it's written, but I think the proper venue to take that up would be if upon conviction to take that up on appeal." "[I]t is the legislature's intent . . . that there be no requirement of proof to show that the threat was made in a manner and under circumstances which

would cause a reasonable person to believe it is likely to be carried out." "[M]aking any threats towards . . . court officials . . . is unacceptable to the legislature, *regardless of whether they were made in a manner that a reasonable person would believe they would be carried out*." (Emphasis added). The trial court appeared to agree with the State.

It is well established that a defendant cannot receive a fair, *i.e.*, constitutional, trial, unless *all* essential elements of the crime charged are "submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 116, 186 L. Ed. 2d 314, 329 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 476–77, 147 L. Ed. 2d 435, 447 (2000); *State v. Rankin*, __ N.C. __, __, 821 S.E.2d 787, 790 (2018). "The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime." *Alleyne*, 570 U.S. at 104–05, 186 L. Ed. 2d at 322. As noted by the Court in *Alleyne*: "If a fact [is] by law *essential to the penalty*, it [is] an element of the offense." *Id.* at 109, 186 L. Ed. 2d at 325 (emphasis added) (citation omitted). This definition of an "element" was recently reaffirmed by our Supreme Court:

> [There is] well-established binding precedent from this Court holding that the complete and definite description of a crime is one in which each essential element necessary to constitute that crime is included. [*State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949)] (observing that *the State carries the burden of establishing the "essentials of the legal definition of the offense itself*").

Rankin, __ N.C. at __, 821 S.E.2d at 793 (emphasis added) (citations omitted). On appeal, the State recognizes that Defendant's comments were protected by the First Amendment unless they were "true threats." We agree, and because proof of a "true threat" is essential to prosecution pursuant to N.C.G.S. § 14-16.7(a), "true threat" must be included in the definition of the crime of threatening to kill a court officer. Further, "true threat" must be included as an "essential element" of the statute. *Id.*; *Alleyne*, 570 U.S. at 109, 186 L. Ed. 2d at 325.

We hold that "true threat" must be included as an essential element of the statute based upon the following: N.C.G.S. § 14-16.7(a) criminalizes, in part, the communication of "threats" to kill certain classifications of people. *Id.* The First Amendment requires that an anti-threat statute such as N.C.G.S. § 14-16.7(a) be construed so that the word "threat" is read as "true threat," and that the State prove a "true threat," to the jury or trier of fact, beyond a reasonable doubt. *See Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; *United States v. Patillo*, 431 F.2d 293, 295 (4th Cir.

1970), *adhered to*, 438 F.2d 13 (4th Cir. 1971). Therefore, "true threat" must be incorporated into the *definition* of N.C.G.S. § 14-16.7(a) if the statute is to be held constitutional. *See Alleyne*, 570 U.S. at 109, 186 L. Ed. 2d at 325; *Rankin*, __ N.C. at __, 821 S.E.2d at 793–94 (emphasizing that the definition of a crime includes descriptions of what constitutes the crime as well as what does not constitute the crime and that, "if . . . words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they" constitute an essential element of the crime).

Although the Supreme Court has not *expressly* stated that "true threat" is an element of anti-threat statutes, it has consistently treated "true threat," and the requisite intent, as essential elements of any *constitutional* anti-threat statute. The Court has required the jury to be instructed on First Amendment elements, implicitly in the case of "true threat," but expressly for other categories of "unprotected" speech. *See Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 ("[W]hatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' "); *see also Elonis v. United States*, 575 U.S. 723, __, 192 L. Ed. 2d 1, 23–4 (2015) (Thomas, J., dissenting) (citations omitted) ("Because § 875(c) criminalizes speech, the First Amendment requires that the term 'threat' be limited to a narrow class of historically unprotected communications called 'true threats.' . . . There is thus no dispute that, at a minimum, § 875(c) requires an objective showing: The communication must be one that 'a reasonable observer would construe as a true threat to another.' "); *Black*, 538 U.S. at 365, 155 L. Ed. 2d at 556 ("As interpreted by the jury instruction, [which did not require the jury to find a true threat,] the [statute] chills constitutionally protected political speech because of the possibility that [the government] will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.").

This is in accord with the Supreme Court's treatment of First Amendment requirements for the other categories of "unprotected speech." *See*, *e.g.*, *Miller v. California*, 413 U.S. 15, 21, 37 L. Ed. 2d 419, 428–29 (1973) (discussing the required elements to prove "obscenity" that falls outside of First Amendment protections); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 11 L. Ed. 2d 686, 706 (1964) (imposing "actual malice" as an element in defamation actions brought by public officials: "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' "); *Yates v. United States*, 354 U.S.

298, 324–25, 1 L. Ed. 2d 1356, 1378–79 (1957) (holding the defendant's conviction violated his First Amendment rights because "[t]he jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government[,]" and "the urging of action for forcible overthrow [was] a necessary *element* of the proscribed advocacy"), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1 (1978); *Bose*, 466 U.S. at 506–07, 80 L. Ed. 2d at 520–21 (citation omitted) (stating, in a prosecution for obscenity, "questions of what appeals to 'prurient interest' and what is 'patently offensive' under the [First Amendment] community standard obscenity test are 'essentially questions of fact' " that must be proven to the jury); *Ginsberg v. New York*, 390 U.S. 629, 643, 20 L. Ed. 2d 195, 206 (1968).

In addition, the Supreme Court has held that placing the burden on a defendant to prove his speech was protected, rather than placing the burden on the government to prove the defendant's speech was "unprotected," is unconstitutional:

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.

Speiser v. Randall, 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 1473 (1958); *id.* (citation omitted) ("Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden . . . to show that the appellants engaged in criminal speech."); *see also United States v. Turner*, 720 F.3d 411, 419 (2d Cir. 2013) ("the evidence at trial was more than sufficient to permit a reasonable jury to find each of the elements of [the anti-threat statute]—including the requirement of a true threat—beyond a reasonable doubt"); *United States v. Pinson*, 542 F.3d 822, 832 (10th Cir. 2008) ("The burden is on the prosecution to show that the defendant understood and meant his words as a [true] threat, and not as a joke, warning, or hyperbolic political argument."); *United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir. 1987) ("The government bears the ultimate burden of proving that [the defendant's] actions were taken with the requisite intent to place them into [the] category [of a 'true threat']."); *United States v. Hoffman*, 806 F.2d 703, 708 (7th Cir. 1986).

Our holding is in line with most jurisdictions; in fact, we are unaware of any jurisdiction that has not treated "true threat" as an essential element of an anti-threat statute. Like every other federal jurisdiction, the Fourth Circuit recognized that in *Black*, the Supreme Court, in defining "true threat," "was defining the necessary *elements* of a threat crime in the context of a criminal statute punishing intimidation." *White I*, 670 F.3d at 509. "In deciding *Watts*, the Court recognized *two major elements* in the offense created by Congress in 18 U.S.C. Section 871(a). The first is that there be proved 'a true "threat," ' and the second is that the threat be made 'knowingly and willfully[.]' " *Patillo*, 431 F.2d at 295 (emphasis added) (citations omitted); *see also*, *e.g.*, *United States v. Houston*, 792 F.3d 663, 668–69 (6th Cir. 2015); *United States v. Lockhart*, 382 F.3d 447, 449–50 (4th Cir. 2004); *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999).

Further, both Supreme Court and federal circuit court precedent recognizes an *intent* requirement must also be read into an anti-threat statute. *See New York v. Ferber*, 458 U.S. 747, 765, 73 L. Ed. 2d 1113, 1127 (1982) (citations omitted) ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."); *Morissette v. United States*, 342 U.S. 246, 263, 96 L. Ed. 288, 300 (1952) (emphasis added) (holding that "mere omission from [the statute] of any mention of intent will not be construed as eliminating that *element* from the crimes denounced"); *Houston*, 792 F.3d at 667; *Bagdasarian*, 652 F.3d at 1118 (emphasis added) (citation omitted) ("*Black* 'affirmed our own dictum—not always adhered to in our cases—that "the *element of intent* [is] the determinative factor separating protected expression from unprotected criminal behavior." ' "); *United States v. Cassel*, 408 F.3d 622, 634 (9th Cir. 2005) (emphasis added) ("Having held that *intent to threaten is a constitutionally necessary element of a statute punishing threats*, we do not hesitate to construe 18 U.S.C. § 1860 to require such intent."); *Francis*, 164 F.3d at 121 ("Although the statute does not mention intent or willfulness, intent is of course an element of the crime.").[9]

When a criminal statute is written without expressly including, as elements, the requirements of the First Amendment, the statute *must be construed and applied* at trial with the First Amendment requirements

9. The "knowingly and willfully" language in N.C.G.S. § 14-16.7(a) imposes an element of intent, but in this case the State and the trial court interpreted "knowingly and willfully" as meaning Defendant understood the words he wrote and intentionally communicated them by posting them on Facebook; and that Defendant knew D.A. Welch was a court officer. Defendant did not object on the basis that the statute itself should be read as requiring that Defendant intended his Facebook posts to threaten anyone.

included as essential elements of the statutory crime. This principle is well established in North Carolina. *See Summrell*, 282 N.C. at 167, 192 S.E.2d at 575 (citation omitted) ("a statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech[] cannot be upheld in the absence of authoritative judicial limitations"). "[I]t is well settled . . . that a statute will not be construed so as to raise a question of its constitutionality 'if a different construction, which will avoid the question of constitutionality, is reasonable.' " *Id.* at 168, 192 S.E.2d at 576 (citation omitted). The trial court may often construe a statute otherwise unconstitutional on its face by instructing the jury on the complete definition of the crime, that is, a definition that includes the statutory elements *as well as* constitutionally required elements. In *Summrell*, the trial court cured the First Amendment issues inherent in the underlying statutes, because it "construed [the statutes] to prohibit only ['fighting words'] and conduct likely to provoke ordinary men to violence. [The trial court] deleted the [unconstitutional language] and left undisturbed the statutes' proscription against acts and language calculated to bring on a breach of the peace." *Id.* at 167–68, 192 S.E.2d at 575–76; *see also State v. Clark*, 22 N.C. App. 81, 87, 206 S.E.2d 252, 256 (1974) (emphasis added) ("Defendant also argues that section (a)(2) of G.S. § 14-288.4, as amended in 1971, is unconstitutionally vague and overbroad. This argument has no application to the present case because *the trial judge restricted the jury's consideration of what constituted disorderly conduct* to sections (a)(3), (a)(4), and (a)(5)b. of G.S. § 14-288.4 (1971). Defendant advances no argument that these sections are unconstitutional."); *State v. Orang*e, 22 N.C. App. 220, 222–23, 206 S.E.2d 377, 379 (1974).

In order to constitutionally determine a communication falls into the "true threat" "unprotected" category of speech, the requirements imposed by the First Amendment must be included as *essential elements* of the underlying crime charged. Further, the "intent" required to prove "true threat" in accordance with the First Amendment is also an *element* of the underlying crime, and must be proven by the State, to the jury, beyond a reasonable doubt. We therefore hold that "true threat," and the proper intent requirements, are essential elements of N.C.G.S. § 14-16.7(a) and must be treated as such by the trial court. We discuss the appropriate intent requirements next.

3. Intent

[3] Congress enacted the anti-threat statute that would become 18 U.S.C. § 871(a) on 14 February 1917. *See Ragansky v. United States*, 253 F. 643, 644 (7th Cir. 1918). 18 U.S.C. § 871(a) states in part:

> Whoever knowingly and willfully deposits for conveyance in the mail . . . any . . . writing . . . containing any threat to take the life of . . . or to inflict bodily harm upon the President of the United States, . . . or knowingly and willfully otherwise makes any such threat against the President, . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 871(a). Shortly thereafter, federal courts began interpreting this statute and the intent requirement for 18 U.S.C. § 871(a) and other anti-threat statutes. The intent requirement for anti-threat statutes was primarily taken from the Seventh Circuit's 1918 opinion in *Ragansky*. The "*Ragansky* test of intention" was adopted by the majority of federal jurisdictions to determine the element of "willfulness" in prosecutions under 18 U.S.C. § 871(a). *United States v. Patillo*, 438 F.2d 13, 14 (4th Cir. 1971) (*Patillo II*). The Supreme Court did not address any of the issues raised by 18 U.S.C. § 871(a) and other anti-threat statutes until *Watts*, where the Court, referencing *Ragansky* specifically, acknowledged that there was disagreement in the lower courts "over whether or not the 'willfullness' requirement of [18 U.S.C. § 871(a)] implied that a defendant must have intended to carry out his 'threat.' " *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667. The defendant in *Ragansky* was convicted of "knowingly and willfully making threats to take the life of the President" pursuant to 18 U.S.C. § 871. *Ragansky*, 253 F. at 644. The defendant had made the statements:

> "I can make bombs and I will make bombs and blow up the President"; . . . "We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all of the rest of the crooks and blow it up" [and;] "I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it."

Id. at 644. The *Ragansky* court stated: "[I]t appears . . . that 'there was a claim by this defendant and testimony in corroboration of his claim that he was joking, that he was not in earnest, that he did not intend to kill him.' " *Id.* The trial court instructed the jury that the defendant's " 'claim that the language was used as a joke, in fun,' is not a defense." *Id.* On appeal, the Seventh Circuit defined "willfully" and "knowingly," and articulated a standard for intent in anti-threat statutes:

> It was not claimed that every one present understood that he was joking, *or that he intended them so to understand*;

[10] the claim appears to have been that defendant had no intention to carry out his threat, and that, therefore, it was a joke; the instruction read in the light of the entire charge must be so construed, and in our judgment it was correct.

A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.

And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and *intentionally* utters them *as the declaration of an apparent determination to carry them into execution.*

Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, "that willfully implies an evil purpose—legal malice."

[The defendant's] present contention cannot be sustained, if by evil purpose or legal malice, more is meant than *an intention to give utterance to words* which, *to defendant's knowledge*, were in form and *would naturally be understood by the hearers as being a threat; that is*, *the expression of a determination*, *whether actual or only pretended*, *to menace the President's safety.*

While under some circumstances, the word "willfully" in penal statutes means not merely voluntarily, but with a bad purpose, nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language *known by him to be in form*

10. Even in *Ragansky* the court is considering the defendant's intent, *i.e.*, what *effect* the defendant *intended his statements to have* on his audience. The implication from the inclusion of what the defendant *did not claim* at trial is that, had there been evidence he intended his statements to be understood as a joke, the outcome may have been different.

> *such a threat*, and who thus, to some extent endangers the President's life.

Id. at 644–45 (citations omitted) (emphasis added). *Ragansky* appears to have required not only that a defendant knew the meaning of the words conveyed, and that the defendant willfully conveyed them, but that the words conveyed were "known by him" to be "in form [that] would naturally be understood by the hearers as being a threat; that is, the expression of a determination, whether actual or only pretended, to menace the President's safety." *Id.* at 645.

Despite this apparent requirement in *Ragansky* that a defendant subjectively *know* the alleged threat would "naturally be understood" as a threat, *id.*, the "*Ragansky* test" was interpreted in subsequent opinions by the majority of federal districts to contain no subjective intent requirement, and thus became a pure "general intent" test. *See United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (citation omitted) (" '[s]ection 18 U.S.C. § 875(c) does not require specific intent in regard to the threat element of the offense, but only general intent' "). The general intent test requires "only that the defendant knowingly transmitted the . . . communication[,]" *id.* at 1064 (citations omitted), and that " 'there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury[.]' " *Id.* at 1065 (citation omitted).[11] This is a negligence standard:

> Courts then ask . . . whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: [The defendant] can be convicted . . . if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

Elonis, 575 U.S. at __, 192 L. Ed. 2d at 15–6. The "general intent" negligence standards applied in federal and state jurisdictions do not include the apparent requirement in *Ragansky* that the defendant must have had "an intention" to communicate "words which, *to defendant's knowledge*,

---

11. The Fourth Circuit employs a "reasonable recipient" of the alleged threat "general intent" standard, which is in line with *Ragansky*, but this version of the general intent standard is not universally accepted in the federal circuits. Furthermore, the Fourth Circuit occasionally applies the specific intent standard set forth in *Patillo*, 431 F.2d 293 and *Patillo II*, 438 F.2d 13. *See Lockhart*, 382 F.3d at 449–50.

were in form and would naturally be understood by the hearers as being a threat[.]" *Ragansky*, 253 F. at 645 (emphasis added).[12]

Our reading of *Ragansky* is bolstered by the *Ragansky* court's reliance on *United States v. Stickrath*, 242 F. 151 (S.D. Ohio 1917). The court in *Stickrath* stated: "Doing a thing knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it. *Felton v. U.S.*, 96 U.S. 699; *Potter v. U.S.*, 155 U.S. 438, 446." *Stickrath*, 242 F. at 154 (citations omitted). The court further explained:

> As used in the statute [the terms "knowingly" and "willfully"] are intended to signify that the defendant, at the time of making the threat charged against him, *must have known what he was doing*, and, *with such knowledge*, proceeded in violation of law to make [the threat]. They are *used in contradistinction to "ignorantly" and "unintentionally."* The offense denounced by the statute is completed at the instant the unlawful threat is knowingly and willfully made. It is not the execution of such threat, *or* (as claimed by defendant) *a continuing intent to execute it*, that constitutes the offense, *but the making of it knowingly and willfully*. If it be thus made, *the subsequent abandonment of the bad intent with which it was made does not obliterate the crime.*

Id. (emphasis added). Pursuant to the holding in *Stickrath*, a defendant had to "know what he was doing," *i.e.*, making a threat, and "with such knowledge, proceed in violation of law to make it." *Id.* Thus, the holding in *Stickrath* appears to require that the defendant had "the bad intent" to carry out the threat at the time the threat was made, but once the defendant had made the threat with intent to carry it out, the crime was complete, and the defendant's subsequent abandonment of the bad intent to carry out the threat was no defense. *Id.* Therefore, though *Ragansky* cited *Stickrath* in support of its holding, *Ragansky* actually contradicts *Stickrath's* statement that "[d]oing a thing knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it." *Id.* The logical implication from *Stickrath* is that an intent to execute the alleged threat had to exist at the time it was made. *Id. Ragansky* abandoned the *Stickrath* specific intent to carry

---

12. Also: "[O]ne who, in the presence of others, voluntarily uses language known by him to be in form . . . a threat[,]" *i.e.*, "the expression of a determination, whether actual or only pretended, to menace the President's safety[,]" may be prosecuted under the statute. *Ragansky*, 253 F. at 645 (citation omitted) (emphasis added).

out the threat element, but maintained a specific intent element requiring proof that a defendant had "an intention to give utterance to words which, to defendant's knowledge, were in form and would naturally be understood by the hearers as being a threat[.]" *Ragansky*, 253 F. at 645.

It was these intent elements that were mentioned in *Watts*. In the case of *Watts*, the defendant was convicted under 18 U.S.C. § 871 of knowingly and willfully making a threat to kill the President. *Watts v. United State*s, 402 F.2d 676, 677 (D.C. Cir. 1968) ("*Watts I*"), *rev'd*, 394 U.S. 705, 22 L. Ed. 2d 664 (1969). The defendant's appeal was rejected by the D.C. Circuit Court of Appeals, which affirmed the following jury instruction: " 'It is the making of the threat, not the intent to carry it out, that violates the law.' " *Id.* at 678. Judge Wright dissented in *Watts I*, thoroughly reviewing the legislative history of the statute and its subsequent treatment by federal courts. *Id.* at 686–91 (Wright, J., dissenting). Judge Wright stated: "Where statutes impinge upon protected speech, statutory provisions governing intent will be read to require specific intent." *Id.* at 691 (citations omitted).

In *Watts*, the Supreme Court reversed the circuit court's *Watts I* opinion and specifically cited Judge Wright's dissent as it seriously questioned the constitutionality of the *Ragansky* test:

> Some early cases [such as *Ragansky*] found the willfullness requirement met if the speaker voluntarily uttered the charged words with "an apparent determination to carry them into execution." The majority below seemed to agree. Perhaps this interpretation is correct, *although we have grave doubts about it. See the dissenting opinion below*, [*Watts I*], 402 F.2d at 686–93 (Wright, J.).

Watts, 394 U.S. at 707–08, 22 L. Ed. 2d at 667 (emphasis added) (some citations omitted).

Despite the Court's apparent agreement, at least in part, with Judge Wright's dissent, and its stated "grave doubts" that the *Ragansky* standard could survive First Amendment analysis, the Court did not answer the question of whether the First Amendment requires a specific, as well as general, intent standard. The Court did, however, make clear that the First Amendment does not permit prosecution of every communication that could be considered threatening: "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667. The Court held: "[W]hatever

the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by [the defendant] fits within that statutory term." *Id.* at 708, 22 L. Ed. 2d at 667. This holding is the genesis of the "true threat" requirement.

The result of the Court's decision not to decide the intent issue was that most federal circuits maintained the *status quo*. Although most circuits continued to apply a general intent standard after *Watts*, in *United States v. Patillo* the Fourth Circuit responded to *Watts* by essentially adopting the standard set forth in Judge Wright's dissent in *Watts I*: "In deciding *Watts*, the [Supreme] Court recognized two major elements in the offense created by Congress in 18 U.S.C. Section 871(a). The first is that there be proved a true 'threat,' and the second is that the threat be made 'knowingly and willfully[.]' " *Patillo*, 431 F.2d at 295. In *Patillo*, the Fourth Circuit held the defendant's statements were "true threats," then stated: "We must next determine whether the trier of fact properly found that those threats were uttered with the degree of willfulness sufficient for conviction under" the anti-threat statute. *Id.* at 296. The *Patillo* court further stated: "*Watts* [] does not resolve a long term controversy over whether 'willfulness' means 'that a defendant must have intended to carry out his 'threat[,]' " but noted the Supreme Court had "grave doubts" that the statute could be constitutionally applied without a specific intent requirement. *Id.* (citation omitted). The court in *Patillo* determined the First Amendment required a defendant's intent to be something more than that set forth in the *Ragansky* standard:

> We think that many of the courts that construed Section 871(a) prior to *Watts* departed "from the plain meaning of words . . . in search of an intention which the words themselves did not suggest," with pernicious results. . . . The interpretation of "knowingly and willfully" alluded to by the Supreme Court in *Watts* was first stated in [*Ragansky*:]
>
> > A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him. . . . And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.
>
> This language in *Ragansky* was part and parcel of a holding, now discredited by *Watts*, that a statement made in jest falls within the ambit of Section 871(a).

> The *Ragansky* interpretation of "willfully and knowingly" is not in keeping with the meaning traditionally accorded to those words when found in criminal statutes. "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. . . ." *Ragansky's* version of the willfulness requirement demands only an "apparent determination," expressed by the words themselves, to perpetrate the act threatened. We believe that a "bad purpose" assumes even more than its usual importance in a criminal prosecution based upon the bare utterance of words. Americans, nurtured upon the concept of free speech, are not accustomed to controlling their tongues to avoid criminal indictment.

Id. at 297 (citations omitted). The court concluded: "We hold that where, as in [this] case, a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a *present intention to do injury* to the President." *Id.* at 297–98 (emphasis added) (footnote omitted). The Fourth Circuit reconsidered *Patillo en banc* because: "It [was] urged upon us in the [government's] petition that the Supreme Court's 'grave doubts,' [stated in *Watts*,] as to the *Ragansky* test of intention must now have been dispelled by two recent decisions from the Second and Ninth Circuits." *Patillo II*, 438 F.2d at 14 (citations omitted). *Patillo II* reviewed the "two recent decisions," but reasoned:

> [F]or the reasons stated in the majority opinion of the [*Patillo*] panel, we reject the *Ragansky* test of intention. We think that an *essential element* of guilt is a present intention either to injure the President, or incite others to injure him[.] Much of what we say here is *dicta* justified, we think, by apparent misunderstanding of our prior panel decision.

Id. at 16 (citation omitted). Although the Fourth Circuit now appears to apply a general intent standard when reviewing anti-threat statutes, *see Darby*, 37 F.3d at 1066, *Patillo* and *Patillo II* have been cited by the Fourth Circuit as recently as 2004 and have not been expressly overruled. *See Lockhart*, 382 F.3d at 449–50; *United States v. Cooper*, 865 F.2d 83, 85 (4th Cir. 1989) (specific intent requirement of *Patillo* was met in prosecution under 18 U.S.C. § 878 because evidence sufficient for jury to determine the defendant "had a present intention to shoot Gandhi").

The Supreme Court's next case involving "true threats" was *Rogers v. United States*, 422 U.S. 35, 45 L. Ed. 2d 1 (1975). However, the Court again resolved the case without addressing the issue of intent. *Id.* at 40–41, 45 L. Ed. 2d at 7. Justice Marshall wrote a concurring opinion in *Rogers*, which Justice Douglas joined, stating in part:

> The District Court and the Court of Appeals adopted what has been termed the "objective" construction of the [anti-threat] statute. This interpretation of [section] 871 originated with the early case of *Ragansky*, and it has been adopted by a majority of the Courts of Appeals, even though this Court has expressed "grave doubts" as to its correctness. As applied in *Ragansky* and later cases, this construction would support the conviction of anyone making a statement that would reasonably be understood as a threat, as long as the defendant intended to make the statement and knew the meaning of the words used.

Id. at 43, 45 L. Ed. 2d at 8 (Marshall, J., concurring) (footnotes and citations omitted).[13] Justice Marshall stated: "In my view, this construction of [section] 871 is too broad." *Id.* at 44, 45 L. Ed. 2d at 9. "In *Watts*, [the Court] observed that giving [section] 871 an expansive construction would create a substantial risk that crude, but constitutionally protected, speech might be criminalized." *Id.* Justice Marshall further stated: "Both the legislative history and the purposes of the statute are inconsistent with the 'objective' construction of [section] 871 and suggest that a narrower view of the statute is proper." *Id.* Justice Marshall concluded: "I would therefore interpret [section] 871 to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Id.* at 48, 45 L. Ed. 2d at 11.

Individual justices have continued to express their beliefs that the First Amendment requires a specific intent as well as a general intent. *See, in chronological order*, *Abrams v. United States*, 250 U.S. 616, 627, 63 L. Ed. 1173, 1179 (1919) (Holmes, J., dissenting) ("[W]hen words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.");

13. As discussed above, it is not clear that the interpretation of *Ragansky* in subsequent opinions correctly states the standard set forth therein.

Watts, 394 U.S. at 708, 22 L. Ed. 2d at 667 (stating the Court "ha[d] grave doubts" that the general intent standard was constitutionally sufficient to sustain a conviction pursuant to an anti-threat statute); *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at 20–2 (Alito, J., concurring) (arguing that the First Amendment required something more than an objective standard, but that a "recklessness" standard would suffice); *Perez v. Florida*, __ U.S. __, __, 197 L. Ed. 2d 480, 482 (2017) (Sotomayor, J., concurring) ("Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—some level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

The next Supreme Court opinion involving "true threats" was *Black*, which contained the first definition of a "true threat" by the Court, and seriously called into question the constitutionality of prosecuting someone under an anti-threat statute without any "true threat" specific intent requirement. *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted) (stating in part that " '[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). Thereafter, the Fourth Circuit

> recognize[d] the potential for a conflict between the Supreme Court's definition of a true threat [in *Black*] and an objective analysis of a true threat. At least two Circuit Courts of Appeal have seized upon this potential conflict, and resolved it by concluding that the Supreme Court's definition of a true threat . . . precludes an objective analysis. Other courts have suggested that *Black* be interpreted to require both an objective and subjective inquiry in the analysis of a true threat.

United States v. White, 2010 WL 438088, at *8 (W.D.Va. Feb. 4, 2010), *aff'd in part, vacated in part, and remanded*, 670 F.3d 498 (4th Cir. 2012) (citations omitted). The Fourth Circuit decided to "remain" a general intent jurisdiction despite *Black*.[14] *White I*, 670 F.3d at 509 (citation

14. Except for the uncertain status of *Patillo*, 431 F.2d 293. *See Lockhart*, 382 F.3d at 449–50; *United States v. Spring*, 305 F.3d 276, 280–81 (4th Cir. 2002); *United States v. Maxton*, 940 F.2d 103, 106 (4th Cir. 1991) (citation omitted) ("extrinsic evidence to prove an intent to threaten should only be necessary when the threatening nature of the communication is ambiguous"); *Cooper*, 865 F.2d at 85 (specific intent requirement of *Patillo*

omitted) (emphasis in original) ("[W]hile the speaker need only *intend to communicate* a statement, whether the statement amounts to a true threat is determined by the understanding of a *reasonable recipient familiar with the context* that the statement is a 'serious expression of an intent to do harm' to the recipient. This is and has been the law of this circuit, and nothing in *Black* appears to be in tension with it.").

General intent jurisdictions like the Fourth Circuit have focused on the following language from *Black*: " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552. These jurisdictions have construed this language as consistent with the general intent standard that evolved from *Ragansky*, *i.e.*, that the defendant understood the meaning of the words in the statement alleged to be a threat; a reasonable person familiar with the context would understand the statement as "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals[,]" *id.*; and the defendant "mean[t] to communicate" the statement. The State need only prove that the defendant intended to communicate the statement, without regard to whether the defendant meant the statement to constitute or contain a threat of any kind, and without regard to whether the defendant had any bad purpose in communicating the statement.

However, this interpretation does not appear to us as being the only logical reading of *Black*, nor even the most obvious. Particularly since we are construing language involving criminal liability, *see Rogers*, 422 U.S. at 47, 45 L. Ed. 2d at 10–1, the interpretation of the *Black* "true threat" definition found in *White I*, 670 F.3d at 509, and opinions from other jurisdictions, leaves us unconvinced. The definition in *Black* can just as readily be read as holding a "true threat" is one where what "the speaker means to communicate" is a "statement" the speaker *intends*

---

met because evidence was sufficient for jury to conclude the defendant "had a present intention to shoot Gandhi"); *United States v. McMurtrey*, 826 F.2d 1061, 1987 WL 38495, *2 (4th Cir. 1987) (unpublished) (citing *Patillo*, and holding "a present intent to do injury" is essential element of 18 U.S.C. § 871(a)); *United States v. Maisonet*, 484 F.2d 1356, 1359 (4th Cir. 1973) (finding First Amendment requirements satisfied because the jury was "charged . . . that the government was required to prove . . . that [the defendant] intended [the communication] to be such a threat"); *United States v. Smith*, 448 F.2d 726, 727 (4th Cir. 1971); *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966) (citation omitted) ("[A] conviction under 18 U.S.C. § 875(c) requires a showing that a threat was intended[.]"); *but see Darby*, 37 F.3d at 1063–66 (4th Cir.) (holding no specific intent required, partly on the erroneous determination that the relevant language in *Dutsch* was "merely *dictum*," and by dismissing *Patillo* in a footnote without any analysis).

the recipient to understand as "a serious expression of an intent to commit an act of unlawful violence[.]" *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552; *see also*, *generally*, *United States v. X-Citement Video*, *Inc.*, 513 U.S. 64, 68–9, 79, 130 L. Ed. 2d 372, 379, 385 (1994) (holding First Amendment required construction of a statute so that the intent element attaches to all of the additional elements). For example: "John's statement was meant to communicate a serious expression of an intent to kill Ron." The obvious, ordinary, and natural reading of this sentence is that John's purpose, or intent, was to inform the recipient that John *planned to kill Ron*, not that John's intent was simply to communicate *something* to the recipient. Of course, in the example, John *also* intended to communicate the statement to the recipient, but only as a means of delivering the specific message contained therein: a threat.

We agree with the Ninth Circuit, which did not appear to identify any alternate reading in the language from *Black*:

> The Court held in [*Black*] that under the First Amendment the State can punish threatening expression, but only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *It is therefore not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.*

Bagdasarian, 652 F.3d at 1116 (emphasis added) (citations omitted). The Ninth Circuit said of the Supreme Court's definition of "true threat" in *Black*:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.

Cassel, 408 F.3d at 631. The court in *Cassel* held that it was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633 (footnote omitted). In *Bagdasarian*, the Ninth Circuit held that the constitutionally required elements of "true threat" and "specific intent" were essential elements in addition to the statutory elements:

> *Two elements* must be met for a statement to constitute an offense under [the statute]: objective and subjective. The *first* is that the statement would be understood by people hearing or reading it in context as a serious expression of an intent to kill or injure a major candidate for President. [15] The *second* is that the defendant intended that the statement be understood as a threat. [The defendant's] conviction under [the statute] can be upheld only if both the objective and subjective requirements are met[.]

Bagdasarian, 652 F.3d at 1118 (citations omitted) (emphasis added).

The Tenth Circuit, after a lengthy and thorough analysis, held: "Does the First Amendment, as construed in *Black*, require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does." *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). The court contended *Black* had "been misconstrued by some courts that we highly respect" and held that "a careful review of the opinions of the Justices [in *Black*] makes clear that a true threat must be made with the intent to instill fear." *Id.* at 976; *id.* at 978 (alteration in original) (citation omitted) ("When the Court says that the speaker must 'mean[] to communicate a serious expression of an intent,' it is requiring more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently."). This specific intent requirement is in addition to the "reasonable person" general intent requirement necessary to prove the threat was a "true threat." *Id.* at 972–73 (citations omitted) ("[T]he statement itself must be one that a reasonable person in the circumstances would understand 'as a declaration of intention, purpose, design, goal, or determination to inflict [bodily injury] on another.' And '[i]t is not necessary to show that [the] defendant intended to carry out the threat,' although the threat must be a serious one, 'as distinguished from words as mere political argument, idle talk or jest.' ").

In *Elonis*, the Supreme Court did not answer the issue before it, whether the First Amendment required more than a general intent standard; instead, it reversed the Court of Appeals based solely on federal statutory construction grounds. The Court held: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at

---

15. In other words, a true threat.

16. "Under [an anti-threat statute], 'wrongdoing must be conscious to be criminal.' " *Id.* "[A] defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like[,]" because " 'wrongdoing must be conscious to be criminal' " and "the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.' " *Id.* at __, 192 L. Ed. 2d at 12–13 (citations omitted). We find the analysis in *Elonis* relevant to our review because long-standing Supreme Court precedent generally requires statutes criminalizing speech to be construed *more narrowly* than criminal statutes not implicating First Amendment protections:

> "[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." . . . [T]he question here is as to the validity of this ordinance's elimination of the scienter requirement—an elimination which may tend to work as substantial restriction on the freedom of speech and of the press. Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, *which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.*

Smith v. California, 361 U.S. 147, 150–51, 4 L. Ed. 2d 205, 209–10 (1959) (emphasis added) (citations omitted); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 56 L. Ed. 2d 525, 541 (1978) (citation omitted) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' ").

Based upon the above analysis, we hold the First Amendment requires that a specific intent element be read into anti-threat statutes. We further agree with the federal districts and hold that proof of a "true threat" requires a general intent test. We believe the general intent test should be from the viewpoint of an objective, reasonable person considering the alleged threat in full context.[16] What is required to prove the "true threat" element and the intent elements will be discussed further below. Therefore, anti-threat statutes must be construed to include,

---

16. We do not believe the "reasonable person" should have to attempt to step into the shoes of either the defendant or the person allegedly threatened.

in addition to the statutory elements, the constitutionally required elements of "true threat," as determined through application of the general intent test adopted above to the definition of a "true threat," and a "specific intent" to threaten.

4. Is "True Threat" a Question of Fact or Law

[4] The Supreme Court has recognized "the vexing nature" of "distinguishing law from fact." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 517 (citation and quotation marks omitted). The State contends "true threat" is a question of law that only a court can decide. The elements necessary to prove speech falls within a recognized category of "unprotected" speech, such as "actual malice" or "true threat," have been referred to as "questions of fact," "questions of law," "mixed questions of fact and law," "ultimate facts," and "constitutional facts." *See Bose*, 466 U.S. at 498–510, 517, 80 L. Ed. 2d at 510–522, 527–28. The Supreme Court generally refers to these determinations as mixed questions of fact and law or, more specifically, as "constitutional facts." *Id.*; *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). According to the Ninth Circuit: "Constitutional facts are facts—such as the existence of actual malice or whether a statement is a true threat—that determine the core issue of whether the challenged speech is protected by the First Amendment." *Id.* "[Q]uestions of 'constitutional fact' have been held to require de novo review." *Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6, 12 L. Ed. 2d 793, 799 n.6 (1964) (citations omitted); *Bose*, 466 U.S. at 508 n.27, 80 L. Ed. 2d at 522 n.27. For this reason, appellate courts will conduct *de novo* whole record review in First Amendment cases, even though " 'the jury was properly instructed and there is some evidence to support its findings[.]' " *Id.* at 506–07, 80 L. Ed. 2d at 520-21 (citation omitted).

Therefore, whatever terminology is applied to the issue of whether speech falls within one of the "unprotected" categories, that question is *usually* for the jury to determine in the first instance:

> If it were clear, as a matter of law, that the speech in question was protected, [*i.e.*, not a true threat,] we would be obligated to remand not for a new trial, but for a judgment of acquittal. If, on the other hand, "there were material facts in dispute or it was not clear that [the communications] were protected expression or true threats," it was appropriate to submit the issue, in the first instance, to the jury.

Hanna, 293 F.3d at 1087 (citations omitted); *see also id.* at 1088 n.5.

5. Proving a "True Threat"

a. **Definition**

[5] In order to prove a "true threat," the State and the trial court must first know the proper definition of "true threat." "[T]he First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive. What is offensive to some is passionate to others. The First Amendment . . . requires [the trier of fact] . . . to differentiate between 'true threat[s],' and protected speech." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (alteration in original) (citation omitted). The Supreme Court in *Watts* did not provide a definition of "true threat," but made clear that speech may not be punished simply because it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; because it is "vituperative, abusive, and inexact"; or because it constitutes "a kind of very crude offensive method of stating a political opposition to" a public official. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 (citations omitted). It is clear that "threats" that amount to nothing more than jest, idle talk, or political hyperbole are protected speech. *Id.*; *United States v. Spruill*, 118 F.3d 221, 228 (4th Cir. 1997). "True threats" do not include "the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee." 16A Am. Jur. 2d Constitutional Law § 527 (footnote omitted).

A "true threat" "instills in the addressee a fear of . . . serious personal violence from the speaker, it is unequivocal, and it is objectively likely to be followed by unlawful acts[.]" *Id.* The Second Circuit noted that the purpose of the *Watts* "true threat" requirement was to

> insure that only unequivocal, unconditional and specific expressions of intention . . . to inflict injury may be punished—only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'

United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (citation omitted). "To fall outside of the First Amendment's protections, a threat must 'according to its language and context convey[] a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic, unpleasantly sharp attacks on government and public officials.' " *United States v. Dillard*, 795 F.3d 1191,

1199 (10th Cir. 2015) (alteration in original) (citations and quotation marks omitted).

As noted, *Black* is the source of the definition of "true threats" currently applied in most, if not all, "true threats" cases:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Black, 538 U.S. at 359–60, 155 L. Ed. 2d at 552 (alteration in original) (citations omitted). We construe the definition set forth in *Black* within the context of "true threat" analysis laid out above. A "true threat" is a statement where the speaker intends to communicate, to a particular individual or group of individuals, a threat, being "a serious expression of an intent to commit an act of unlawful violence[.]" *Id.*

b. **Intent**

As held above, we adopt the standard set forth by the Ninth Circuit, which includes both a general intent standard to prove a "true threat," and a specific intent standard to prove a defendant's subjective intent to threaten a person or group of persons by communicating the alleged threat. *Bagdasarian*, 652 F.3d at 1118 (citations omitted) ("Two elements must be met for a statement to constitute an offense under [an anti-threat statute]: objective and subjective.").

c. **Context**

The Supreme Court has long recognized that determination of whether a defendant's "speech" falls into one of the categories of "unprotected" speech, such as "true threats," must be made considering the context in which the communication was made; *i.e.*, all the facts surrounding the communication of the challenged speech. *See*, *e.g.*, *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 750, 57 L. Ed. 2d 1073, 1094 (1978) ("[C]ontext is all-important[;] [t]he concept requires consideration of a

host of variables."); *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 752, 135 L. Ed. 2d 888, 908 (1996) (citations omitted) ("[W]hat is 'patently offensive' depends on context[.]"). As with the other "unprotected" categories, the Supreme Court looks to the context of an alleged threat in order to determine whether it constitutes a "true threat." *Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d at 667.

Federal circuit courts have consistently held that determination of whether a "threat" rises to the level of a "true threat" must be determined not only based on the specific language used, or acts undertaken, but also by the context within which the alleged threat was made. "Determining whether a statement amounts to a true threat requires 'a fact-intensive inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant.' " *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015) (citations omitted). The Ninth Circuit recognized in 2002: "We, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat." *Planned Parenthood v. Amer. Coal. of Life*, 290 F.3d 1058, 1078 (9th Cir. 2002) (citation omitted); *see also id.* at 1078–79 (cases cited therein); *United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir. 1990) (citation omitted) ("In *Hoffman* we emphasized the importance of the context of a statement in determining whether it is a true threat or merely political hyperbole."). The Fourth Circuit has also recognized the "*Watts* requirement that the defendant's statement be examined in its full context[.]" *Patillo*, 431 F.2d at 296 (citation omitted); *White II*, 810 F.3d at 220. State courts also require consideration of context. *See*, *e.g.*, *Colorado v. McIntier*, 134 P.3d 467, 472 (Colo. App. 2005) ("The critical inquiry is 'whether the statements, viewed in the context in which they were spoken or written, constitute a "true threat" ' "); *Harrell v. Georgia*,778 S.E.2d 196, 200–01 (Ga. 2015). Therefore, we hold:

> Two elements must be met for a statement to constitute an offense under [an anti-threat statute]: objective and subjective. The first is that the statement would be understood by people hearing or reading it *in context* as a *serious expression of an intent to kill or injure* [the person or persons from an identified group]. The second is that the defendant *intended* that the statement *be understood as a threat*. Because [a defendant's] conviction under [an anti-threat statute] can be upheld only if both the objective and subjective requirements are met, neither standard is the obvious starting point for

> [appellate] analysis, and . . . resolution of either issue may serve as an alternate holding.

Bagdasarian, 652 F.3d at 1118 (emphasis added) (citations omitted).

6. Jury Instructions

[6] As recognized by our Supreme Court, correct and thorough jury instructions are fundamental to a fair and reliable trial:

> "The jury charge is one of the most critical parts of a criminal trial." "The purpose of . . . a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict," including how "the law . . . should be applied to the evidence[.]" As a result, the trial court has a duty "to instruct the jury on all substantial features of a case raised by the evidence." In the event that a "defendant's request for [an] instruction [is] correct in law and supported by the evidence in the case, the trial court [is] required to give the instruction, at least in substance." "[I]n giving jury instructions," however, " 'the court is not required to follow any particular form,' as long as the instruction adequately explains 'each essential element of the offense.' "

State v. Fletcher, 370 N.C. 313, 324–25, 807 S.E.2d 528, 537 (2017) (alterations in original) (citations omitted). Complete and proper jury instructions are vital for the "essential feature of a jury[,] . . . [its] interposition between the accused and his accuser." *Williams v. Florida*, 399 U.S. 78, 100, 26 L. Ed. 2d 446, 460 (1970).

"[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Alleyne*, 570 U.S. at 114, 186 L. Ed. 2d at 329. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' . . . of the charged offense." *Id.* at 107, 186 L. Ed. 2d at 324 (citations omitted). " 'The general rule is that what is necessary to be charged as a descriptive part of the offense[, an essential element,] is required to be proved' " by the State beyond a reasonable doubt. *State v. Mather*, 221 N.C. App. 593, 599, 728 S.E.2d 430, 434 (2012) (quoting *State v. Connor*, 14 N.C. 700, 704, 55 S.E. 787, 789 (1906)). "This Court . . . reviews de novo the trial court's jury instructions regarding the elements of the offense at issue." *State v. Watterson*, 198 N.C. App. 500, 503, 679 S.E.2d 897, 899 (2009) (citation omitted).

a. **Requirements**

Failure to submit every essential element of a crime for jury determination violates the defendant's constitutional rights:

> The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime.

Alleyne, 570 U.S. at 104–05, 186 L. Ed. 2d at 322 (citations omitted). As discussed above, a "true threat" is a "constitutional fact" that must be proven by the State beyond a reasonable doubt. Therefore, "true threat" is an *essential element* of N.C.G.S. § 14-16.7(a), and the trial court is constitutionally prohibited from deciding the existence of a "true threat" as a matter of law:[17]

> At stake . . . are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a *jury determination that [he] is guilty of every element of the crime with which he is charged*, beyond a reasonable doubt."

Apprendi, 530 U.S. at 476–77, 147 L. Ed. 2d 435, 447 (emphasis added) (citations omitted); *see also Lockhart*, 382 F.3d at 449–50 (listing "true threat" as an element required by the First Amendment).

Nonetheless, the State argues that the trial court has no obligation to instruct the jury on any aspect of "true threat" jurisprudence in an anti-threat trial. The State relies on the Supreme Court's opinion in *Dennis*, which, according to the State, "held the courts, not juries, decide whether speech is protected by the First Amendment" and, therefore, the trial court, and not the jury, should determine whether a communication is a "true threat." While it is true that the constitutionality of N.C.G.S. § 14-16.7(a), facially or as applied, is ultimately decided by

---

17. The trial court can, of course, determine the *non-existence* of a true threat as a matter of law, prior to, during, or following the evidentiary portion of the trial.

"the courts," the State's additional argument that the trial court, not the jury, should determine whether the facts of a case support a finding of a "true threat" in the first instance is counter to relevant Supreme Court precedent and overwhelming consensus found in federal and state court opinions. In fact, we cannot locate a single jurisdiction that does not send to the jury, in the first instance, the question of whether a defendant's "speech," considered in context, falls into one of the established categories of "unprotected" speech.

The Supreme Court has regularly considered whether the *jury* correctly determined that the government, or the plaintiff, proved elements imposed by the First Amendment, even when those elements were not included in the language of the relevant statute. In fact, the Supreme Court's review of the constitutionality of a state statute may be dictated by the interpretation of the statute as stated in the jury instructions: "[T]he gloss which [the State] placed on the ordinance [by the jury instruction] gives it a meaning and application which are conclusive on us. . . . As construed and applied it at least contains parts that are unconstitutional." *Terminiello v. City of Chicago*, 337 U.S. 1, 5, 93 L. Ed. 1131, 1135 (1949); *see also id.* ("The ordinance as construed by the trial court [in its jury instructions] seriously invaded [First Amendment protections]. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest."); *Black*, 538 U.S. at 364–65, 155 L. Ed. 2d at 556 ("As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.").

The Tenth Circuit expressly rejected the State's reading of *Dennis*:

> Citing *Dennis*, [the defendant] also argues the district court should have resolved his First Amendment defense as a matter of law rather than submit the matter to the jury. . . . [In *Dennis*,] [t]he trial court denied defendants' motion to dismiss, which was based on their assertion that the statute was unconstitutional. . . .
>
> *Dennis* is readily distinguishable. Here, [the defendant] is not contesting the [facial] constitutionality of [the anti-threat statute]. Rather, he asserts only that his particular speech was political in nature. We consistently have held that whether a defendant's statement is a true threat or mere political speech is a question for the jury. If there is no question that a defendant's speech is protected by the

> First Amendment, the court may dismiss the charge as a matter of law.

United States v. Viefhaus, 168 F.3d 392, 396–97 (10th Cir. 1999) (citations omitted). The Fourth Circuit has repeatedly acknowledged that " '[g]enerally, what is or is not a true threat is a jury question[.]' " *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 692 (4th Cir. 2018) (citation omitted). The Fourth Circuit has cited *Dennis* for the proposition that a defendant is "entitled to have the issue as to whether his statements constituted a [true] 'threat' properly submitted to the jury." *Alexander*, 418 F.2d at 1206. Every other federal circuit is in agreement. *See, e.g.*, *United States v. Stock*, 728 F.3d 287, 297–98 (3rd Cir. 2013). Courts from other states have also addressed the "true threat" jury instruction issue. *See Johnston*, 127 P.3d at 712 (agreeing with "*Black*, our decisions . . ., and the body of federal case law[,]" which have held anti-threat statutes "must be limited to true threats . . . and the jury must be instructed accordingly"); *see also, e.g.*, *North Dakota v. Brossart*, 858 N.W.2d 275, 284–85 (N.D. 2015).

The United States Constitution demands that the State prove *every* element of a criminal offense beyond a reasonable doubt to a jury, absent proper waiver of a jury trial. Sixth and Fourteenth Amendment "rights indisputably entitle a criminal defendant to 'a *jury determination* that [he] is guilty of *every element of the crime* with which he is charged, beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447 (citations omitted) (emphasis added); *see also In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970). We hold that the trial court must properly and fully instruct the jury on all the required elements of anti-threat statutes such as N.C.G.S. § 14-16.7(a), including the element of "true threat," along with its associated intent elements, both general and specific.

Our Supreme Court has recognized that the trial court must instruct the jury in a manner that ensures the defendant's First Amendment rights will not be violated. *State v. Leigh*, 278 N.C. 243, 252, 179 S.E.2d 708, 713 (1971). In *Leigh*, the Court granted the defendant a new trial because "[n]owhere in the charge did the trial judge explain the law or apply the law to the evidence concerning [the] defendant's contention [that his speech was protected by the First Amendment]." *Id.*

In order to obtain a constitutional conviction for threatening a court officer pursuant to N.C.G.S. § 14-16.7(a), the State must prove, beyond a reasonable doubt, that: (1) the defendant; (2) knowingly and willfully; (3) made a threat; (4) constituting a "true threat," meaning a statement "that an ordinary, reasonable [person] who is familiar with the context

in which the statement [wa]s made would interpret as a serious expression of an intent to do harm";[18] (5) to a court official; (6) knowing the court official was a court official; and (7) when the defendant communicated the statement, the defendant specifically intended the statement to be understood by the court officer as a real threat expressing the defendant's intention to carry out the actions threatened. N.C.G.S. § 14-16.7(a); *White II*, 810 F.3d at 221; *Cassel*, 408 F.3d at 632–33.

b. **Prejudice**

Failure to properly instruct a jury on a constitutionally required element of a crime is subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 11–13, 144 L. Ed. 2d 35, 48–50 (1999). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

> [The test] is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *[S]ee Delaware v[.] Van Arsdall*, [475 U.S. 673, 681, 89 L. Ed. 2d 674, 684 (1986)] ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Neder, 527 U.S. at 15–16, 144 L. Ed. 2d 35 at 51 (citations omitted); *State v. Hammonds*, 370 N.C. 158, 167, 804 S.E.2d 438, 444 (2017) (citing N.C.G.S. § 15A-1443 (2015)) (" 'A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.' ").

III. Defendant's Appeal

A. *As Applied Challenge/Whole Record Review*

[7] Based upon our holdings above, we conduct an independent whole record review to determine whether Defendant's Facebook posts constituted a "true threat" to kill D.A. Welch, and whether Defendant subjectively intended his Facebook posts to reach D.A. Welch for the purpose of causing her to believe that Defendant intended to kill her. *Milkovich*,

18. *White II*, 810 F.3d at 221.

497 U.S. at 17, 111 L. Ed. 2d 17 (citations omitted) (the Supreme Court has "determined that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression" ' "); *Bagdasarian*, 652 F.3d at 1118 (establishing the State must prove a "true threat" pursuant to both a reasonable person general intent standard considering the context, as well as the defendant's specific intent to threaten the alleged victim).

1. Plain Language Review of the Alleged Threats

We first examine each "threat" alleged in the indictment based *solely* upon the plain language; then we examine the alleged threats in context. *See In re White*, 2013 WL 5295652, *44 (E.D.Va. 2013). Defendant's indictment alleged five "threats," and reads in relevant part:

> [D]efendant . . . did knowingly and willfully make a threat to kill Ashley Welch, District Attorney, . . . by posting the following on Facebook: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go. . . . I will give them both the mtn justice they deserve . . . [I]f our head prosecutor won't do anything then the death to her as well . . . [I]t is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! . . . It is time for old Time mtn justice!"

At trial, the State argued that only five of Defendant's posts, and no posts from Defendant's Facebook friends, should be admitted into evidence, contending: "We believe those are the five relevant texts. It's the State's position that the other texts . . . are not relevant." "The question is under the elements and under the statute did [D]efendant threaten to kill [D.A. Welch]. The context of that conversation is not relevant[.]" Further, the five posts did not fully align with the posts containing the alleged threats in the indictment. The State told the jury in its closing argument: "We had Detective Stewart read you . . . the five posts that the State finds at issue." One of the five posts constituting State's Exhibits 1 – 5 did not include any of Defendant's comments from the indictment, and one of the comments included in Defendant's indictment was not included in any of the posts the State argued were "relevant."

However, on appeal, the State argues context: "[T]he content of [Defendant's] posts and the surrounding context objectively show that

[he] made true threats." "The content of [Defendant's] posts objectively threaten[ed] harm to [D.A.] Welch. [Defendant] posted":

> • "Death to our so called judicial system . . . . If our head prosecutor won't do anything then the death to her as well."[19]
>
> • "[S]he will be the first to go, period and point made."[20]
>
> • "[I]t is up to the people to administer Justice! I'm always game to do so. They make new ammo everyday!"

The State narrows its focus to two of the three alleged threats listed above, stating "[Defendant's] posts, 'death to [her],' and 'she will be the first to go,' speak for themselves. He made true threats to kill [D.A.] Welch." The State does not argue on appeal that the two comments referring to "mountain justice" constituted threats to kill D.A. Welch; these comments are not even referenced in the State's "true threat" argument, and we agree that they are of minimal relevance.

Solely considering the plain language of the "threats" alleged in the indictment, we agree with the State and find only two of the alleged threats merit closer analysis. The following three alleged threats do not contain any language indicating any threat, much less a "true threat," to kill D.A. Welch: (1) "I will give them both the mtn justice they deserve[,]" (2) "it is up to the people to administer justice! I'm always game to do so. They make new ammo everyday![,]" and (3) "It is time for old Time mtn justice!"[21] These comments are vague and do not indicate Defendant had any intention to do anything specific to anyone at any particular time. These comments contain nothing that "an ordinary, reasonable [person] . . . would interpret . . . as a serious expression of an intent to" kill D.A. Welch, *White II*, 810 F.3d at 221 (citation omitted), and nothing in these comments would support a jury finding that by posting them on his Facebook page Defendant had the specific intent to threaten D.A. Welch, *i.e.*, that Defendant *intend*ed D.A. Welch to *believe* he was

---

19. These two statements are not contained in the same post. Although the "Death to our so called judicial system" comment is included in one of the posts the State had Detective Stewart read into evidence, nothing in that post was included in the indictment. Considering these two comments together could be appropriate in a contextual analysis, since both use the particular "death to" language. However, it is not appropriate to combine comments from different posts as if they were from the same post.

20. The "period and point made" language was not included in the indictment.

21. This alleged threat from the indictment was not even included in the five posts the State introduced as the five "relevant" posts, State's Exhibits 1 - 5.

actually planning to kill her. *Bagdasarian*, 652 F.3d at 1118. We therefore look to the plain language of the remaining two alleged threats.

First: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go." The meaning of these words is simply too vague to be considered a "true threat." *Yates*, 354 U.S. at 327, 1 L. Ed. 2d at 1380 ("Vague references to 'revolutionary' or 'militant' action of an unspecified character, which are found in the evidence, might in addition be given too great weight by the jury in the absence of more precise instructions."). The first sentence is clearly political hyperbole and protected speech. *Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d at 667. The second sentence includes the words "she will be the first to go[,]" which is an apparent reference to D.A. Welch. However, even on its face this language is not clearly a threat, much less a "true threat." "She will be the first to go" could mean "she will be the first to die"; but even if that were its meaning, there are no specifics that would suggest an actual intent that D.A. Welch be killed, by Defendant or anyone else, and there is nothing in this statement indicating, assuming Defendant actually hoped for D.A. Welch's death, that *he* had any intent to kill her.[22] Further, if D.A. Welch "will be the first to go," it would only occur during a "rebellion against our government[.]" The alleged "threat" is contingent upon an event that no reasonable person would believe was ever likely to occur. *Id.* at 707-08, 22 L. Ed. 2d at 667 (citation omitted) (even the *Ragansky* test required the speaker to have "uttered the charged words with 'an apparent determination to carry them into execution' "). In addition, this alleged "threat" could also refer to a non-violent "rebellion," *e.g.*, mass protests of the people leading to D.A. Welch's resignation, a "rebellion" at the ballot box in the next election, or any number of circumstances that do not include Defendant murdering D.A. Welch.

Second: "[I]f our head prosecutor won't do anything then the death to her as well." This is the only comment in the indictment that includes language associating "death" with D.A. Welch. However, the language of this comment does not evince "a serious expression of [Defendant's]

22. We want to make clear the Supreme Court has held there is no need to prove that Defendant actually intended to carry out any threat to kill D.A. Welch. However, the alleged threat must be such that a reasonable person would understand it as a real threat to kill D.A. Welch in order for it to rise to the level of a "true threat." That is, the content of Defendant's communication must at least *reasonably appear* to express Defendant's intent to carry out the threat; and Defendant must have also intended his communication to be *received* by D.A. Welch as a real threat to kill her, even if Defendant had no intention to actually harm her. *Bagdasarian*, 652 F.3d at 1118.

intent" to kill D.A. Welch. *White II*, 810 F.3d at 221 (citation omitted). It is conditional on its face, even in the truncated form presented in the indictment: "*if* [D.A. Welch] won't do anything *then* the death to her as well." (Emphasis added). Meaning if D.A. Welch did "*something*," there would be no longer be a basis for the "then the death to her as well" sentiment. Nothing in the comment indicated *what* D.A. Welch would have to do, or fail to do, to warrant "the death to her as well" sentiment. Nothing in the comment indicated an actual plan to kill D.A. Welch, even if she failed to "do something" at some undetermined time in the future. Nor does the comment indicate that, if someone were actually going to act on whatever "the death to her as well" comment might suggest, it would be Defendant. Further, there were no specifics such as time, manner, place, ability, preparation, or other facts that might allow a reasonable person to read Defendant's words as a "true threat" to kill D.A. Welch. *See United States v. Roberts*, 915 F.2d 889, 890–91 (4th Cir. 1990). Conducting a plain language review of the "threats" alleged in the indictment, we hold that, standing alone or read together, the plain language of the alleged threats does not constitute "a serious expression of [Defendant's] intent" to kill D.A. Welch. *White II*, 810 F.3d at 221 (citation omitted).

We reach the same conclusion if we expand our review beyond the five comments included in the indictment and include State's Exhibits 1 – 5 in their entirety. These posts also included comments expressing: Defendant's disgust that the parents would not be prosecuted for their child's death; his disdain for "our judicial system"; distrust and disgust associated with "the government and the judicial system" and "politicians," declaring: "Death to our so called judicial system since it only works for those that are guilty!" One comment stated: "I will give them both the mountain justice they deserve[,]" apparently directed toward the parents, then stated: "I'm tired of this political bullshit." Another comment said: "Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise was[, w]hen the deputy ask me is it worth it[,] I would [] say with a Shotgun Pointed at him and a ar15 in the other arm was it worth to him?" This comment suggested Defendant had posted prior, unrelated comments on Facebook indicating he would meet any "raid" of his home with deadly force. Defendant also told his Facebook friends: "What I do Training wise from this point is ur fault[,]" the meaning of which is unclear, and declared: "U want me come and take me[.]" Defendant also invited someone, presumably law enforcement, to "raid my house for communicating threats and see what they meet." Defendant completed this post with an apparent metaphor involving fish and a pond. Defendant replied to one of Burch's

comments by claiming that D.A. Welch would never "reply" to the accusations because she wasted her "6 digit income" smoking outside, and because "[s]he won't try a case unless it gets her tv time. Typical politician." Defendant posted he was "sure my house is being Monitored right about now! I really hope They are ready for what meet them at the front door." He made a comment stating the "coming rebellion" "can start at my house. . . . . If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice!" Defendant stated he was "always game to do so" and "[t]hey make new ammo everyday!" Defendant opined that his Facebook friends might "need to learn what being free is verse being a puppet of the government" because then they "might actually be happy!" Defendant made a vague statement about his Facebook friends all knowing "someone who will like this Comment" or "post." Finally, State's Exhibit 5 included another attack on "the court," and "most importantly [the] western nc justice system," calling it "useless." Defendant declared "[i]t is time for old Time mtn justice!" This post concluded: "Now let Them knock on my door[.]"

These posts were full of hyperbolic rants against the courts, the judicial system, the government and politics in general, as well as a taunt directed toward anyone, presumably law enforcement, who would attempt to "raid" his house or property. Although these posts provided context to the alleged threats which, according to the State at trial, was irrelevant, the statements in these additional comments did not include any "true threats" to do anything to D.A. Welch.

2. Context of Defendant's Facebook Posts

The "language itself" of the alleged threats demonstrated no more than that Defendant was angry about the decision not to prosecute the parents and, in response, he took to Facebook to rant about politicians, local government, the local judicial system, and D.A. Welch. *See Citizens United*, 558 U.S. at 349, 175 L. Ed. 2d at 788. In other words, though the language used was extreme, ugly, and upsetting, it was political hyperbole. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667. Next, we review the whole record to determine whether, considering all the facts surrounding Defendant's posting of these comments, they rise to the level of a "true threat." Defendant's Facebook posts, as well as his "friends' " posts, speak for themselves. Therefore, our review consists of applying the dictates of the First Amendment to the uncontested evidence, a question of law, which we conduct *de novo*. *Shackelford*, __ N.C. App. at __, 825 S.E.2d at 695; *Bly*, 510 F.3d at 457–58.

We first note a fatal error in the State's argument: none of the legal requirements the State argues apply in this matter were conveyed to

the jury, so it could not have conducted the "Fourth Circuit's objective test for true threats" or any other test. Addressing the merits of the State's argument, it contends "proof that [D]efendant ha[d] access to weapons" was context supporting a finding of a "true threat," stating that Defendant "made clear in his posts that he had more than enough firepower to carry out his threats to kill [D.A.] Welch. He explained that he was not afraid to use his firearms: He said he 'would open every gun' that he has." However, the State never proved that Defendant *actually* owned any firearms or ammunition; did not elicit any testimony from D.A. Welch that she knew, or believed, Defendant owned firearms; and did not show that Defendant's alleged firearms elicited fear or concerned her in any way. If law enforcement considered Defendant or his alleged access to "more than enough firepower to carry out his threats to kill [D.A.] Welch" as a realistic threat, presumably they would have investigated further and sought an order to remove any firearms from Defendant's possession if warranted. Further, the comment in which Defendant stated he "would open every gun" *was not directed toward D.A. Welch*; it was directed toward any hypothetical law enforcement officers who attempted to raid his home, "*for whatever reason* like the guy on smoke rise[.]" (Emphasis added).

The State argues on appeal that Defendant "bragged in his posts about the firearms that he could use to shoot [D.A. Welch]." However, Defendant never indicated that he had any intention of shooting D.A. Welch or using any firearms against her in any manner. He only referenced firearms in connection with hypothetical "raids" on his house: "Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise[,]" "[I] would [meet 'the deputy'] with a Shotgun Pointed at him and a ar15 in the other arm[.]" In this comment, Defendant indicated that he had *previously* spoken of his intent to respond to any "raid" of his property with armed resistance, *prior to making any of the allegedly threatening comments about D.A. Welch*. Defendant never indicated any belief that D.A. Welch would "raid" his home.

Next, the State contends "the evidence shows that both [D.A.] Welch and law enforcement responded as if [the alleged] threats were real." Courts consider the "reaction of the audience upon [the] utterance" of the alleged threat and how seriously the threat is received. *In re White*, 2013 WL 5295652 at *45; *see also United States v. Davis*, 876 F.2d 71, 73 (9th Cir. 1989) (considering recipient's state of mind as well as actions taken in response relevant to determination of a true threat). D.A. Welch showed some concern by contacting her office and having her real estate agent remove information about her house from the Internet. However, she also testified that she did *not* feel the need to

have personal protection, she was *not* concerned about returning to work the next day, even knowing that Defendant would likely also be in the adjacent building, and she apologized to officers whom she believed were keeping an eye on her at the courthouse, telling them their extra vigilance was not necessary. D.A. Welch's actions and her testimony demonstrated only a low level of concern in general, and neither her conduct nor her testimony suggested that she believed Defendant's Facebook comments to have been serious expressions of Defendant's intent to kill her, or that she was seriously frightened of Defendant.

"[T]he seriousness with which . . . law enforcement took" the alleged threat is also an important contextual factor. *In re White*, 2013 WL 5295652 at *45 (citing *White I*, 670 F.3d at 512–13); *see also Dinwiddie*, 76 F.3d at 925. Though not on duty at the time, Detective Stewart's concerns are more appropriately considered here. The record evidence indicates that she was the only one of Defendant's Facebook friends who was concerned about Defendant's posts. Detective Stewart did not express any concern directly to Defendant, either on Facebook or by contacting him in person. Instead, she waited over an hour before contacting D.A. Welch and the sheriff. It is also relevant that Detective Stewart had personal relationships with both D.A. Welch and the sheriff due to her job, and that she was a detective. It is more likely that a person will contact someone with whom they have a relationship to convey information that causes them even mild concern, and law enforcement officers are trained to react to things that the general public may ignore. Detective Stewart's reaction should be considered from the viewpoint of a reasonable law enforcement officer and friend of D.A. Welch, not as a general "reasonable person."

The sheriff's response was to *ask* D.A. Welch if she wanted a deputy to come to her house, an offer that was declined. The sheriff apparently did not consider the likelihood of any danger to D.A. Welch to be significant enough to act without her request. The evidence suggests law enforcement did not consider Defendant's comments serious enough to warrant an immediate response, as they did not attempt to locate or contact him that evening, nor the next morning, even though D.A. Welch worked next to Defendant, and they both frequented the shared smoking area. As the State concedes, Defendant "knew exactly where to find [D.A.] Welch" and "would have had easy access to [D.A.] Welch while she was outside and unguarded." Nobody was assigned to keep an eye on Defendant or D.A. Welch to ensure D.A. Welch's security.[23] The SBI

23. D.A. Welch did testify to her belief that officers in the courthouse were staying close to her, presumably as protection.

was the first agency to contact Defendant about the posts, and that was not until the afternoon of 25 August 2016, at Defendant's place of work.

According to the record evidence, law enforcement did not contact Burch. Burch's comments were clearly not "true threats," but if Burch believed that Defendant, by posting his comments, "mean[t] to communicate a serious expression of an intent to" kill D.A. Welch, *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted), Burch *was* indicating his eagerness to join Defendant in that endeavor. Further, the record suggests that the parents were not contacted, though the "give them both the mtn justice they deserve" comment was likely directed to the parents, not D.A. Welch. If officers suspected that Defendant or Burch, or both, were truly threatening to exact some kind of "vigilante" or "mountain" justice on the parents, it is presumed that they would have taken measures to protect, or at least inform, the parents.

Further, the most overt "threats" were directed at law enforcement officers, including threatening to "open every gun I have" on any law enforcement that came to Defendant's "door." If law enforcement considered Defendant to be serious in his threat to "open every gun [he had,]" logically, they would have investigated Defendant about those comments, and demonstrated greater concern in general. As noted above, law enforcement did not respond in a manner suggesting they believed Defendant's Facebook posts indicated an actual threat to kill D.A. Welch, nor that they were concerned about Defendant potentially possessing an assortment of firearms. Defendant was not charged or investigated in response to his threats toward law enforcement officers. These comments demonstrate that Defendant knew how to speak more directly about killing someone than using comments like "mountain justice," "she will be the first to go," and "the death to her as well." Since it was the State's burden to prove not only a "threat," but a "true threat," this evident lack of concern on the part of authorities weighs against a finding that a reasonable person reading Defendant's posts, understanding the full context surrounding their communication, would believe that Defendant "mean[t] to communicate a serious expression of an intent to" kill D.A. Welch. *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted).

The relationship between the speaker and the recipient of the alleged threat is highly relevant in "true threat" analysis. *Id.* However, Defendant's posts were not made in the "context of a volatile or hostile relationship[.]" *In re S.W.*, 45 A.3d 151, 157–60 (D.C. 2012). D.A. Welch testified she interacted with Defendant on a daily basis at work and their interactions were never unusual or disconcerting. D.A. Welch testified

she had never prosecuted Defendant or any of his family members; that Defendant had always been polite; and that Defendant had never acted in an inappropriate or threatening manner with her. Detective Stewart also testified that the interactions she had witnessed between Defendant and D.A. Welch were polite and non-threatening, Defendant had even requested a bumper sticker from D.A. Welch in order to support her election bid. Defendant told Agent Schick that he voted for D.A. Welch, and still considered her to be a good district attorney. Courts consider the speaker's history of threatening the recipient, and whether the recipient had reason to believe the speaker was prone to violence. *Id.*, *White I*, 670 F.3d at 513. The record is clear that Defendant had never threatened D.A. Welch, and it contains no suggestion that he had ever threatened anyone else, was prone to violence, or was likely to follow through with any allegedly violent threat.

The State also argues on appeal that Defendant "knew [D.A.] Welch. They worked in the same small town[,]" Defendant "knew where to find [D.A.] Welch, for example, on her smoke breaks and in the courthouse parking lot. He worked in an office near that same courthouse. He would have had easy access to Welch while she was outside and unguarded." The State contends "proof that a defendant knows where to find a person makes the defendant's threats against that person objectively more serious." However, when we consider the fact that Defendant knew where D.A. Welch worked, and where she took her smoke breaks, along with law enforcement's decision not to monitor Defendant or D.A. Welch, the State's argument is undercut. Law enforcement did not act in a manner suggesting Defendant was considered a serious threat to D.A. Welch. Further, since D.A. Welch was the District Attorney, her place of work would have either been known, or easily discoverable, by anyone, making Defendant's knowledge of this fact of little relevance.

The State contends that Defendant "even conceded in his posts that he was 'communicating threats.' " It is true that after making the "then the death to her as well" comment, Defendant stated: "Now raid my house for communicating threats and see what they meet." This kind of language can add to context supporting a finding of a "true threat," but it must also be read in context; it does not *per se* elevate every utterance to a "true threat." Nor do we typically allow defendants to define the crimes for which they are charged. More importantly, because this is the general intent portion of our review, Defendant's actual mindset is just one of many contextual factors that may be useful in determining whether a reasonable person, applying the general intent standard, would objectively determine Defendant's posts contained a "true threat."

Finally, the State contends that Defendant "encouraged those reading his threats to communicate them directly to [D.A.] Welch." The manner of conveying the alleged threat can be very relevant. A statement communicated directly and "privately" to the intended recipient is more suggestive of a serious threat than one made publicly to a group that does not include the "intended recipient." *Id.*; *U.S. v. Syring*, 522 F.Supp.2d 125, 134 (D.D.C. 2007). Defendant never communicated any statement directly to D.A. Welch. He posted the comments while at home making dinner for his family. Defendant made two relevant comments, first: "I have friends on fb whom see this. I hope they do! Death to our so called judicial system since it only works for those that are guilty!" This post is a rant against "the government and the judicial system," and included Defendant's comment that he would respond to any "deputy" sent to "raid" his home with firepower. This post does not mention D.A. Welch, and there is no suggestion that Defendant wanted anyone to share this post with D.A. Welch. The second comment contained no threatening language at all. It was in response to Sammons' comment: "I wouldn't expect that from Franklin but maybe Asheville[.]" Defendant informed Sammons that D.A. Welch's district did not include Asheville and told Sammons: "This is how politics works. That's why my harsh words to her and any other that will Listen and share it to her fb page." Nothing in this post states that Defendant wanted anyone to "share" a threat, much less a "true threat," "to her fb page." That Defendant was not requesting anyone to "share" "true threats" to D.A. Welch's Facebook page is clear because both of these comments were made *before* Defendant's "then the death to her as well" comment and, therefore, could not have been written with any intent to convince anyone to "share" that post with D.A. Welch.

Although the State argued at trial that it did not need to prove any "true threat," and we have addressed all the State's arguments on appeal, we must conduct an independent review of the entire record to determine if the evidence presented at trial, considered in context, could support a finding of a "true threat." *Bose*, 466 U.S. at 505, 511, 80 L. Ed. 2d at 519, 523; *Bagdasarian*, 652 F.3d at 1118. This Court also reviews the record to determine whether the evidence could support a determination that Defendant *intended* the following: his posts would eventually get to D.A. Welch and, upon reading the posts, D.A. Welch would believe Defendant actually intended to kill her. *Bose*, 466 U.S. at 505, 511, 80 L. Ed. 2d at 519, 523.

The forum in which an alleged "true threat" was communicated is a primary contextual factor. *See Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d

at 666–67; *Bly*, 510 F.3d at 459. "This Court long ago recognized that members of the public retain strong free speech rights when they venture into public [spaces], which . . ., time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 172 L. Ed. 2d 853, 862 (2009) (quotation marks and citations omitted). "In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such 'traditional public fora.' " *Id.*; *see also Packingham*, 582 U.S. at __, 198 L. Ed. 2d at 279–80. The fact that Defendant's comment was posted on Facebook is of great importance to our "true threat" analysis. The Supreme Court has recognized:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. . . .
>
> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. . . . In short, social media users employ . . . websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Id. at __, 198 L. Ed. 2d at 280 (citations omitted).

Defendant was engaging in a heated discussion, or "debate," about a political concern with his Facebook friends, which was emotionally charged due to the content of the discussion, a dead child, as well as shared feelings, very likely incorrect, that D.A. Welch improperly declined to prosecute the parents. Facebook has the status of a "public square," but can feel like a "safer" place to discuss controversial topics or make inappropriate, hyperbolic, or boastful statements. The audience is generally known to the person posting, and there is often a sense of community and like-mindedness. The record evidence is that every response to Defendant's posts on Facebook was supportive of Defendant's comments. None of the responses on Facebook indicated concern that Defendant might be planning to kill D.A. Welch. By posting

on Facebook, Defendant was expressing his feelings publicly, but selectively, in the "most important place[] . . . for the exchange of views." *Id.*

Courts also consider the "purpose" of the conversation within which an alleged threat was made. *See United States v. Landham*, 251 F.3d 1072, 1083–84 (6th Cir. 2001). One purpose of Defendant's comments was clearly to express his frustration about what he perceived as a great injustice, perhaps fueled in part by the six beers he estimated drinking. The purpose was also to solicit discussion about D.A. Welch's decision not to prosecute the parents, and to complain about local politicians, the lack of "justice" in the area, and the "corruption" of the local "justice system" in general. Protection of the free flow of ideas and opinions of political concern is of particular importance in First Amendment cases, even, or even particularly, when the opinions represent a minority view, or are offensive to many people. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; *Bly*, 510 F.3d at 459. The "discussion" initiated by Defendant's first post was undoubtedly political speech, even if some of it was ill-advised, vituperative, and irresponsibly hyperbolic.

All of Defendant's comments, even the most disturbing, were directed toward a call for political change, or an expression of disdain for the political system. The alleged threats against D.A. Welch were completely intertwined with Defendant's political rants. It is general knowledge that Facebook, like many other sites on the Internet, often serves as a place where people air their grievances. Further, it is not uncommon for some of the posts on Facebook and other Internet platforms to be "over the top," exaggeratedly offensive, threatening, or irrational. *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (citations omitted) ("[A] court may take judicial notice of a fact which is . . . so notoriously true as not to be the subject of reasonable dispute[.]").

A related consideration is whether the context in which the alleged threat was communicated is traditionally "an area often subject to impassioned language and hyperbole[.]" *Metzinger*, 456 S.W.3d at 97 ("Defendant's tweets facially reveal that they were made in the context of sports rivalry, an area often subject to impassioned language and hyperbole."). Political speech on social media, or on the Internet in general, is undoubtedly one of the "areas" most "often subject to impassioned language and hyperbole[,]" or " 'rhetorical excesses, and impotent expressions of anger or frustration[.]' " *Id.* (citation omitted). Defendant's posts "facially reveal that they were made in the context of [angry political speech], an area often subject to impassioned language and hyperbole." *Id.*

The specificity of the alleged threat is a consideration in "true threat" analysis. *See United States v. Callahan*, 702 F.2d 964, 966 (11th Cir. 1983) (citation omitted) (finding that a letter specifying time, date, and place of threatened assassination constituted a true threat). As well as being conditional and vague, the alleged threat, "If our head prosecutor won't do anything then the death to her as well[,]" lacked any specifics such at time, date, place, method, or other circumstances that would suggest Defendant was actually planning to kill D.A. Welch. The "she will be the first to go" comment was predicated on some future "rebellion against our government[,]" and does not even specify that Defendant personally intended to do *anything* to D.A. Welch if the "rebellion" actually came.

In addition, courts consider the reaction of those *not* the intended recipient who read the alleged threat. *Ross v. City of Jackson*, 897 F.3d 916, 922 n.6 (8th Cir. 2018); *Dinwiddie*, 76 F.3d at 925; *In re White*, 2013 WL 5295652 at *45. There were no comments or posts in response to Defendant's posts that expressed any concern that Defendant was actually threatening to kill D.A. Welch or anyone else. All the online responses expressed support or agreement. Detective Stewart, whose reaction is discussed above, was the sole person concerned enough to take any action in response to Defendant's posts.

Courts also factor the defendant's explanation for having communicated the alleged threat, if any, and the defendant's actions following the posting of the alleged threat. *See Ross*, 897 F.3d at 922 n.6. As testified to by Detective Stewart and Agent Schick, Defendant deleted his posts shortly after making them. This action supports Defendant's statements to Agent Schick that "he wanted to apologize, because the last thing in the world he wanted to do is threaten to kill anybody[,]" that he "did not mean for the posts[,]" especially the "death to her" post, to come across as a threat to D.A. Welch, and that he did not want the posts to somehow reach D.A. Welch or the parents and upset them. Defendant asked Agent Schick "that if [he] saw [D.A. Welch], tell her I'm sorry and I did not mean it that way[.]" A person with an actual intent to threaten to kill someone is unlikely to delete the alleged threats within a couple of hours of posting them, and then politely ask a law enforcement officer to convey his apology to the alleged intended victim. Absent additional facts suggesting otherwise, Defendant's decision to delete the posts shortly after making them greatly diminishes the likelihood that a reasonable person who read the posts on Facebook would construe them to contain any "true threat" to kill D.A. Welch. Defendant's act of deleting the posts is strong evidence that Defendant did not intend his posts to constitute a "true threat" to kill D.A. Welch. Although it was the

State's burden, it presented no alternative theory for Defendant's decision to delete that conversation.

3. The State's Evidence Failed to Prove a "True Threat"

We hold that "[n]othing in Defendant's [posts] credibly suggested, either directly or indirectly, that Defendant was threatening violent acts that *were likely to occur*." *Metzinger*, 456 S.W.3d at 97–98 (emphasis added). The decision to prosecute Defendant may well have been made, at least in part, due to the State's belief that it could constitutionally convict Defendant pursuant to N.C.G.S. § 14-16.7(a) if it simply convinced the jury that the words Defendant wrote, *without considering any context*, could be interpreted as a threat; that Defendant knew the meaning of the words he wrote, and that Defendant willfully clicked the "post" button on his Facebook page. Conducting First Amendment "true threat" review, however, we hold, as a matter of law, that Defendant's Facebook posts did not rise to the level of a "true threat." Therefore, Defendant was unconstitutionally prosecuted pursuant to N.C.G.S. § 14-16.7(a) in this case. We would reach the same conclusion applying regular *de novo* review to answer this constitutional question. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110–11 (2018). The statement "[i]f our head prosecutor won't do anything then the death to her as well," considered in context, is simply not a statement that a reasonable person would understand as Defendant expressing a *serious intent to kill* D.A. Welch. Even if this were a close call, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Wis. Right To Life*, 551 U.S. at 474, 168 L. Ed. 2d at 349. We therefore vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087 (citations omitted) ("If it were clear, as a matter of law, that the speech in question was protected, we would be obligated to remand not for a new trial, but for a judgment of acquittal.").

4. The State's Evidence Failed to Prove Intent to Threaten

[8] We further hold that the record evidence could not have supported a finding that Defendant's intent in posting his comments was to cause D.A. Welch to believe Defendant was going to kill her. *Bagdasarian*, 652 F.3d at 1118 ("[A] conviction under [an anti-threat statute] can be upheld only if both the objective and subjective requirements are met, . . . and our resolution of either issue may serve as an alternate holding."). If Defendant intended D.A. Welch to believe he was going to attempt to kill her, there were a number of methods that would have been just as easy, and more effective. The State would have to convince the jury beyond a

reasonable doubt that Defendant, while cooking dinner for his wife and children, posted his Facebook comments with the intent that they would be perceived as a "true threat" to kill D.A. Welch; that Defendant did not care that anyone reading his alleged threats to kill would immediately know his identity; that Defendant assumed at least one of his Facebook friends would share his posts with D.A. Welch so the "true threat" would reach his intended target; and that Defendant was unconcerned that his acts would likely result in his arrest and prosecution.

If Defendant truly desired to convey to D.A. Welch a "true threat" to kill her, and was not concerned about the likely consequences, he could have simply threatened D.A. Welch in person—at work or anywhere else; he could have left a written threat for her at her office, or mailed a threat there; or he could have attempted to send her a threatening message on Facebook directly.[24] The fact that Detective Sampson happened to see Defendant's posts, took screenshots before they were deleted, and alerted D.A. Welch, constituted a series of events unlikely to have been foreseen by Defendant. Further, if Defendant intended to threaten D.A. Welch, it is unlikely that he would have buried his intended threats among long, rambling diatribes against multiple people and government entities. It is also unlikely that language directed at people or groups Defendant did not intend to threaten would be much more direct and violent than the contingent, non-specific, and equivocal language he used for his supposed intended target, D.A. Welch. Further, if Defendant intended D.A. Welch to receive his comments and believe he was planning to kill her, it is unlikely he would have attempted to send her an apology when he was informed his comments had, in fact, reached D.A. Welch. Considering all the attendant circumstances, particularly the alleged threats in the context of the entire Facebook "conversation" on Defendant's personal page, to which D.A. Welch did not have access, we hold that there was insufficient evidence to prove the element of specific intent to threaten as required by the First Amendment. For this reason, as well, we vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087.

5. Jury Instructions

[9] Defendant requested the trial court instruct the jury that the State must prove Defendant communicated a "true threat"; that it instruct the

24. Anyone with a Facebook account can send a personal message to another account holder unless they have been specifically "blocked." Although Defendant and D.A. Welch were not Facebook "friends," she would have had no reason to block Defendant until after she was alerted to his posts.

jury on the definition of "true threat"; and that it instruct the jury on the appropriate standards of intent. The State argued against Defendant's requested instruction on the basis that neither "true threat" nor its intent requirements were elements of N.C.G.S. § 14-16.7(a). The trial court denied Defendant's requested instruction. We have already rejected the State's argument that it was the trial court's duty to make the "true threat" determination in the first instance. Making this determination was the sole province of the jury and, even then, only if Defendant's motions to dismiss had been properly denied; and they were not.

Neither the State nor the trial court demonstrated an understanding that "true threat" was a required element of N.C.G.S. § 14-16.7(a). At the charge conference, Defendant told the trial court: "So I'm asking that you instruct on true threats. I believe it's a correct statement of the law[,]" and stated: "When you look at this case, this is solely about speech[.]" Defendant argued "the only way a jury can render a verdict in this case is if they know what a true threat is and are instructed on it. Otherwise, they don't have the appropriate legal standard." Defendant requested the following instruction:

> In this context, you must find [] Defendant communicated a "true threat." A "[t]rue [t]hreat" is a statement where the speaker ([D]efendant) means to communicate a serious expression of intention to commit an act of unlawful violence to a particular individual (D.A. [Welch]), not merely "political hyperbole," vehement, caustic and sometimes unpleasantly sharp attacks, or vituperative, abusive and inexact statements." The [D]efendant must intend to [have] communicate[d] a "[t]rue [t]hreat" to the D.A.

Defendant's requested instruction was a generally correct statement of the law and it was error for the trial court to refuse to give it, or a differently worded instruction that correctly stated all the elements that the State was required to prove and the jury was required to determine. When asked to respond to Defendant's requested instructions, the State answered: "The State would object to all these instructions[.] The pattern jury instructions are clear that *there are three and only three elements to this charge*. Now *with regards to the threat*, the *only* element is that the defendant knowingly and willfully made a threat to kill the victim." (Emphasis added). The State further argued that the First Amendment did not apply to Defendant's case:

> I get that the defendant is raising First Amendment objections to that statute as it's written, but I think the proper

> venue to take that up would be if upon conviction to take that up on appeal.
>
> What he's asking the Court to do is rewrite the North Carolina statute to comport with his interpretation of the First Amendment requirements.
>
> Under the misdemeanor communicating threats statute, the North Carolina legislature specifically put in an element, "the threat is made in a manner and under circumstances which would cause a reasonable person to believe the threat is likely to be carried out."
>
> The same legislature specifically exempted that element from this crime. Therefore, it is the legislature's intent . . . that there be *no requirement of proof to show that the threat was made in a manner and under circumstances which would cause a reasonable person to believe it is likely to be carried out.*
>
> I think it can be inferred that the legislature felt that *making any threats* towards . . . court officials . . . is unacceptable to the legislature, *regardless of whether they were made in a manner that a reasonable person would believe they would be carried out.* They specifically exempted that element from this statute that exists in the other threat statute, and I think it would be inappropriate to reinsert it back in.

(Emphasis added). Following the State's argument, the trial court ruled against Defendant. The State's argument was in direct conflict with the general intent standards applied by *every* jurisdiction we have found, as well as the specific intent requirement we have adopted in this opinion. *White II*, 810 F.3d at 219 (citation omitted) (under the universally accepted general intent standard, the State had the burden of proving Defendant's posts were such that "a reasonable [person] . . . familiar with the circumstances would interpret [them] as a serious expression of [Defendant's] intent to" kill D.A. Welch).

Compounding the error, the State argued context to demonstrate Defendant's "state of mind," even though it had erroneously informed the jury that the context surrounding Defendant's posting of the comments, as well as Defendant's intent, was irrelevant to the jury's decision. In its closing argument, the State told the jury that under N.C.G.S. § 14-16.7(a), to prove Defendant "willfully made a threat to kill" D.A. Welch, the State

was only required to prove that words included in Defendant's post could interpreted as a "threat," without any definition of what a "threat" entailed; that Defendant understood the meaning of the words;[25] and that Defendant intended to post those words. The State did not believe it was required to prove Defendant communicated any "true threat," and told the jurors they would be acting contrary to the law "if you add [an intent] element in there, if you go back to the room and say well, we're going to give consideration to whether he meant to follow through on it or not[.]" However, not only was the State required to prove the general and specific intent elements required by the First Amendment, a defendant's intent to carry out a threat is also relevant because "[a] person who says he is going to bomb a building is more likely to give the impression he is serious if he actually *is* serious." *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008). The State further argued that it did not matter if Defendant "was venting or not. You cannot threaten court officials[,]" in other words, that Defendant's state of mind was irrelevant. This was a clear misstatement of the law. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 ("But whatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term."). However, the State then argued the following to the jury, using posts not contained in the indictment in order to demonstrate Defendant's "violent" state of mind:

> "When the deputy asks me if it was worth it, I would say with a shot gun pointed at him and an AR-15 in the other arm was it worth it to him. I would open every gun I had." This shows his frame of mind as he's posting it. *This is not about [D.A. Welch], but he's talking about what he's going to do when law enforcement comes to his house. This shows his frame of mind as he's making these posts.* You saw somebody else named [] Burch then jumped into the conversation, and what [] Burch posted was, "Vigilante justice." And then the defendant comes back and says, "If that's what it takes."

(Emphasis added).

Without instructing the jurors that they were required to consider the alleged threats in context, and that they were required to apply the appropriate intent standards, the jury was free to find Defendant guilty without having made a determination that any of Defendant's posts

25. *I.e.*, that Defendant understood English.

were "true threats." *Id.*; *Harte-Hanks*, 491 U.S. at 668, 105 L. Ed. 2d at 577 (citations omitted) (stating that, for the "actual malice" inquiry, "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry"). The State also argued in its closing:

> Now in *voir dire* and opening arguments [D]efendant talked about the defense was speech. It's our position that this crosses the line. Yes, one of the great hallmarks of this country is our right to free speech. But we all know that free speech crosses a line at some point. And when the free speech crosses the line to *venting your frustration about government*, it crosses the line into *putting her in fear* of her life, that's when the law steps in. And *that's not free speech*. That's when you've gone too far.

(Emphasis added). Assuming the State did not mean to suggest that "venting your frustration about the government" "crosses the line," it still argued erroneous First Amendment law to the jury when it stated that any Facebook post that "put[] [D.A. Welch] in fear of her life" "crossed the line" and rendered Defendant's speech "unprotected" by the First Amendment. No "true threat" standard is met solely by proving the subjective reaction of the intended recipient to the alleged threat.[26] The State told the jurors: "You cannot threaten court officials[,]" and "Did [Defendant] intend on grabbing a gun and getting into his car, driving over to [D.A. Welch's] house that night and shooting her? Doesn't matter. He posted a threat. He knew it was a threat." Both the State and the trial court mistakenly understood N.C.G.S. § 14-16.7(a) to proscribe *any* statement that could be read as a "threat" to kill a court officer. The trial court rejected Defendant's proposed instruction on "true threat," and instead instructed the jury that it only had to find:

> [D]efendant knowingly and willfully made a threat to kill [D.A. Welch]. A person acts "knowingly" when the person is aware or conscious of what he is doing. A person acts "willfully" when the act was done intentionally. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances

26. On appeal, the State acknowledges: "As a constitutional matter, intent for the victim to feel fear is not a necessary ingredient for a true threat." (Citations omitted).

> proven as a reasonably prudent person would ordinarily draw therefrom.[27]

The First Amendment required more. *See*, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 509–15, 132 L. Ed. 2d 444, 449–53 (1995).

There is no evidence to suggest the requirements of the First Amendment were applied to Defendant's case at any point in the process. In a criminal jury trial, *every element* of the crime *must* be submitted to the jury. *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447. Defendant "cannot stand convicted unless and until a jury *acting under proper instructions* finds from what [Defendant] said that indeed he did make a[] [true] threat." *Alexander*, 418 F.2d at 1207 (emphasis added). The trial was conducted without the understanding that "whatever the 'willfullness' requirement implies, the [anti-threat] statute initially require[d] the [State] to prove a true 'threat[,]' " *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667, and that "all threat statutes[] 'must be interpreted with the commands of the First Amendment clearly in mind.' Thus, such statutes apply only to 'true threat[s]'—i.e., threats outside the protective scope of the First Amendment." *Wheeler*, 776 F.3d at 742–43 (citations omitted). The instruction given did not include the First Amendment requirements that were included in Defendant's requested instruction: (1) that it was the State's burden to prove beyond a reasonable doubt the element that Defendant communicated a "true threat" to kill D.A. Welch; (2) that a "true threat" is a statement "where the speaker [Defendant] means to communicate a serious expression of an intent to commit an act of unlawful violence [murder] to a particular individual [D.A. Welch,]" *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552, not merely "political hyperbole," "vehement, caustic and sometimes unpleasantly sharp attacks[,]" or "vituperative, abusive and inexact statements," *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; (3) that "the prosecution must show that an ordinary, reasonable [person] who is familiar with the context in which the statement [wa]s made would interpret it as a serious expression of an intent to" kill D.A. Welch, *White II*, 810 F.3d at 221; and (4) that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat[,]" which the State must prove beyond a reasonable doubt, considering the relevant context. *Cassel*, 408 F.3d at 632–33.

The "true threat" inquiry requires " 'delicate assessments of the inferences a "reasonable [decision-maker]" would draw from a given set

---

27. This "intent" instruction included in the charge only applied to whether Defendant willfully, *i.e.*, intentionally, posted the words he wrote on Facebook.

of facts and the significance of those inferences to him[,]' " and this decision " '[is] peculiarly on[e] for the trier of fact.' " *Gaudin*, 515 U.S. at 512, 132 L. Ed. 2d at 451 (citations omitted). Because "true threat" is a necessary element of N.C.G.S. § 14-16.7(a), determination of that element by the jury was a *constitutional requirement*, not, as argued by the State, an issue for the trial court to decide. *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447. "[The defendant] was entitled to have the issue as to whether his statements constituted a [true] 'threat' properly submitted to the jury. It follows that if the evidence suggested inquiries for the jury on that issue which the charge erroneously foreclosed, [the defendant] must have a new trial." *Alexander*, 418 F.2d at 1206 (footnote omitted); *see also id.* (emphasis added) ("[T]he charge did not mention *the necessity*, in determining whether a [true] threat was made, *of examining the statement in its full contex*t."). Due to the failure to properly instruct the jury on constitutionally required elements, N.C.G.S. § 14-16.7(a) was unconstitutionally applied to Defendant.

Having found constitutional error in the jury instruction given at Defendant's trial, we must conduct harmless error analysis:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

State v. Ortiz-Zape, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (citing N.C.G.S. § 15A-1443(b) (2011)). The State attempts to shift this burden to Defendant and, therefore, does not make any argument that the failure to properly instruct the jury was harmless beyond a reasonable doubt. Because the State does not make the required argument, it has failed in its burden. *Id.*; N.C.G.S. § 15A-1443(b) (2017).

Instead, the State argues: "Even if [Defendant's] posts were protected speech, his conviction would still survive scrutiny under the First Amendment." The State seems to be conflating Defendant's as-applied "true threat" challenge with a facial challenge, arguing: "The State may regulate speech, even through content-discriminatory means, so long as the State's means are narrowly tailored to serve a compelling interest." (Citing *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436). However, "[t]he fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied[.]" *Taxpayers for Vincent*, 466 U.S. at 803 n.22, 80 L. Ed. 2d at 785 n.22. The State requests this Court to apply strict-scrutiny review "to [Defendant's] conduct" and find that his "conviction under the threats statute is narrowly tailored to serve the State's

interest in maintaining a stable government[.]" Because Defendant has not made a facial challenge to N.C.G.S. § 14-16.7(a), we do not consider whether the statute would survive strict scrutiny review. Further, we hold that the State would be unable, on the facts before us, to prove the error harmless beyond a reasonable doubt. *Id.*

IV. Conclusion

We hold, upon *Bose* independent whole record review, that Defendant's conviction was obtained through the unconstitutional application of N.C.G.S. § 14-16.7(a) in his prosecution. Initially, we hold Defendant's posts were not "true threats" as a matter of law and, therefore, the State could not prove any violation of N.C.G.S. § 14-16.7(a). For this reason, we vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087. As a separate and distinct basis for vacating Defendant's conviction and remanding for entry of a judgment of acquittal, we also hold that the evidence was insufficient to meet the element of specific intent, that when Defendant posted the comments on Facebook his intent was that they would reach D.A. Welch and that she would believe Defendant was actually planning to kill her. *Bagdasarian*, 652 F.3d at 1118. In the event our Supreme Court determines that *Bose* independent whole record review will not be used in North Carolina for First Amendment "true threat" appeals, we also hold that we would reach the same results pursuant to our regular standard of appellate review. Finally, in the event our holdings that Defendant's conviction should be vacated and remanded for entry of a judgment of acquittal are not upheld, we also hold that the trial court's failure to properly instruct the jury on all essential elements of N.C.G.S. § 14-16.7(a), *i.e.*, its failure to instruct the jury on the "true threat" and intent elements required by the First Amendment, constituted prejudicial error requiring reversal of Defendant's conviction and remand for a new trial.

Because we are dealing with issues of first impression in North Carolina, we were required to make additional holdings in order to reach the resolution of this matter. In this opinion, we have held the following concerning application of the First Amendment to anti-threat statutes in North Carolina: (1) The First Amendment requires that "true threat" *must* be included as an *element* of any prosecution based upon an alleged threat. The "true threat" element includes a proper definition of "true threat" and application of the general intent standard set forth above. (2) Whether considered part of the definition of "true threat" or a separate element, the First Amendment requires the State to prove beyond a reasonable doubt that a defendant specifically intended that

his communication would reach the intended target, and that the defendant also intended his target would believe the communication to be a real threat and feel threatened thereby. (3) It is the State's burden to prove a defendant communicated a "true threat" based on the language and nature of the alleged threat itself and all the relevant attendant circumstances, *i.e.*, context. If challenged, it is also the State's duty to prove that an anti-threat statute can be constitutionally applied, based upon the particular facts of each case. (4) Regardless of whether "true threat" is labeled fact, law, or a combination thereof, it is a "constitutional fact," and is generally a question for the jury, or the trial court acting as the trier of fact, to decide in the first instance, unless the State's evidence is insufficient to prove a "true threat" as a matter of law, in which case the trial court should dismiss the charge upon a defendant's motion. (5) Because the jury determines whether the State has proven a communication constitutes a "true threat" in the first instance, the jurors *must be instructed* in such a manner that they understand the definition of "true threat," the correct intent standards and how to apply them, and the requirement that they consider the alleged threat in context, that is, considering all the relevant circumstances surrounding the communication of the alleged threat, including relevant circumstances both preceding and following communication of the alleged threat. (6) We follow the Supreme Court and the majority of federal jurisdictions in holding "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact[-]finding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 516–17; *id.* at 502, 80 L. Ed. 2d at 517. Independent whole record appellate review must ensure that "the speech in question actually falls within the unprotected category and [is] confine[d to] the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505, 80 L. Ed. 2d at 519.

VACATED.

Judge ZACHARY concurs.

Judge DIETZ concurs in part in a separate opinion.

DIETZ, Judge, concurring.

I concur in Part III.A.3 of the majority opinion. After a night of drinking, David Taylor took to Facebook and unleashed his frustration at the

local district attorney, who had declined to bring charges in the death of a toddler.

The only portion of Taylor's rambling series of Facebook posts that plausibly could be considered a threat against the district attorney is his statement that "If our head prosecutor won't do anything, then death to her as well."

Even in isolation, this statement is not necessarily a "true threat." In modern English language, calling for "death to" something quite often is *not* a threat to kill that thing—it often expresses a desire for the downfall or ruin of that thing.

We know this not only for English usage generally, but from Taylor's own usage in this same series of Facebook posts. Shortly before his "death to her as well" comment, Taylor stated, "Death to our so called judicial system since it only works for those that are guilty!"

Moreover, Taylor's statement was conditional, just like the statement by Robert Watts in the landmark case establishing the true threat doctrine. *Watts v. United States.*, 394 U.S. 705, 708 (1969). Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Likewise, Taylor said *if* the district attorney did not change her charging decision concerning the toddler's death—which Taylor viewed as a political one—then "death to her as well." The conditional nature of this threat reduces the sort of immediacy needed to satisfy the Supreme Court's definition of a true threat.

Finally, we cannot look at Taylor's statement in isolation. It was part of a lengthy invective—some of it crude and offensive, some of it rather poetic—that expressed Taylor's lack of faith in the government and the justice system. He complained that he had "voted for it to change and apparently it never will." He repeatedly questioned whether the government would protect his rights and suggested that he may need to take up arms to defend himself. And he complained specifically about the district attorney, speculating that "She won't try a case unless it gets her tv time. Typical politician."

In this context, Taylor's purported threat was "political hyperbole" expressing his distrust in politicians, the justice system, and the government. *Id.* at 708. Indeed, even his statement following "death to her as well," in which he explained "Yea I said it. Now raid my house for communicating threats and see what they meet," carries this meaning. Taylor had so little faith in his own government that he *expected* to be arrested for criticizing public officials, even though he had a constitutional right to do so.

The advent of social media has given us a window into our fellow citizens' views that we did not have before. Drunken political tirades like Taylor's once were confined to living rooms or pool halls. They now can be seen by everyone, everywhere. The First Amendment protects them either way. Taylor's rant was not a true threat—it was "a kind of very crude offensive method of stating a political opposition to" the district attorney. *Id.* His speech is protected by the First Amendment and cannot be criminalized. I therefore concur in the decision to reverse Taylor's criminal conviction.

STATE OF NORTH CAROLINA
v.
TOBY JAY WILES

No. COA19-381

Filed 17 March 2020

1. Search and Seizure—motion to suppress—sufficiency of findings—traffic stop—validity—based on mistaken belief

In a prosecution for driving while impaired, the trial court properly denied defendant's motion to suppress evidence from a traffic stop where competent evidence supported the court's factual findings, including that an officer stopped defendant's car because he believed someone in the passenger seat was not wearing a seatbelt, the officer smelled a strong odor of alcohol when he approached the car, and the officer decided to give the passenger (who was wearing their seatbelt by the time the officer approached) the benefit of the doubt since both the seatbelt and the passenger's shirt were gray. Moreover, the trial court properly concluded that the stop was valid because the officer's mistaken belief about the passenger's seatbelt still provided a reasonable suspicion to justify the stop.

2. Appeal and Error—preservation of issues—failure to object at trial

In a prosecution for driving while impaired arising from a traffic stop of defendant's car, defendant failed to preserve for appellate review his arguments that an officer unconstitutionally extended the length of the stop and lacked probable cause to arrest him—defendant never raised these arguments at trial.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—perfunctory argument

In an appeal from a conviction for driving while impaired, in which defendant's appellate brief included a perfunctory argument—fewer than 100 words consisting of conclusory assertions and lacking citations to the record or to any legal authority—against the trial court's denial of his motions to dismiss, defendant's argument was deemed abandoned for failure to comply with Appellate Rule 28(b)(6).

4. Evidence—driving while impaired—positive alcohol screening tests—prosecutor's statements at closing argument—prejudice

In a prosecution for driving while impaired, the admission of testimony did not violate Evidence Rule 403 where, in accordance with N.C.G.S. § 20-16.3(d), an officer testified to defendant's positive alcohol screening tests from the night of his arrest without revealing defendant's actual blood alcohol concentration (thus, the testimony did not unduly prejudice defendant). Further, the prosecutor's description at closing arguments of alcohol "circulating through defendant's system" did not prejudice defendant because those statements were based on facts in evidence, as well as reasonable inferences drawn from those facts.

5. Evidence—expert witness—qualification—testimony regarding HGN testing—trial for driving while impaired

In a prosecution for driving while impaired, the trial court did not abuse its discretion in qualifying the officer who arrested defendant as an expert on horizontal gaze and nystagmus (HGN) testing and subsequently admitting his testimony regarding HGN testing. The officer had successfully completed HGN training with the State Highway Patrol, and therefore met the requirements of Evidence Rule 702(a1)(1), which permits an expert to testify to the results of an HGN test that is administered by a person with HGN training.

Appeal by defendant from order entered 31 August 2017 by Judge W. Robert Bell, and judgment entered 21 December 2018 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellant.

ZACHARY, Judge.

Defendant Toby Jay Wiles appeals from an order denying his motion to suppress and a judgment entered upon a jury's verdict finding him guilty of driving while impaired. After careful review, we affirm the trial court's denial of Defendant's motion to suppress, and conclude that he received a fair trial, free from error.

Background

At around 8:00 p.m. on 23 May 2015, Defendant drove past State Trooper Kelly Stewart, who was parked along the side of the road. Believing that the passenger in the front seat of Defendant's truck was not wearing a seatbelt, Trooper Stewart signaled for Defendant to pull over. As Trooper Stewart approached the passenger's side of Defendant's parked truck, he "[a]lmost instantaneously" noticed an odor of alcohol "coming through th[e] passenger window." Upon reaching the passenger-side window, Trooper Stewart saw the passenger wearing his seatbelt. The passenger stated he had worn his seatbelt the entire time, and Trooper Stewart realized that the gray seatbelt had blended into the passenger's gray shirt. Accordingly, Trooper Stewart decided not to issue a citation to Defendant.

Trooper Stewart explained why he had stopped the vehicle, and the passenger responded that he had been wearing his seatbelt prior to Trooper Stewart's initiation of the stop. Trooper Stewart, noting the strong odor of alcohol emanating from the vehicle, asked whether either man had been drinking. Both answered in the affirmative. Trooper Stewart asked the men to exit the truck, and he observed that Defendant's "eyes were red, glassy and bloodshot." Trooper Stewart administered a roadside Alco-Sensor test to Defendant, which detected the presence of alcohol on Defendant's breath. Trooper Stewart next conducted a horizontal gaze nystagmus ("HGN") test on Defendant, which indicated that Defendant was impaired. Trooper Stewart arrested Defendant and charged him with driving while impaired.

Defendant filed a motion to suppress "all evidence and statements obtained as a result of the stop" by Trooper Stewart, which came on for hearing before the Honorable W. Robert Bell in Catawba County Superior Court on 31 August 2017. Trooper Stewart testified that, but for the seatbelt issue, Defendant appeared to abide by "all the normal rules

of the road." In its order denying Defendant's motion to suppress, the trial court found that Trooper Stewart "[b]eliev[ed] it would be a dereliction of duty to ignore the smell of alcohol coming from the automobile." Thus, the trial court concluded that "[d]uring the 'mission of' the valid traffic stop and prior to the completion of its initial purpose Trooper Stewart obtained information that provided reasonable suspicion of criminal activity to warrant an extension of the initial traffic stop."

On 17 December 2018, Defendant was tried before a jury in Catawba County Superior Court, the Honorable Nathaniel J. Poovey presiding. The jury found Defendant guilty of driving while impaired, and Defendant gave notice of appeal in open court.

Discussion

Defendant raises six issues on appeal: three arising from the hearing on his motion to suppress, and three from his trial. We address each issue in turn.

I. Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress because Trooper Stewart (1) lacked reasonable suspicion to stop Defendant's truck; (2) unconstitutionally extended the length of the stop; and (3) lacked probable cause to arrest Defendant.

A. Standard of Review

It is well settled that

> [t]he standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. The court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.

State v. Wainwright, 240 N.C. App. 77, 83-84, 770 S.E.2d 99, 104 (2015) (internal citations and quotation marks omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

B. The Stop of Defendant's Vehicle[1]

[1] From the order denying his motion to suppress, Defendant challenges findings of fact 6, 7, and 8 as not being supported by competent evidence, as well as conclusion of law 2, which stated that the traffic stop was valid. We address each in turn.

1. *Findings of Fact*

Defendant challenges the following findings:

> 6. [Trooper Stewart] observed the Defendant driving towards his position. There was a passenger in the front passenger seat of the vehicle that Trooper Stewart believed 100% was not wearing a seat belt.
>
> 7. [Trooper] Stewart stopped the truck being driven by the Defendant and approached the passenger side to investigate. Standing at the open passenger side window [Trooper Stewart] smelled a strong odor of alcohol emanating from the passenger compartment of the vehicle. He also noticed that the passenger was wearing a seatbelt.
>
> 8. The passenger stated that he had been wearing a seatbelt the entire time. Despite his certainty that the passenger had not been wearing a seatbelt, Trooper Stewart gave the benefit of the doubt to the passenger since he was wearing a [gray] shirt and the seatbelt was [gray] also.

Defendant offers no particular evidence of the insufficiency of the evidence to support the findings of fact. However, each of these findings is directly traceable to Trooper Stewart's testimony on direct examination at the suppression hearing, during which he recounted the events of the night in question. Trooper Stewart explained that he "did truly, 100 percent believe that [Defendant] wasn't wearing his seat belt." He also said that he "approached the passenger side and . . . . [w]hile [he] was at the vehicle [he] was getting an odor of alcohol from the vehicle." Lastly, he noted that, "If [he is] giving [the passenger] the benefit of the doubt, [he] couldn't say with a gray shirt, gray seat belt, that clear-cut, [he] couldn't have testified 100 percent that [the passenger] wasn't wearing [a seat belt]."

---

1. Defendant properly objected to this issue at both the suppression hearing and the subsequent trial.

"The court's findings are conclusive on appeal if supported by competent evidence[.]" *Wainwright*, 240 N.C. App. at 84, 770 S.E.2d at 104. Competent evidence is defined as "evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (citation omitted), *disc. review denied*, 369 N.C. 190, 793 S.E.2d 694 (2016). Because Trooper Stewart's testimony concerning the stop provided "evidence that a reasonable mind might accept as adequate," these findings are supported by competent evidence and are conclusive on appeal. *Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

2. *Conclusion of Law*

Defendant also challenges conclusion of law 2, which states:

> Trooper Stewart's view of and belief that the passenger in Defendant's car was not wearing a seatbelt provided him more than an unparticularized suspicion or hunch that a law was being broken and gave him the minimal level of objective justification for making the traffic stop. The traffic stop was valid.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. As applied through the Fourteenth Amendment, the Fourth Amendment "impose[s] a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54, 59 L. Ed. 2d 660, 667 (1979) (internal quotation marks omitted). Accordingly, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L. Ed. 2d 297, 302 (1991).

"[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). With regard to an officer's authority to lawfully stop a vehicle, our Supreme Court has held that "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). To assess the validity of a stop, "[a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop

exists." *Id.* at 441, 446 S.E.2d at 70 (internal quotation marks omitted); *see also State v. Nicholson*, 371 N.C. 284, 290, 813 S.E.2d 840, 844 (2018) ("Assessments of reasonable suspicion are often fact intensive, and courts must always view facts offered to support reasonable suspicion in their totality rather than in isolation.").

Here, Defendant argues that "[a] subjective and admittedly mistaken observation that a passenger is not wearing a seatbelt cannot, logically, serve as the objectively reasonable basis for performing an investigative stop of a vehicle." We disagree.

It is manifest that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes–whether of fact or of law–must be *objectively* reasonable." *State v. Eldridge*, 249 N.C. App. 493, 498, 790 S.E.2d 740, 743 (2016) (citation omitted). The issue in this case is whether Trooper Stewart's mistake of fact—i.e., his mistaken belief that Defendant's passenger was not wearing a seatbelt—could provide reasonable suspicion to justify the stop.

It is well established that a law enforcement officer may stop a vehicle for a seatbelt infraction, and during the mission of the stop determine that probable cause exists to arrest a person for the commission of a separate offense. *See, e.g.*, *State v. Salinas*, 214 N.C. App. 408, 409, 715 S.E.2d 262, 263 (2011) (concluding that it was constitutional for police officers to stop the suspect on belief that he was not wearing his seatbelt, and then, "[b]ased upon [the d]efendant's physical appearance, conduct, and a strong odor of burnt marijuana, . . . eventually search[ ] the vehicle and discover[ ] drug paraphernalia"), *aff'd and modified*, 366 N.C. 119, 729 S.E.2d 63 (2012); *State v. Brewington*, 170 N.C. App. 264, 268-69, 612 S.E.2d 648, 651 (affirming a defendant's conviction where the car was stopped due to a seatbelt violation, only to discover drugs on the defendant's person upon reaching the car), *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

Further, it is clear that a law enforcement officer's mistaken belief that a defendant has violated the law may nevertheless provide the reasonable suspicion required for a lawful stop. In *State v. Kincaid*, 147 N.C. App. 94, 96, 555 S.E.2d 294, 297 (2001), the defendant held up his hand to cover his face as he drove by the officer. The officer recognized the defendant, and believed that the defendant's license had been revoked for several years. *Kincaid*, 147 N.C. App. at 96, 555 S.E.2d at 297. Upon stopping the defendant, however, the officer discovered that the driver's license was, in fact, valid. *Id.* Despite his mistake regarding the license, the officer proceeded to ask the defendant whether he could search the car for drugs, because he had previously heard that the defendant was

a drug dealer. *Id.* The defendant consented to the search, which yielded the discovery of marijuana, and the defendant was arrested. *Id.* At a pretrial suppression hearing, the trial court found that "the officer had reasonable suspicion to stop [the] defendant, even though the suspicion proved to be wrong[,]" and concluded that the search was not unreasonable. *Id.* at 97, 555 S.E.2d at 297. On appeal, this Court held that "[a]lthough the officer's suspicion turned out to be incorrect," the officer had reasonable suspicion to stop the defendant in light of the totality of the circumstances. *Id.* at 98, 555 S.E.2d at 298.

In the present case, as in *Kincaid*, Trooper Stewart initially stopped Defendant based on a purported seatbelt infraction, not a reasonable suspicion that Defendant was driving while impaired. Trooper Stewart's mistake—failing to see a gray seatbelt atop a gray shirt—is one a reasonable officer could make. As Trooper Stewart explained:

> [T]he only reason I didn't cite him is not because I still didn't believe my initial suspicion but because I couldn't say 100 percent testifying with my hand on the Bible with him having a gray shirt that it could [sic] have been the other way. But I did truly, 100 percent believe that he wasn't wearing his seat belt.

However, this reasonable mistake of fact did not divest Trooper Stewart of the authority to investigate the source of the odor of alcohol.

Trooper Stewart testified that he smelled alcohol "instantaneously." He explained that while he inquired into the seatbelt issue, he noted the smell of alcohol. Trooper Stewart asked whether Defendant and his passenger had been drinking:

> [i]mmediately following my initial giving the reason for why I stopped and listening to the passenger's articulation about him actually having his seat belt on. I did say, well, I appreciate that; however, right now I'm smelling alcohol coming out of your vehicle. And I said I understand it has nothing to do with your seat belt but I can't just ignore what I'm smelling.

In sum, Trooper Stewart's stop of Defendant's car was constitutional despite his mistake of fact regarding the passenger's seatbelt infraction. Trooper Stewart had a reasonable suspicion to justify his stop based on his "100 percent" belief that the passenger was not wearing a seatbelt. Furthermore, Trooper Stewart's inquiry into whether Defendant had been drinking was appropriate. *See Salinas*, 214 N.C. App. at 409, 715 S.E.2d at 263; *Kincaid*, 147 N.C. App. at 96, 555 S.E.2d at 297.

C. Extension of the Traffic Stop and Probable Cause to Arrest

[2] In his next two arguments, Defendant asserts that (1) Trooper Stewart unconstitutionally extended the traffic stop "in order to smell something"; and (2) there was no probable cause to arrest Defendant. However, because Defendant failed to object to these purported errors at trial, we need not reach the merits of these arguments.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). However, an objection during "a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007).

After careful review of the transcript, we cannot find—and Defendant does not identify—specific objections at trial concerning the issues raised on appeal. Instead, in his brief to this Court, Defendant directs our attention to a short colloquy with the trial court, which occurred at the beginning of the second day of trial:

> [Defense Counsel]: Judge, just for the record, I had just three objections that were just to preserve the record for appellate purposes. I don't know if the Court – I think the Court heard the last one but I don't know. I didn't say them entirely loud because they were just for, you know, for purposes of preserving those issues.
>
> But I would object to the stop at a point that the trooper said he was activating his blue lights to pull over [Defendant].
>
> The Court: I heard that objection. I think I overruled it, but I didn't hear any others.
>
> [Defense Counsel]: And then I objected to the arrest and then just to – out of an abundance of caution objected to the – before the intoxilyzer reading.
>
> The Court: You're saying that – you did object to before the intoxilyzer reading but I don't remember you objecting to the arrest. Your saying it is so now doesn't make it so, so I don't think you objected before the actual arrest.

> [Defense Counsel]: Well, did the Court hear my objection before the intoxilyzer reading?
>
> The Court: I did.

Plainly, Defendant never objected to either (1) the extension of the stop, or (2) whether there was probable cause to arrest Defendant. Because these arguments are constitutional in nature, and because "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal," *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001), we dismiss this portion of Defendant's appeal.[2]

II. Trial

From his jury trial, Defendant argues that the trial court erred in (1) denying his motion to dismiss; (2) admitting into evidence the results of portable breath tests under Evidentiary Rule 403; and (3) qualifying Trooper Stewart as an expert in HGN administration under Evidentiary Rule 702.

A. Denial of Defendant's Motion to Dismiss

[3] Defendant posits that the trial court erred in denying his motions to dismiss at the close of the State's evidence and all evidence. However, in his brief to this Court, Defendant offers a perfunctory argument, fewer than 100 words in length, asking this Court to reach a different outcome from that of the trial court. His argument consists of a few conclusory assertions that the trial court should have granted the motion to dismiss. More importantly, Defendant neglects to include any legal authority or references to the transcript upon which to base these assertions. Our Rules of Appellate Procedure make clear that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Having failed to cite any authority or make a proper argument to this Court, this portion of Defendant's appeal is "taken as abandoned." N.C.R. App. P. 28(b)(6).

---

2. In his reply brief to this Court, Defendant requests in the alternative that this Court invoke Appellate Rule 2 so that we may reach the merits of these arguments. Rule 2 provides that, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules[.]" N.C.R. App. P. 2. However, a reply brief should be "limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief," N.C.R. App. P. 28(h)(3), and Defendant may not assert new grounds for appellate review in the reply brief. *See State v. Triplett*, 258 N.C. App. 144, 147, 810 S.E.2d 404, 407 (2018).

B. Admission of Breath Tests

[4] Defendant next argues that the trial court "abused its discretion when it allowed the State to introduce evidence regarding two portable breath tests." Defendant maintains that these "positive test results, as along with the prosecutor's description of alcohol circulating through Defendant's system, unduly prejudiced his defense."

1. *Standard of Review*

Admissions under Rule 403 are reviewed by this Court for an abuse of discretion. *State v. Adams*, 220 N.C. App. 319, 328, 727 S.E.2d 577, 584 (2012). "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. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (quotation marks omitted), *cert. denied*, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006).

2. *Evidentiary Rule 403*

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). The official comment to Rule 403 provides that "unfair prejudice" is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* cmt.

Admissibility of evidence in driving-while-impaired cases is covered under Chapter 20 of our General Statutes. Where the suspect has been stopped, "[a] law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test." *Id.* § 20-16.3(a). "The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result . . . is admissible in a court." *Id.* § 20-16.3(d).

In the present case, Defendant first asserts that "the admission of positive results . . . unduly prejudiced his defense." However, Trooper Stewart only testified to the positive test results, without revealing the actual alcohol concentration. The testimony was therefore in accordance with § 20-16.3(d), and was not erroneously admitted.

Defendant next contends that the State's reference in its closing argument to alcohol "circulating in [Defendant's] system" was prejudicial. A prosecutor is afforded a generous latitude in argument. *State*

v. Covington, 290 N.C. 313, 327, 226 S.E.2d 629, 640 (1976). Counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." *Id.* at 327-28, 226 S.E.2d at 640.

Here, the State's closing argument was aptly based on facts in evidence, as well as reasonable inferences drawn from those facts. The State recounted (1) the strong odor of alcohol coming from the car; (2) Defendant's admission to having consumed alcohol; and (3) the positive results from the portable breath tests conducted at the scene of the stop. Taken together, and in light of the wide discretion prosecutors are permitted in closing arguments, we conclude that the trial court did not err in allowing the prosecutor to assert that alcohol was "circulating in [Defendant's] system," and that Defendant did not suffer any resultant prejudice.

C. Trooper Stewart's Qualification as an Expert

[5] Finally, Defendant argues that the trial court "abused its discretion in granting the State's motion to qualify [Trooper Stewart] as an expert, and thereafter admitting testimony regarding HGN testing." We disagree.

1. *Standard of Review*

This Court reviews the admissibility of expert testimony for abuse of discretion. *State v. Barker*, 257 N.C. App. 173, 176, 809 S.E.2d 171, 174 (2017).

2. *HGN Testing*

Evidentiary Rule 702 provides, in pertinent part, that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a). Expert testimony is appropriate where (1) it is based upon sufficient facts or data, (2) it is based upon reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Id.* Although our General Statutes broadly characterize admissible expert testimony as "scientific, technical or other specialized knowledge," the statute specifically provides that:

> (a1) Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance

> with the person's training by a person who has successfully completed training in HGN.

Id. § 8C-1, Rule 702(a1)(1).

In the case at bar, Trooper Stewart testified to his successful completion of HGN training with the North Carolina State Highway Patrol, and the State tendered him as an expert in "the administration and interpretation of horizontal gaze and nystagmus testing." Accordingly, pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1), the trial court did not err in qualifying Trooper Stewart as an expert based on his training and professional experience administering the test, or in admitting his testimony regarding HGN testing.

Conclusion

We affirm the trial court's denial of Defendant's motion to suppress, and dismiss Defendant's unpreserved arguments found in Parts I(C) and II(A) of this opinion. Our examination of Defendant's remaining arguments and our review of the record lead us to conclude that Defendant received a fair trial, free from error.

AFFIRMED IN PART; DISMISSED IN PART; NO ERROR IN PART.

Judges STROUD and MURPHY concur.

LISA M. TAUBE, Plaintiff

v.

TAMARA "TAMMY" HOOPER, individually, and in her official capacity as Chief of Police for the City of Asheville; and CITY OF ASHEVILLE, Defendants

No. COA19-827

Filed 17 March 2020

1. Libel and Slander—defamation—statements to media—police sergeant's performance—plaintiff not identified

The trial court properly dismissed claims for libel and slander per se brought by a police sergeant (plaintiff) after statements were made to media outlets by the city and police chief regarding an incident involving excessive use of force by a police officer, which referred to an unnamed supervisor who received discipline for unsatisfactory performance in investigating the incident. Although media and the public shortly thereafter learned that plaintiff was the

referenced supervisor, the statements themselves were not defamatory because they did not identify plaintiff.

2. Libel and Slander—defamation—police sergeant—affidavit of separation—truthful statement

The trial court properly dismissed a claim for libel per se brought by a police sergeant (plaintiff) after the chief of police submitted a mandatory affidavit of separation in which a box was checked that the department was aware of a recent investigation of potential misconduct by plaintiff, because plaintiff's own pleadings acknowledged the truth of the statement. Further, the phrase "potential misconduct" was vague enough that it did not tend to impeach plaintiff in her profession as a law enforcement officer and therefore was not actionable per se.

Appeal by plaintiff from order entered 21 May 2019 by Judge W. Erwin Spainhour in Buncombe County Superior Court. Heard in the Court of Appeals 19 February 2020.

John C. Hunter for plaintiff.

McGuire, Wood & Bissette, PA, by Joseph P. McGuire, for defendants.

ARROWOOD, Judge.

Lisa M. Taube ("plaintiff") appeals from the trial court's dismissal of her defamation claims for failure to state a claim upon which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). For the following reasons, we affirm.

I. Background

This case involves statements by Asheville Police Department Chief Tammy Hooper ("the Department" and "defendant Hooper") and the City of Asheville concerning plaintiff's response to an incident wherein one of the officers she supervised used excessive force to arrest an individual. As a result of these statements, plaintiff filed suit against defendants, asserting claims of defamation and intentional infliction of emotional distress. The allegations in plaintiff's complaint are summarized as follows.

Plaintiff was employed as a Sergeant with the Department from 2005 until her resignation on 31 August 2018. On the night of 24 August 2017,

plaintiff was the supervisor on duty for the Department's Downtown Unit. During her shift, plaintiff was notified that Officer Christopher Hickman, one of her reporting officers, had used physical force incident to the arrest of an individual. Shortly after midnight, plaintiff arrived at the scene and took statements from Officer Hickman and the arrestee. These statements were recorded on her body-worn camera and uploaded to the Department's computer server later that night. Plaintiff also arranged for photographs to be taken of the arrestee to document potential injuries.

Because plaintiff was soon due to depart on a scheduled two-week family vacation to Michigan, which included a wedding at 8:00 p.m. later that day, she concluded her initial investigation and reporting at this point and forwarded the information she had gathered with a reminder of her planned leave to her supervisors and reporting officers. She notified them that she had initiated the process of creating the "Blue Team Report," the reporting procedure for use of force incidents required by Department policy. Defendant then departed on her scheduled vacation.

On 25 August 2017, the Department suspended the Blue Team Report procedure and launched a Professional Standards Section administrative investigation into the arrest, use of force, and Officer Hickman's conduct. This investigation relieved plaintiff of further responsibility in preparing the Blue Team Report.

Months later, Officer Hickman's use of force became the subject of local media attention and public outcry as a perceived instance of police brutality. On 28 February 2018, the Asheville Citizen-Times first brought the incident to the public's attention by acquiring and publishing the bodycam footage of the arrest. This news coverage made the Department, defendant Hooper, and the City of Asheville the subject of considerable public criticism. Other information emerged tending to further subject defendant Hooper to criticism for her months-delayed response to the incident.

As the news story continued to develop, on 5 March 2018 the City of Asheville released a written statement to the public concerning the incident:

> That Supervisor, however, despite being told by Hickman that he had struck [the arrestee] in the head with his Taser, and despite [the arrestee] saying that he was choked, did not immediately forward any information or complete notes of these interviews with Hickman and [the arrestee], and did not review the body camera footage that evening.

> Because of conduct related to this incident, that Supervisor ultimately received discipline for unsatisfactory performance and was ordered to undergo additional training.

Later that day, defendant Hooper gave an interview to a local television station. She made the following statement:

> There were some issues with the Supervisor who showed up to review the incident. Our expectations, our policy is pretty clear about what the Supervisor's responsibilities are, those are laid out pretty clearly in the [written statement] that was issued. All those things didn't happen. And so I think that the intention of the Supervisor was to do a more thorough review later or something to that effect, but that's not acceptable. So the Supervisor dropped the ball on the response to that, and was disciplined in response.

Based on these statements, local journalists and the public soon discovered plaintiff's identity as "the Supervisor." Ever since these statements, plaintiff has been subjected to public scorn and hateful electronic communications.

Plaintiff resigned from the Department on 31 August 2018. Pursuant to her resignation, defendant Hooper submitted a legally mandated "Form F-5, *Affidavit of Separation*" to the North Carolina Criminal Justice Education and Training Standards Commission. On the form, defendant Hooper checked a box indicating that "[the Department] **IS** aware of any investigation(s) in the last 18 months concerning potential criminal action or potential misconduct by this officer." (emphasis in complaint). The Affidavit of Separation form is a document that is customarily viewed by law enforcement entities in determining whether to hire a candidate for a law enforcement position.

On 9 May 2019, defendants moved to dismiss plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The trial court granted this motion and dismissed plaintiff's claims. Plaintiff timely appealed.

II. Discussion

Plaintiff argues that the trial court erred in dismissing her claims of libel and slander *per se* pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[1] For the following reasons, we disagree.

1. Plaintiff has abandoned any challenge to the trial court's dismissal of her other claims by failing to argue them in her appellate briefs. N.C.R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

A. Standard of Review

"We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citation omitted).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fail[s] to state a claim upon which relief can be granted. [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. at 448, 781 S.E.2d at 7-8 (internal quotation marks and citations omitted).

B. Claims of Libel *Per Se* and Slander *Per Se*

"In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Prods., Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987) (citing *Hall v. Publishing Co.*, 46 N.C. App. 760, 266 S.E.2d 397 (1980)).

> The term defamation covers two distinct torts, libel and slander. In general, libel is written while slander is oral. Libel *per se* is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. Slander *per se* is an oral communication to a third person which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease. When defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel.

Phillips v. Winston-Salem/Forsyth Cty. Bd. of Educ., 117 N.C. App. 274, 277-78, 450 S.E.2d 753, 756 (1994) (internal quotation marks, alterations, and citations omitted).

In reviewing whether a plaintiff has stated a claim of defamation *per se*, the allegedly defamatory statement "alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The [statement] must be defamatory on its face within the four corners thereof." *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 318-19, 312 S.E.2d 405, 409 (internal quotation marks and citation omitted), *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). "The question always is how would ordinary men naturally understand the [statement.]" *Id.* at 318, 312 S.E.2d at 409 (citation omitted).

1. Statements Made to the Press

[1] In the instant case, plaintiff alleges three statements by defendants were defamatory *per se*. The first two statements plaintiff alleges were defamatory *per se* were statements defendants provided to local media outlets. The essence of these statements was that "the Supervisor who showed up to review" Officer Hickman's use of force had failed to follow the department's reporting policy and "that Supervisor ultimately received discipline for unsatisfactory performance and was ordered to undergo additional training."

The trial court did not err in dismissing plaintiff's claims of libel and slander *per se* because these statements do not sufficiently identify plaintiff as their subject, thus lacking the "of or concerning plaintiff" element of a viable defamation claim. "In order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them dafamatory [sic]." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979) (citation omitted).

We find the facts in the instant case comparable to those of *Chapman v. Byrd*, 124 N.C. App. 13, 475 S.E.2d 734 (1996). In *Chapman*, one of the defendants told his coworkers to avoid dining at a certain restaurant in a shopping center because " '[he] heard someone over there has AIDs [sic].' " *Id.* at 15, 475 S.E.2d at 736. Nine people worked at the shopping center at the time, and the defendant did not further specify which person he believed had AIDS. *Id.* These nine workers sued the defendant for defamation, alleging this statement defamed them each individually. *Id.*

Distinguishing the case from *Carter v. King*, 174 N.C. 590, 592, 94 S.E. 4, 5 (1917) (holding plaintiff juror stated viable defamation claim by alleging defendant stated "there was one man on the jury that was not bribed"), this Court held that the plaintiffs had not stated a viable defamation claim because the statement did not adequately identify them. *Chapman*, 124 N.C. App. at 16-18, 475 S.E.2d at 737-38. We reasoned that "here the statements concern only one person in a group of nine, *i.e.*, the statements referred to 'someone.' Plaintiffs have not cited nor have we found any North Carolina case holding that any one person of a group of nine may bring a defamation action based on statements made about a single unidentified member of the group. . . . Since the alleged statements referred only to 'someone' in a group of nine, they clearly do not refer to some, most or all of the group." *Id.* at 16-17, 475 S.E.2d at 737-38 (citing *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163, 1165 (1st Cir. 1977) (holding defamatory statement referring to one unspecified police officer in a group of twenty-one was not "of or concerning" each individual officer in group).

In the instant case, the allegedly defamatory statements referred to "the Supervisor who showed up to review the incident." Plaintiff points to the fact that local media outlets and people following the story ascertained that she was the referenced supervisor soon after defendants made the statements. However, we cannot consider this fact in reviewing plaintiff's claims that these statements were defamatory *per se*. We are limited to an interpretation of only the language within the statements' four corners. *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409 (citation omitted). Here, similar to *Chapman*, defendants' statements to the press concern one unidentified supervisor in the Asheville Police Department, of which there are many, that responded to Officer Hickman's use of force incident.

The only case we are able to find in which the surrounding context was remotely considered in reviewing whether an allegedly *per se* defamatory statement was "of or concerning plaintiff" is *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002). In that case, a campaign advertisement accused "Dan Boyce's law firm" of unethical practices. *Id.* at 33, 568 S.E.2d at 900. In holding that each plaintiff lawyer of the firm stated a claim for libel *per se*, we reasoned that the statement "maligned each attorney in the firm, of which there [were] only four. Moreover, . . . identification of the law firm of Boyce & Isley, PLLC was readily ascertainable from the reference to 'Dan Boyce's law firm.' " *Id.*

The instant case is distinguishable from *Boyce & Isley, PLLC*. Defendants' statements do not malign every member of a small group whose members are readily identifiable by the community at large. Rather, the statements refer to the one "supervisor," of which there are many in the Department, that responded to the reported incident of force by a subordinate officer. Unlike "Dan Boyce's law firm," whose named member was a candidate running a statewide campaign for Attorney General, *id.* at 27, 568 S.E.2d at 896-97, we do not believe that an ordinary person hearing defendants' statements about "the supervisor" on duty would be able to readily ascertain plaintiff's identity.

Because these allegedly defamatory statements do not sufficiently identify her as their subject, plaintiff has failed to plead viable claims of libel and slander *per se*. The trial court did not err in dismissing these claims.

2. Statement in Mandatory Affidavit of Separation

[2] The third statement underlying plaintiff's claims of libel *per se* was in the Affidavit of Separation submitted by defendant Hooper to the North Carolina Criminal Justice Education and Training Standards Commission. In this mandatory report detailing the nature of plaintiff's subsequent separation from the Department, defendant Hooper checked a box stating that "[the Department] **IS** aware of any investigation(s) in the last 18 months concerning potential criminal action or potential misconduct by this officer."

As an initial matter, we note that plaintiff's complaint has overcome the hurdle presented by the qualified privilege claimed by defendants at the pleadings phase because she alleges malice in defendant Hooper's publication of the statement. *See Andrews v. Elliot*, 109 N.C. App. 271, 275-76, 426 S.E.2d 430, 433 (1993) (holding defense of qualified privilege in publishing statement does not defeat claim of defamation *per se* at pleadings stage where complaint alleges actual malice in publication).

Plaintiff argues that this statement was libelous *per se* because it tended to impeach her in her profession as a law enforcement officer. We find that the truth of the referenced statement defeats plaintiff's claim. Furthermore, the referenced statement is not *per se* actionable.

Plaintiff's complaint acknowledges that she "had been the subject of an investigation into potential unsatisfactory job performance as stated in the Written Warning she had received." The complaint states that the Department's Professional Standards Section investigated Officer Hickman's use of force and the surrounding circumstances, and that

"[a]s a result of the finding of the investigation, a recommendation was made to sustain an allegation of Unsatisfactory Performance against [plaintiff,]" and plaintiff was subsequently disciplined with a written warning and brief suspension without pay. Thus, the statement that the Department was aware of an investigation into plaintiff's potential misconduct was established as true by the allegations of the complaint. Truth is an absolute defense to an allegation of defamation. *Holleman v. Aiken*, 193 N.C. App. 484, 496-97, 668 S.E.2d 579, 587-88 (2008). Where plaintiff's own pleadings establish the truth of an allegedly defamatory statement, dismissal per Rule 12(b)(6) is proper. *Id.*

Furthermore, a statement that plaintiff had been investigated for "potential misconduct" does not tend to impeach her in her profession as a law enforcement officer as a matter of law. We have previously held more concrete accusations concerning actual, rather than potential, workplace misconduct not actionable *per se*. *See*, *e.g.*, *Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 34, 724 S.E.2d 568, 578-79 (2012) ("We do not believe that Plaintiff's complaint, alleging that Defendant 'falsely contended' that Plaintiff 'falsified his time card,' or reported Plaintiff to the Nuclear Regulatory Commission sets forth a cause of action for libel *per se* sufficient to survive Defendants' Rule 12(b)(6) motion.") (alterations omitted); *Stutts v. Power Co.*, 47 N.C. App. 76, 78, 82, 266 S.E.2d 861, 863, 865 (1980) (holding statement by plaintiff-employee's supervisor that he was "fired . . . for a dishonest act and falsifying the records" by punching time card on day of absence from work not actionable *per se* as professional impeachment). The statement that plaintiff was investigated for "potential misconduct" is far more vague, and does not allege the existence of any actual misconduct in and of itself. Therefore, the trial court did not err in dismissing plaintiff's libel *per se* claims based upon defendant Hooper's statement in the Affidavit of Separation.

III. Conclusion

For the foregoing reasons, we find no error in the trial court's dismissal of plaintiff's claims pursuant to Rule 12(b)(6).

AFFIRMED.

Judges DILLON and BERGER concur.

TOPPING v. MEYERS

[270 N.C. App. 613 (2020)]

RICHARD TOPPING, PLAINTIFF
v.
KURT MEYERS AND MCGUIREWOODS, LLP, DEFENDANTS

No. COA19-618

Filed 17 March 2020

1. Appeal and Error—interlocutory appeal—substantial right—defamation case—denial of Rule 12(b)(6) motion—risk of inconsistent verdicts

After a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, defendants failed to show that an order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, and therefore their interlocutory appeal from that order was dismissed. Although misapplication of the "actual malice standard" for defamation at the summary judgment stage can implicate a substantial right to free speech, the same is not true at the motion to dismiss stage. Further, defendants did not have a substantial right to avoid the risk of inconsistent verdicts between the defamation and negligence claims because the law only recognizes a substantial right to avoid the risk of inconsistent verdicts on the same issues in different trials.

2. Appeal and Error—interlocutory appeal—substantial right—defamation case—absolute privilege—immunity from suit

Where a mental health area authority hired an attorney and law firm (defendants) to investigate misconduct by their former chief executive (plaintiff) and to represent the authority in a lawsuit against the executive based on that investigation, and where defendants revealed their findings to the media at a press conference allowed by the authority, defendants' interlocutory appeal from the denial of their motion to dismiss plaintiff's defamation lawsuit against them did not affect a substantial right to immunity from suit, and was therefore dismissed. Defendants could not claim absolute privilege from suit because their statements were not "made in due course of a judicial proceeding," and any legislative immunity afforded to the authority—flowing from the investigation as a quasi-judicial proceeding—did not extend to defendants' statements.

3. Appeal and Error—petition for certiorari—showing of good cause—defamation case

Where a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, and where defendants failed to show that an interlocutory order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, the Court of Appeals denied defendants' petition for a writ of certiorari because defendants also failed to show "good and sufficient cause" for allowing certiorari as an alternative to interlocutory jurisdiction.

Judge BROOK concurring in part and concurring in the result in part with separate opinion.

Appeal by defendants from order entered 18 March 2019 by Judge Joseph N. Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2020.

Rudolf Widenhouse, by David S. Rudolf, Joseph P. Lattimore, and Sonya Pfeiffer, for plaintiff-appellee.

Mullins Duncan Harrell & Russell PLLC, by Allison O. Mullins and Alan W. Duncan, for defendant-appellants.

TYSON, Judge.

Kurt Meyers and McGuireWoods, LLP ("Defendants") appeal from an order entered 18 March 2019 denying their motion to dismiss Richard Topping's ("Plaintiff") claims against them. We dismiss Defendant's interlocutory appeal and remand.

I. Background

Defendants' client, Cardinal Innovations Healthcare Solutions ("Cardinal") is a Local Management Entity/Managed Care Organization under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. N.C. Gen. Stat. § 122C-1 (2019). Cardinal is an "area authority," which is "a local political subdivision of the State." N.C. Gen. Stat. §§ 122C-3(1), 122C-116(a) (2019).

Plaintiff became the Chief Executive Officer ("CEO") of Cardinal 1 July 2015. Following receipt and review of a North Carolina State Auditor's performance audit in May 2017, the Secretary of the North

Carolina Department of Health and Human Services ("DHHS") initiated an investigation into Cardinal's activities.

The subsequent investigatory report "sharply criticized" the severance provisions of Plaintiff's employment contract and several other Cardinal executives, and also Plaintiff's compensation and potential bonus opportunities under his contract. Plaintiff and three other executives resigned from Cardinal in November 2017, after the audit and DHHS report. Plaintiff was paid two years' severance, allegedly worth $1.7 million. DHHS officials took over Cardinal's operations and fired its board members. The new board ("the Board") hired Defendants in January 2018 to conduct an independent internal investigation of Plaintiff's conduct relating to the drafting and approval of the severance agreements, and the November 2017 severance payments made to himself and three other former Cardinal executives, who had also resigned.

Defendant Meyers presented the findings of the investigation to the Board on 23 March 2018. The Board voted to file a lawsuit against Plaintiff, seeking the return of the November 2017 two year's severance payment based upon his alleged misconduct. The Board also authorized a press conference to be held after filing the suit, wherein Defendant Meyers would present the findings and allegations in the complaint to the media.

Cardinal filed suit against Plaintiff at 9:00 a.m. on 26 March 2018. A press conference began at 10:30 a.m., during which Defendant Meyers gave his presentation to the assembled representatives of the media.

Plaintiff filed suit against Defendants on 30 May 2018, alleging libel *per se*, slander *per se*, negligent infliction of emotional distress, negligence, and punitive damages. Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). Defendants asserted, *inter alia*, Plaintiff's claims are barred by absolute privilege and Plaintiff had improperly recast and re-asserted his defamation claims as negligence claims.

The trial court struck four paragraphs of Plaintiff's complaint for impermissible reliance upon the North Carolina Rules of Professional Conduct to allege a legal duty and standard of care for the negligence claims. The trial court otherwise denied Defendants' motion. Defendants timely filed notice of appeal.

II. Interlocutory Jurisdiction

Defendants argue this Court possesses jurisdiction over this interlocutory appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

> Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

On a purported appeal from an interlocutory order without the trial court's Rule 54(b) certification, "the appellant has the burden of showing this Court 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." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

Defendants assert the trial court's order deprived them of substantial rights in two ways: (1) the trial court's failure to dismiss Plaintiff's defamation claims for absolute privilege; and, (2) the trial court's failure to dismiss Plaintiff's negligence claims attacking speech as duplicative of his defamation claims. We address each in turn. Alternatively, Defendants have concurrently filed a petition for a writ of certiorari with this Court.

A. Absolute Privilege

Defendants analogize their claim of absolute privilege to sovereign immunity or public official immunity to assert the trial court's denials

of their motion to dismiss are immediately appealable. *See, e.g.*, *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citations omitted) (the "denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable"); *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (citation omitted) ("Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable.").

> The rationale for the exception to the general rule [denying interlocutory appeals] stems from the nature of the immunity defense. A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost.

Clark v. Red Bird Cab Co., 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (1994) (citations and internal quotation marks omitted).

If an absolute bar to suit extends and applies to Defendants' actions, the trial court's failure to dismiss Plaintiff's claims deprives Defendants of immunity from suit. If applicable, this denial of immunity from suit, as asserted in Defendants' motion, is a substantial right for Defendants, which would be lost, absent interlocutory review. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. In "considering the particular facts . . . and the procedural context" of this case, we conduct a full analysis of the issue of absolute immunity from suit below, to determine whether Defendants have asserted a "substantial right" in this interlocutory appeal. *See Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

B. Negligence Claims

[1] Defendants also assert a substantial right exists for this Court to exercise interlocutory jurisdiction over their appeal of the trial court's denial of their motion to dismiss Plaintiff's negligence-based claims regarding Defendants' speech. Defendants argue the trial court's failure to dismiss Plaintiff's negligence-based claims misapplies defamation standards including the actual malice standard, denies them applicable defenses including the truth, and also presents the danger of inconsistent verdicts.

"An order implicating a party's First Amendment rights affects a substantial right." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998). Our Courts have recognized, when considering a motion for summary judgment, a misapplication of the actual

malice standard could have a chilling effect on a defendant's right to free speech and implicates a substantial right. *Boyce & Isley, PLLC v. Cooper* (*Boyce II*), 169 N.C. App. 572, 575-76, 611 S.E.2d 175, 177 (2005) (citing *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003)). In *Boyce II*, however, this Court held the denial of a Rule 12 motion to dismiss does not implicate a substantial right as could arise by the denial of a motion for summary judgment under Rule 56:

> misapplication of the actual malice standard on summary judgment could lead to some loss or infringement on a substantial right, whereas denial of the 12(c) motion here will not. On a motion for summary judgment the forecast of evidence is set. A court can more adequately determine whether the forecast evidence (affidavits, depositions, exhibits, and the like) presents a factual issue under the correctly applied legal standard for actual malice. In reviewing the allegations of the pleadings as in ruling on a 12(c) motion, the court need only decide if the elements of the claim, perhaps including actual malice, have been alleged, not how to apply that standard. An incorrect application of the actual malice standard to deny summary judgment results in trial, whereas denial of a 12(c) motion results in further discovery and possibly summary judgment or other proceedings. Although we recognize that the First Amendment protects substantial rights, there is nothing here to suggest an immediate loss of these rights. . . . Any defenses or arguments that plaintiffs cannot actually prove their allegations in the complaint due to lack of evidence regarding malice will not be immediately lost if this case proceeds.

Id. at 577-78, 611 S.E.2d at 178.

Although the ruling in *Boyce II* dealt with a Rule 12(c) motion for judgment on the pleadings, a Rule "12(c) motion is more like a [Rule] 12(b)(6) motion than one for summary judgment, because at the time of filing typically no discovery has occurred, no evidence or affidavits are submitted, and a ruling is based on the pleadings themselves—along with any properly submitted exhibits." *Id.* at 576, 611 S.E.2d at 177-78. Where, as here, the interlocutory appeal is asserted on denial of a Rule 12(b)(6) motion, and not under a Rule 12(c) motion for judgment on the pleadings, the reasoning stated in *Boyce II* is stronger.

Alternatively, Defendants argue the risk of inconsistent verdicts on the defamation and negligence claims represents a substantial right.

However, our Courts have only found a substantial right in the risk of inconsistent verdicts between multiple trials on the same issues, not between multiple claims in the same trial. "The avoidance of one trial is not ordinarily a substantial right. . . . [T]he right to avoid the possibility of two trials on the same issues can be a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citations and alterations omitted).

Defendants' second issue is properly dismissed as interlocutory. Defendants have not shown they possess a substantial right which would be jeopardized absent appellate review, at least upon denial of their Rule 12(b)(6) motion to dismiss. We express no opinion on the merits, if any, of Plaintiff's claims or Defendants' arguments and defenses.

III. Issue

In the remaining issue, Defendants argue the trial court erred in denying their motion to dismiss Plaintiff's claims based on the assertion of absolute privilege.

IV. Standard of Review

"We review *de novo* a trial court's ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Watts-Robinson v. Shelton*, 251 N.C. App. 507, 509, 796 S.E.2d 51, 54 (2016).

Generally, immunities from suit and assertions of privileges are strictly construed in North Carolina. *See, e.g.*, *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962) (physician-patient privilege); *Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 823 (1992) (attorney-client privilege), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994).

"In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding. These issues are questions of law to be decided by the court." *Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004) (citations omitted). "The trial court's conclusions of law are reviewed *de novo*." *Shirey v. Shirey*, __ N.C. App. __, __, 833 S.E.2d 820, 825 (2019).

V. Analysis

[2] In North Carolina, absolute privilege or "complete immunity" from suit applies to communications which are:

> so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in

> respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only *where the public service or the due administration of justice requires it*, *e.g.*, words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred.

Bouligny, Inc. v. Steelworkers, 270 N.C. 160, 170-71, 154 S.E.2d 344, 354 (1967) (emphasis original) (citations omitted).

These communications represent the core of speech protected by absolute privilege. As a claimant of absolute privilege departs from this protected core, the claim to the immunity from suit diminishes.

> [T]he protection from liability to suit attaches by reason of the setting in which the defamatory statement is spoken or published. The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances. The judge, legislator or administrative official, when speaking or writing apart from and independent of the functions of his office, is liable for slanderous or libelous statements upon the same principles applicable to other individuals.

Id. at 171, 154 S.E.2d at 354.

This Court has stated, "an attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *Jones v. Coward*, 193 N.C. App. 231, 234, 666 S.E.2d 877, 879 (2008) (quoting Restatement (Second) of Torts § 586 (1977)).

"Our courts have held that statements are 'made in due course of a judicial proceeding' if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing." *Burton v. NCNB*, 85 N.C. App. 702, 705, 355 S.E.2d 800, 802 (1987) (citations omitted).

The trial court ruled Defendants' assertion of absolute privilege over Meyers' statements departs and deviates from the core speech protected by the judicial-proceeding privilege in two significant ways: (1) Defendants were investigatory counsel, and not litigation counsel, for Cardinal in the newly-commenced judicial proceeding; and, (2) Defendants' speech occurred during a press conference to the media and not while in the courtroom. Defendants also argue Cardinal's status as a statutorily-created entity and being a local political subdivision cloaks their investigation and statements as a quasi-judicial or legislative proceeding.

A. Investigatory Counsel

The trial court determined: "Defendant Meyers's statements are not entitled to an absolute privilege [because he] was not counsel for the Board in the judicial proceeding . . . ." The trial court did not provide any precedent or legal basis for distinguishing Meyers' role as counsel retained by the Board to investigate Plaintiff from the status of "counsel for the Board in the judicial proceeding."

The trial court's ruling implies that Cardinal's litigation counsel would be entitled to a greater claim to absolute privilege than Defendants for making the same statements by virtue of their role in this judicial proceeding. We see no basis for the trial court's distinctions between in-house, investigatory, and litigation counsel.

Cardinal hired Defendants to conduct its investigation into Plaintiff's conduct as its CEO and his interactions with other Cardinal senior officers based upon the audit and intervention from DHHS. Defendants' investigation formed the basis for Cardinal's allegations and claims in their civil suit filed against its former CEO. Cardinal had filed a civil proceeding against Plaintiff in the superior court earlier the same day as the press conference was held. The complaint and judicial proceeding were both predicated upon Defendants' investigation and the findings and allegations made about Plaintiff in their report to the Board.

Plaintiff's complaint concedes Defendant Meyers' statements were made in a press conference held at 10:30 a.m. on 26 March 2018, an hour and a half after Cardinal had filed its lawsuit against Plaintiff. Plaintiff alleged Defendant Meyers "knew that [Cardinal's] lawsuit . . . would be based on his investigation," and "agreed to participate in a press conference about [Plaintiff's] alleged misconduct in conjunction with the filing of the lawsuit." Plaintiff further alleged and acknowledged Defendant Meyers' statements "mirrored" the allegations asserted in Cardinal's

complaint, and his PowerPoint repeated "the same misconduct as was alleged in the lawsuit filed by Cardinal earlier that day."

"Where the relation of attorney and client exists, the law of principal and agent is generally applicable." *Bank v. McEwen*, 160 N.C. 414, 420, 76 S.E. 222, 224 (1912). It is undisputed that Defendants' statements at the press conference "mirrored" allegations asserted in Cardinal's complaint. Defendants acted as Cardinal's counsel and agents throughout the investigation and press conference, just as the litigation counsel did when it filed the complaint against Plaintiff on Cardinal's behalf. Defendants' claim to absolute privilege flows through their principal-agent relationship with Cardinal. The immunity from suit protects the principal. If the principal is immune, its agents are as well. *See id.*

We cannot distinguish Defendants' statements based on whether they had been retained by Cardinal as counsel for investigation or litigation. Preparation for litigation is as much the practice of law as is litigating the claims. *See* N.C. Gen. Stat. § 84-2.1(a) (2019). The trial court erred by distinguishing Defendants' role as investigatory versus litigation counsel as a factor in its analysis.

B. Out-of-Court Press Conference

We next analyze the venue or "occasion" where and when the statements were made. *See Bouligny, Inc.*, 270 N.C. at 171, 154 S.E.2d at 354. The trial court concluded Defendants were not entitled to immunity from suit because "the statements were made outside of the proceeding at a press conference attended by members of the media." The trial court denied dismissal and reasoned this privilege "does not apply to statements made outside of the judicial proceeding, particularly when the statements are made to the media," citing *Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432-33 (1993).

The trial court's order denying Defendants' motion partially relied upon this Court's decision in *Andrews*, wherein one attorney sued another for mailing a copy of a letter containing allegedly slanderous and libelous statements about him to a newspaper, where it was seen and read by at least three of their employees. *Id.* at 272, 426 S.E.2d at 431. The letter did not concern pending litigation, however; it merely threatened litigation after accusing the other attorney of various criminal and ethical misdeeds. *Id.* at 273, 426 S.E.2d at 431.

Plaintiff cites this Court's earlier decision in *Boston v. Webb* to support the trial court's decision. *Boston v. Webb*, 73 N.C. App. 457, 460, 326 S.E.2d 104, 106 (1985), *disc. rev. denied*, 314 N.C. 114, 332 S.E.2d 479. In *Boston*, a detective sergeant was fired from the city police department.

Id. at 458, 326 S.E.2d at 105. The detective sergeant appealed to the city manager, who upheld the termination. *Id.* After conducting an investigation into the firing and briefing the city council, the city manager wrote and published a press release explaining the termination decision. *Id.* The detective sergeant filed a defamation claim against the city manager. *Id.* at 457, 326 S.E.2d at 104.

This Court held the city manager was not entitled to an absolute privilege for the statements made in his press release. *Id.* at 460, 326 S.E.2d at 106. Both *Boston* and the present case concern statements made to the press following an investigation. Unlike the present case, however, the city manager's press release in *Boston* was independent of any filed or pending lawsuit. The city manager had investigated and ruled upon the detective sergeant's appeal prior to publishing his release and statements to the media. *Id.* at 458, 326 S.E.2d at 105.

Although neither *Andrews* nor *Boston* squarely addresses the denial of absolute privilege for statements made to the media while a judicial proceeding is ongoing, no case Defendants cite demonstrates why the privilege should be extended in this case to carry their burden to overcome the presumption of correctness and reverse the trial court's order.

Defendants cite a series of cases recognizing our courts have defined "the phrase 'judicial proceeding' . . . broadly, encompassing more than just trials in civil actions or criminal prosecutions." *Harris v. NCNB*, 85 N.C. App. 669, 673, 355 S.E.2d 838, 842 (1987) (citation omitted). These cases represent small and incremental steps, extending the absolute privilege of complete immunity from suit beyond the protected core of in-court speech. *See*, *e.g.*, *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954) (privilege extended to statements made in pleadings and other papers filed in a judicial proceeding); *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 880 (privilege extended to counsel's statements or questions to a potential witness in preparation of pending litigation); *Rickenbacker v. Coffey*, 103 N.C. App. 352, 357-58, 405 S.E.2d 585, 588 (1991) (privilege extended to potential witness' statements to counsel at pre-deposition conference); *Burton*, 85 N.C. App. at 707, 355 S.E.2d at 803 (privilege extended to out-of-court statements made between the parties or their attorneys during pending litigation); *Harris*, 85 N.C. App. at 674, 355 S.E.2d at 842 (privilege extends to out-of-court communications between attorneys preliminary to proposed or anticipated litigation).

These cases extend the absolute privilege beyond the core of protected speech in the courtroom during a trial. These extensions are logical and practical, and each protected communication and testimony

furthers the purpose of the privilege. The "public policy underlying this privilege is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits." *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879 (citation and internal quotation marks omitted).

Defendants have not shown extension of absolute privilege to statements made by counsel during an out-of-court press conference would further this core protected purpose. Our immunity from suit precedents appropriately protect communications made between parties, their counsel, or the court itself, from the fear of defamation suits. A press conference to the media is not communication between the parties, their counsel, nor with or concerning the court.

Absolute privilege appropriately protects statements asserted in a pleading filed with the trial court and invoking judicial process. *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. Statements made outside the proceeding to the public or media representatives at a press conference, even those averments that "mirror" allegations made in a filed complaint, deviate from and stray too far beyond the core and "occasion" of speech to invoke immunity from suit. Such immunity cannot be justified by asserted public interest beyond encouraging frankness and protecting testimony, communications between counsel *inter se* or with the court, and participation within the judicial proceeding. *See id.*

A press conference is neither an inherent nor critical component of a judicial proceeding. To hold otherwise would enable any litigant to file barratrous or sanctionable pleadings containing scurrilous, false, or defamatory language, then immediately convene a press conference outside the courthouse to further disseminate and re-publish those otherwise defamatory statements, while asserting immunity from challenge or to being answerable in court.

This potential conduct ranges too far afield from the core of protected speech subject to absolute privilege. Our Supreme Court noted long ago: "The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances." *Bouligny, Inc.*, 270 N.C. at 171, 154 S.E.2d at 354.

Construing the immunity of absolute privilege narrowly, as we must, the inverse concern of chilling speech by the threat of defamation suits is not so great as to necessitate absolute immunity from suit for statements made at out-of-court press conferences during pending litigation. *See id.* A litigant, or their counsel, who gives a press conference during

a judicial proceeding is not deprived of defenses nor is necessarily liable for their statements. Neither are they absolutely immune from suit challenging and asserting defamatory conduct.

The venue or "occasion" for Defendants' statements weighs heavily against recognizing absolute privilege in this case, far more so than the distinction between litigation and investigatory counsel. Defendants have not shown that absolute immunity should extend from the courtroom during a judicial proceeding to an extrajudicial press conference, whether the speaker is litigation or investigatory counsel. Defendants' arguments claiming immunity from suit on the basis of the pending litigation are overruled.

C. Quasi-Judicial Investigation

Defendants alternatively assert they are immune from suit for their statements resulting from their investigation of Plaintiff because that investigation was a quasi-judicial proceeding. The phrase "judicial proceeding" in the context of absolute privilege also encompasses quasi-judicial proceedings. *Harris*, 85 N.C. App. at 673, 355 S.E.2d at 842 (citation omitted). "Quasi-judicial" is "a term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Angel v. Ward*, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979) (citation and alterations omitted).

In *Angel*, a partner of a certified public accounting firm telephoned an Internal Revenue Service agent's supervisor to complain about the agent's treatment of his firm's clients. *Id.* at 289, 258 S.E.2d at 789. The agent's supervisor requested the partner file his complaints in a written letter, which he did. *Id.* at 289, 258 S.E.2d at 789-90. The agent was subsequently fired. *Id.* at 289, 258 S.E.2d at 790. She sued the partner and his firm alleging libel *per se* for the remarks made in his letter to her supervisor. *Id.*

This Court held the partner's written remarks were libelous *per se*, as they tended to impeach the agent in her trade or profession. *Id.* at 291, 258 S.E.2d at 791. However, this Court also affirmed the trial court's ruling the CPA's remarks were absolutely privileged in the due course of a quasi-judicial proceeding. *Id.* at 293, 258 S.E.2d at 792. This Court determined the letter was requested by the agent's supervisor in the quasi-judicial process of evaluating the agent in connection with her employment. *Id.*

> Had defendants merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege. However, in the instant case, defendants admittedly submitted their letter upon the request of plaintiff's immediate supervisor, who was putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service.

Id. at 293, 258 S.E.2d at 791-92.

Defendants liken their press conference to the letter sent in *Angel*, because it was held at the direction of Cardinal, a local political subdivision. *See* N.C. Gen. Stat. § 122C-116(a). In this argument, the extension of absolute privilege flows not from judicial immunity, but rather from legislative immunity. Defendants do not cite any binding authority from our courts on this extension of legislative immunity to Cardinal, but do cite cases from other states where the absolute privilege has been extended to "lesser legislative bodies," such as local political subdivisions. *See*, *e.g.*, *Sanchez v. Coxon*, 854 P.2d 126, 128 (Ariz. 1993) (privilege extended to town council meeting); *Noble v. Ternyik*, 539 P.2d 658, 660 (Or. 1975) (privilege extended to port commission meeting).

No cases Defendants cite, however, extend the legislative immunity to statements made during a press conference to the media. The only cited case in which immunity from suit was extended beyond a lesser legislative body's official meeting itself, involved statements made by one city council member to other city council members, and also statements potentially overheard by patrons of a deli restaurant "within listening distance." *Issa v. Benson*, 420 S.W.3d 23, 28-29 (Tenn. Ct. App. 2013).

The court in *Issa* held the statements made to other city council members were protected by legislative immunity. *Id.* at 28. The court also held the council member's statements at the deli were in response to a threat of litigation against the city, were "preliminary to proposed litigation," and were protected by judicial immunity. *Id.* at 29.

If legislative immunity applies to Cardinal and its Board, Defendants' argument would only appropriately cover statements made by the Board's members in its meetings, and possibly Defendants' statements to the Board at its behest. Defendants cite no authority, binding or persuasive, to extend the legislative immunity afforded to quasi-judicial, "lesser legislative bodies," to statements made by agents, including

counsel of such a body, to the public or media representatives in a press conference held at the body's request or direction.

This Court declined to hold that statements made by the city manager in the press release in *Boston* was "issued in the course of a judicial *or quasi-judicial* proceeding." *Boston*, 73 N.C. App. at 461, 326 S.E.2d at 106 (emphasis supplied). As discussed above, a press conference ventures too far afield from the core of protected speech to be entitled to absolute immunity from suit under legislative immunity in a quasi-judicial proceeding. *See id.*

Defendants fail to show entitlement to absolute immunity from suit flowing from either Cardinal's pending suit against Plaintiff as a judicial proceeding, or their investigation of Plaintiff as a quasi-judicial proceeding. Defendants' appeal on this issue is properly dismissed as interlocutory.

VI. Petition for Writ of Certiorari

[3] Defendants have also filed with this Court a petition for writ of certiorari as an alternative to their assertion of substantial rights to an interlocutory appeal. "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). "A petition for the writ must show merit or that error was probably committed below." *Id.* (citation omitted).

As discussed above, Defendants have not shown a substantive right in jeopardy to merit an interlocutory review at the Rule 12 stage in the proceedings. Similarly, we find Defendants have also not shown "good and sufficient cause" for us to allow Defendant's petition and issue our writ of certiorari in this case. In the exercise of our discretion and pursuant to Appellate Rule 21, we decline to issue the writ of certiorari. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari *may* be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists[.]") (emphasis supplied).

VII. Conclusion

Defendants fail to show they possess "a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. Although the trial court's distinction between litigation and investigatory counsel is unpersuasive and without basis, the trial court did not err in declining to extend absolute immunity from suit to Defendants in this case.

Defendants' statements made at the out-of-court press conference during pending litigation are too far afield to be considered "made in due course of a judicial proceeding." *Burton*, 85 N.C. App. at 705, 355 S.E.2d at 802. Defendants' statements made at the out-of-court press conference following their investigation into Plaintiff's conduct on behalf of Cardinal do not fall within the immunity afforded to lesser legislative bodies. *See Boston*, 73 N.C. App. at 461, 326 S.E.2d at 106. Defendants' appeal as to their assertion of absolute privilege is dismissed as interlocutory.

Asserted misapplication of the actual malice standard does not affect a substantial right at the Rule 12 motion to dismiss stage of litigation, as it could at a hearing under Rule 56 for summary judgment. *Boyce II*, 169 N.C. App. at 577-78, 611 S.E.2d at 178.

Defendants have failed to show either a substantial right as a basis for interlocutory appeal or good and sufficient cause as a basis for our discretionary grant of a writ of certiorari. Defendants' appeal on this issue is dismissed as interlocutory and this cause is remanded for further proceedings.

We express no opinion on the validity, if any, of Plaintiff's claims nor Defendant's defenses thereto. *It is so ordered.*

DISMISSED AS INTERLOCUTORY.

Judge BERGER concurs.

Judge BROOK concurs in part and concurs in the result in part with separate opinion.

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

I concur in the majority opinion insofar as it holds that we must dismiss this interlocutory appeal because it does not implicate a substantial right and in its denial of Defendant's petition for writ of certiorari. More specifically, I concur in the holding that we must reject the assertion of a substantial right to exercise interlocutory jurisdiction over the trial court's denial of Defendant's motion to dismiss Plaintiff's negligence-based claims. I further concur in the majority's holding that "Defendants have not shown that absolute immunity should extend from the courtroom during a judicial proceeding to an extrajudicial press conference, *whether the speaker is litigation or investigatory counsel*." *Topping*, *supra* at ___ (emphasis added).

I do not join section V.A. of the majority's opinion labelled "Investigatory Counsel." First, this section is not necessary to arrive at the agreed upon dismissal. Further, I disagree with the majority's contention that the trial court's distinction between litigation and investigatory counsel is without basis. In fact, Judge Crosswhite cites *Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432-33 (1993), for the proposition that "judicial proceedings privilege . . . does not apply to statements made outside the judicial proceeding" and thus does not shield the statement of Defendant Meyers as he "was not counsel for the Board in [its] judicial proceeding[.]" While we need not decide the merits of this issue, I cannot agree that the trial court's assertion here was baseless.

Accordingly, and with respect, I concur in part and concur in the result in part.

LAURA SUE TUEL, PLAINTIFF
v.
ANTHONY RYAN TUEL, DEFENDANT

No. COA19-691

Filed 17 March 2020

Child Custody and Support—primary physical custody—best interest determination—change in custodial parent's residence

The trial court's order awarding primary physical custody to plaintiff-mother and allowing plaintiff to relocate from North Carolina to Indiana with her children was vacated and remanded because its findings of fact on best interests focused on plaintiff's family support network in Indiana but failed to explain why this support network was better than the current level of support in North Carolina. Further, the best interest findings were inconsistent with other findings and ultimately failed to support the conclusion that allowing relocation was in the children's best interests.

Appeal by defendant from order entered 18 March 2019 by Judge Addie H. Rawls in Johnston County District Court. Heard in the Court of Appeals 5 February 2020.

No appearance for plaintiff.

Tharrington Smith, LLP, by Evan B. Horwitz and Jeffrey R. Russell, for defendant.

ARROWOOD, Judge.

Anthony Ryan Tuel ("defendant") appeals from the trial court's Order for Permanent Child Custody and Temporary Child Support granting primary physical custody to his former wife Laura Sue Tuel ("plaintiff") and permitting her to move with their children to Indiana. For the following reasons, we vacate and remand.

I. Background

Plaintiff and defendant married on 21 December 2002. Two children were born of the marriage on 17 April 2014 and 12 September 2016. The parties and their children resided in Johnston County, North Carolina. On 16 May 2017, plaintiff filed a complaint for child custody. The following day she left the marital residence and moved with the children to her parent's home in Rushville, Indiana.

Plaintiff and the children stayed with her parents in Indiana for three months. With the consent of the parties, on 21 August 2017 the trial court entered a Memorandum of Judgment/Order establishing the parties' temporary child custody rights and obligations. This order provided for the return of plaintiff and the children to North Carolina, pending permanent resolution of the parties' custody dispute.

On 5 July 2018, the trial court held a hearing adjudicating a permanent resolution to the issue of custody of the children. The trial court heard evidence and testimony from both parties. This evidence, in relevant part, tended to show the following facts. The parties experienced marital difficulties predating the birth of their children that were exacerbated by the added responsibilities of parenthood. Plaintiff suffered from mental health issues since adolescence, including two suicide attempts during her college years. The trial court received into evidence numerous journal entries and online forum posts written by plaintiff, as well as records from her therapy sessions, indicating that these issues stemmed from what she characterized as an abusive, disciplinarian upbringing by her religious fundamentalist parents. She underwent mental health therapy from March to June of 2017 and was diagnosed with "adjustment disorder with mixed anxiety and depressed mood[.]"

Plaintiff ceased all contact with her parents shortly after the birth of the parties' first child in 2014. The reason for this estrangement was in part due to plaintiff's resentment about her own upbringing and

concerns with how her parents' religious beliefs would conflict with the worldview under which they planned to raise their own children. Nonetheless, amid increasing marital strife and a desire to separate from defendant, plaintiff reinitiated contact with her family in May of 2017 for support. After a visit from plaintiff's mother that month, plaintiff filed a complaint seeking custody of the children and relocated them to her parents' home in Rushville, Indiana.

After hearing the evidence at trial, the trial court entered an Order for Permanent Child Custody and Temporary Child Support on 18 March 2019. The order granted primary physical custody to plaintiff, permitted plaintiff to move with the children to Rushville, Indiana, and granted defendant secondary physical custody. Defendant appeals from this order.

II. Discussion

On appeal, defendant argues that the trial court abused its discretion in its custody order by concluding as a matter of law that granting plaintiff primary custody would be in the best interests of their children, despite: (a) failing to make adequate findings of fact addressing the factors in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), relevant to determining custody upon relocation of a parent to a foreign jurisdiction; and (b) otherwise making findings supporting this conclusion that were not supported by competent evidence. We agree with defendant's first contention, and therefore do not reach his second argument.

The trial court failed to make findings on several *Ramirez-Barker* factors relevant to material issues raised by the evidence at the hearing. In addition, many of the findings upon which it did base its conclusion of law are internally inconsistent. Therefore, we vacate and remand for entry of a new custody order not inconsistent with this opinion.

A. Standard of Review

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted). "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C. Gen. Stat. § 50-13.2(a) (2019)). We review this conclusion of law *de novo* to determine whether it is adequately supported by the trial court's findings of fact. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904

(2008) (citation omitted). "The findings of fact are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary. The evidence upon which the trial court relies must be substantial evidence and be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Everette*, 176 N.C. App. at 170, 625 S.E.2d at 798 (internal citations omitted).

B. *Ramirez-Barker* Factors

Defendant first argues that the trial court did not make findings necessary to support an order granting primary physical custody to a parent relocating to another jurisdiction. We agree.

> In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation.

Ramirez-Barker, 107 N.C. App. at 79-80, 418 S.E.2d at 680 (internal citation omitted); *see also Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting *Ramirez-Barker*).

We disagree with defendant insofar as he suggests that a relocation custody order is fatally deficient if the trial court fails to make explicit findings addressing each and every *Ramirez-Barker* factor. As we noted in *Frey v. Best*,

> although the trial court may appropriately consider these factors, the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and

> moral faculties. All other factors, including visitorial [sic] rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so. Naturally, no hard and fast rule can be laid down for making this determination, but each case must be determined upon its own peculiar facts and circumstances.

189 N.C. App. 622, 633-34, 659 S.E.2d 60, 69-70 (2008) (internal quotation marks, alteration, emphasis, and citations omitted). Nonetheless, these factors will be highly relevant to the best interest of the child in nearly all of these situations.

In its custody order, the trial court made abundantly clear that its primary consideration in granting plaintiff primary custody and permitting her to move with the children to Rushville, Indiana was based upon its finding that:

> It would be in the best interest of the minor children for them to be able to locate with the plaintiff to Rushville, Indiana given the strong ties of the Plaintiff's family and other support systems that would assist the Plaintiff with the care of the minor children. . . . The plaintiff's parents, her mother in particular, are willing and able to provide the care for the minor children to alleviate the cost and need of outside childcare.

The court found that both plaintiff and defendant would be fit and proper to share custody. It also found the children thrive under the care of each. However, the court gave no explanation why primary custody with plaintiff would be in the children's best interests, other than in reference to plaintiff's family support network in Rushville, Indiana.

Other than the advantage of a family support network for assistance in childcare, which defendant challenges and we discuss *infra*, none of the trial court's findings engage in any comparison between Rushville, Indiana and defendant's home in Johnston County, North Carolina, or each area's relative potential to enrich the children's lives. The court found that Rushville, Indiana is situated in a rural area and has the usual amenities of a mid-sized town. Yet the court failed to make any finding comparing this area to Johnston County, North Carolina, or provide any explanation as to why Indiana would otherwise provide the children with a more enriching environment.

Additionally, the court gives short shrift to several of the other *Ramirez-Barker* factors, reciting them as findings without engaging in any substantive analysis of its conclusions or relating them to the best interests of the children. For example, the trial court found that the distance between Indiana and North Carolina would require modification of the current custody schedule to one in which the children visited defendant during seasonal school breaks and holidays. However, the court omitted any consideration of how such a visitation schedule would preserve and foster the children's relationship with defendant or serve their best interests. The court also found that defendant opposed the relocation of the children. Rather than assessing the integrity of and reasons for his opposition, the trial court instead chose to downplay his opposition by finding that he unreasonably failed to acknowledge his role in the failure of the marriage. A party's fault for the failure of the marriage is not an appropriate consideration in determining whether relocation would be in the best interests of the children. *In re McGraw Children*, 3 N.C. App. 390, 393, 165 S.E.2d 1, 3 (1969) ("In a custody hearing it is the welfare of the children which is the concern of the courts, not the technicality of which parent was at fault in bringing about the state of separation."). In a custody order with 31 findings of fact, the trial court relates the effect of relocation to the best interests of the children only a few times outside the context of plaintiff's family support network.

Given the cursory manner in which the trial court addressed the other *Ramirez-Barker* factors and its failure to otherwise note alternative considerations indicating that relocation of the children to Indiana with plaintiff would be in their best interests, its conclusion of law rests upon its finding of an advantage in the family support network in Indiana. This finding alone cannot carry the weight of the custody order. *See Evans*, 138 N.C. App. at 142, 530 S.E.2d at 580 ("When the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact.") (internal quotation marks, alteration, and citation omitted); *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) ("The quality, not the quantity, of findings is determinative. This custody order contains eighty findings of fact, but Plaintiff correctly notes that many of the findings of fact are actually recitations of evidence which do not resolve the disputed issues. The findings also fail to resolve the primary issues raised by the evidence which bear directly upon the child's welfare.")

Assuming *arguendo* its sufficiency to support the order, this finding is undermined by unresolved contradictions with several other findings of fact in the order. The trial court based its finding that plaintiff's family support network in Indiana would serve the children's best interests in part on its finding that "[t]he minor children . . . appear to have long standing relationships with their extended family members, with the exception of a three year period of time that ended a few weeks prior to the parties' separation, during which the plaintiff was estranged from her parents." The court also found that the children were born 17 April 2014 and 12 September 2016, and that plaintiff and defendant separated on 17 May 2017. Thus, the court's findings make clear that the children were four and one years old, respectively, at the time of the hearing on 5 July 2018, and only had contact of any sort with plaintiff's parents for around one year. The court does not explain how such young children could develop "long standing relationships" with plaintiff's family over so short a period. We find no competent evidence which would support this determination.

Furthermore, the trial court makes numerous findings that suggest contact with plaintiff's parents would not be in the children's best interests. The court found that part of the reason for plaintiff's estrangement from her family was attributable to defendant's dislike of them due to "conversations that plaintiff may have had with defendant concerning the plaintiff's relationship with her parents and/or some childhood experiences that plaintiff did not have good feelings about." The court further found that plaintiff had kept a journal and written other materials about her parents in her twenties that "made derogatory statements about the plaintiff's parents, referring to physical abuse and emotional abuse."

Although the court then went on to note that these writings were "her way of venting[,]" occurred over ten years ago, and "are not indicative of the plaintiff's present relationship with her parents[,]" notably absent from the order is any determination as to whether the trial court believed the accounts of abuse. In 2017, the plaintiff also told her therapist that "her parents were physically, verbally, and emotionally abusive as a means of 'discipline[.]' " Other than their availability to provide transportation and supervision of the children if plaintiff secures employment in Indiana, the trial court does not make any countervailing findings indicating that contact with plaintiff's parents would be beneficial to the children. Given its mention of plaintiff's poor relationship with her parents in her youth, this omission is particularly striking.

The trial court may very well have believed plaintiff's prior accounts of her parents' abusive behavior to be mere exaggeration and believed

her parents to be suitable caretakers that would enrich the children's lives. However, because the court's order lacks any such findings, we are unable to ascertain why contact with plaintiff's parents would better serve their interests than the custody arrangement in effect at the time of the hearing. This also renders the custody order's findings of fact facially deficient.

We also note inconsistencies in the trial court's findings addressing plaintiff's mental health issues and their bearing upon her fitness to have primary custody of the children. The court found that plaintiff's mental health issues, including "adjustment disorder with mixed anxiety and depressed mood[,]" "more than likely revolved around issues of being involved in a bad marriage, as well as being the primary caregiver of two minor children. . . . Nothing about the plaintiff's mental health history negatively impacts her fitness as a parent." Thus, the court finds that plaintiff's mental health issues are partially caused by the burden of being the children's primary caregiver, yet fails to explain how these issues would not be exacerbated by awarding her primary custody of the children and placing them in daily contact with her parents, with whom she had a dysfunctional relationship at best.

For the aforementioned reasons, we find that the trial court's findings of fact do not support its conclusion of law that granting plaintiff primary physical custody of the children and permitting their relocation to Indiana would be in their best interests. Therefore, the trial court abused its discretion in so ordering.

C. Evidentiary Support

Defendant also argues that the custody order contains numerous findings of fact that are not supported by competent evidence. Because we have found these findings facially deficient and inadequate to support the trial court's conclusion of law, we need not reach the question of their evidentiary support.

III. Conclusion

"[A]lthough it is not so as a matter of law, it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child." *Ramirez-Barker*, 107 N.C. App. at 79, 418 S.E.2d at 680. The glaring deficiencies and contradictions in the trial court's findings of fact render them inadequate to support its conclusion of law and prevent us from determining whether this is such a rare case. We

therefore vacate the custody order and remand for entry of a new order not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MARCH 2020)

4000 PIEDMONT PARKWAY ASSOCS., LLC v. EASTWOOD CONSTR. CO., INC. No. 19-669	Guilford (19CVS489)	Affirmed
CHEEK v. DANCY No. 19-622	Wilkes (17CVS1049)	Affirmed
HAMRICK v. GASTON CNTY. DEP'T OF SOC. SERVS. No. 19-17	Gaston (18CVS1309)	Dismissed
IN RE B.H. No. 19-411	Wake (18SPC5812)	Affirmed
IN RE C.A.B. No. 19-179	Mecklenburg (16JT456)	Vacated and Remanded
IN RE C.B. No. 19-279	Catawba (17JA13) (17JA50)	Affirmed
IN RE C.R.R. No. 19-156	Caldwell (16J65) (16J92)	Affirmed
IN RE D.S. No. 19-322	Mecklenburg (15JA612)	Affirmed in part, dismissed in part.
IN RE J.C. No. 19-150	Sampson (17JA90) (17JA91) (17JA92) (17JA93)	Affirmed in part; Reversed and Remanded in Part.
IN RE J.C. No. 19-396	Wake (17JA10-15)	Affirmed
IN RE N.J.E. No. 19-34	Nash (16JT14) (16JT15)	Affirmed
IN RE P.N.K. No. 19-208	Guilford (15JT239)	Affirmed
IN RE S.R. No. 19-459	Beaufort (18JA47)	Affirmed

IN RE X.A.R. No. 19-584	Guilford (16JA53)	Affirmed
STATE v. CLARK No. 19-634	Pitt (17CRS50420)	NO ERROR IN PART; DISMISSED IN PART
STATE v. DIXON No. 19-609	Orange (16CRS50771) (18CRS151) (18CRS182)	No Error
STATE v. FIELDS No. 19-822	Mecklenburg (17CRS212000) (17CRS212002-03)	Dismissed
STATE v. FINLEY No. 19-494	Mecklenburg (18CRS202735) (18CRS27340)	No Prejudicial Error
STATE v. HAIRSTON No. 19-650	Forsyth (18CRS54818)	No Error
STATE v. HUGHES No. 19-50	Lincoln (10CRS52580-82) (11CRS852-56)	No Error in Part; Vacated in Part.
STATE v. JERRY No. 19-195	Iredell (17CRS2317) (17CRS56584)	No Error
STATE v. ODEMS No. 19-402	Cleveland (16CRS216) (16CRS51419-20)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. RANDALL No. 19-544	Buncombe (08CRS122-124) (08CRS51510-24)	Affirmed
STATE v. RICHARDSON No. 19-410	Wake (14CRS217792-93)	No Error
STATE v. WELLS No. 19-708	Buncombe (15CRS4921) (15CRS91259)	No Error
WALLACE v. MAXWELL No. 19-291	Henderson (15CVS2000)	Affirmed
ZHANG v. RUBIN No. 19-682	Orange (17CVS611)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS