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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 5, 2021

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Filed 21 April 2020

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Post-conviction relief—DNA testing—materiality—The trial court properly denied defendant's motion for post-conviction DNA testing (after pleading guilty to second-degree murder) for lack of materiality where there was substantial evidence of defendant's guilt, and where the fact that two people were involved in the killing

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Trafficking—jury instructions—lesser-included charge of selling a controlled substance—total weight of tablets—plain error analysis—Where defendant was charged with trafficking opium pursuant to N.C.G.S. § 90-95(h)(4) (which requires at least 4 grams), and the evidence showed defendant sold hydrocodone tablets with a total weight of 8.47 grams, the trial court did not commit plain error by failing to ex mero motu instruct the jury on the lesser-included charge of selling opium even though the State's witness testified she purchased twenty 10-milligram tablets of hydrocodone from defendant. There was no conflict in the evidence regarding the weight of the hydrocodone tablets because 10 milligrams referred to the amount of the active ingredient, not the total weight of the tablets. Under section 90-95(h)(4), the total weight of tablets, pills, and other mixtures—not just the weight of their active ingredient—determines whether the amount possessed constitutes trafficking. **State v. Coleman, 91.**

ESTATES

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HOMICIDE

Attempted first-degree murder—jury instructions—malice—use of deadly weapon—In a prosecution for attempted first-degree murder where the evidence showed defendant injured the victim by pistol-whipping her but she was not injured when he later shot into a door after she closed it between them, any error in the trial court's jury instruction regarding the malice element (informing the jury they could infer malice from defendant inflicting a wound on the victim with a deadly weapon) was not prejudicial error because defendant's intentional use of his gun against the victim gave rise to a presumption that defendant acted with malice, and malice could also be inferred by the lack of provocation by the victim and verbal threats made against her. **State v. Yarborough, 159.**

Attempted first-degree murder—malice—premeditation and deliberation—sufficiency of evidence—The State presented sufficient evidence for the jury to reasonably conclude that defendant attempted to kill the victim with malice and premeditation and deliberation where defendant told the victim he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, he stated over the phone that he had a hostage, and when the victim tried to escape by shutting the front door, defendant shot near the door handle four to six times before kicking the door and yelling. **State v. Yarborough, 159.**

First-degree murder—jury instructions—self-defense—In a first-degree murder trial where the evidence showed defendant chased the victim down and shot her after she had thrown her gun at him and ran away, defendant was not entitled to a self-defense instruction because there could no longer be any reasonable belief it was necessary for him to defend himself at the time he shot the victim. Further, defendant's testimony that he could not remember shooting the victim, along with his expert's testimony that defendant acted involuntarily due to preexisting psychological conditions, defeated his self-defense argument. **State v. Yarborough, 159.**

JURISDICTION

Bill of information—timing of filing—waiver of indictment—lack of arraignment—In a drug trafficking case, the trial court had subject matter jurisdiction to proceed on a superseding bill of information filed after the judge's address to the jury venire but before jury selection, because the plain language of N.C.G.S. § 15A-646 did not require the State to file a superseding bill of information before trial. Further, defendant waived indictment and the information was proper in form. The lack of formal arraignment on the new charge (which corrected the type of drug at issue) was not reversible error where defendant did not object and had notice of the charge. **State v. Stallings, 148.**

To amend a criminal judgment—two requirements for divestment of jurisdiction—In a prosecution for trafficking in methadone, the trial court retained jurisdiction to amend the judgment against defendant five days after its entry where defendant had already filed notice of appeal but the fourteen-day period for doing so (under Appellate Rule 4(a)(2)) had not elapsed. Under N.C.G.S. § 15A-1448(a)(3), a trial court is only divested of jurisdiction when both a notice of appeal has been given and the period for taking appeals has elapsed. **State v. Lebeau, 111.**

MOTOR VEHICLES

Operating a motor vehicle while displaying an expired registration plate—sufficiency of evidence—The trial court improperly denied defendant's motion to dismiss a charge of operating a motor vehicle while displaying an expired registration plate (N.C.G.S. § 20-111(2)) because the State's evidence showed that an officer stopped defendant's car for not displaying a registration plate at all. **State v. Money, 140.**

NEGLIGENCE

Res ipsa loquitur—broken jaw—sufficiency of allegations—applicability of Rule 9(j)—In a wrongful death action, plaintiffs' personal injury claim asserted against a nurse under the doctrine of res ipsa loquitur was properly dismissed where plaintiffs' allegations failed to show the decedent's injury, a broken jaw suffered while decedent was in the hospital and under the nurse's care, was the type of injury that could only occur due to a negligent act or omission of the nurse. Therefore, the claim required a Rule 9(j) certification under the Rules of Civil Procedure, but plaintiffs' failure to include Rule 9(j) allegations regarding the nurse's actions or the broken jaw subjected the claim to dismissal. **Robinson v. Halifax Reg'l Med. Ctr., 61.**

PROBATION AND PAROLE

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SENTENCING

Prison sentence—based on two misdemeanors and an infraction—unauthorized by law—In a prosecution for various driving-related offenses, where defendant was sentenced to ten days' imprisonment suspended upon twelve months of supervised probation, the sentence was reversed and remanded on appeal because defendant had no prior convictions, was convicted of two Class 3 misdemeanors and one infraction, and therefore should have received a sentence imposing only court costs and a fine (pursuant to N.C.G.S. § 15A-1340.23(d)). **State v. Money, 140.**

Right to be present—to hear sentence—amended judgment—no substantive change—In a prosecution for trafficking in methadone, where the trial court later amended the judgment against defendant in her absence, the court did not violate defendant's right to be present to hear her sentence because the amendment did not

effect a substantive change to that sentence. Instead, where the original judgment sentenced defendant to 70 months of imprisonment and the amended judgment sentenced her to a minimum of 70 months and a maximum of 93 months—thereby reflecting the required sentence for defendant's trafficking charge under N.C.G.S. § 90-95(h)(4)—the amendment merely corrected a clerical error and clarified that the sentence would comport with the applicable statute. **State v. Lebeau, 111.**

STATUTES OF LIMITATION AND REPOSE

Wrongful death—voluntary dismissal—tolling period—new claim not asserted in first complaint—In a wrongful death action, plaintiffs' claim against a nurse was barred by the two-year statute of limitations for wrongful death actions based on medical malpractice (N.C.G.S. § 1-53(4)) where plaintiffs' initial action, timely filed within two years of decedent's death, only included claims against other defendants but not the nurse. Therefore, the tolling provision of Civil Procedure Rule 41(a), invoked when plaintiffs took a voluntary dismissal, only applied to claims asserted in the initial complaint and not the claim against the nurse that was added to the re-filed complaint. **Robinson v. Halifax Reg'l Med. Ctr., 61.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—neglect—probability of future neglect—In a termination of parental rights case, the Court of Appeals reconsidered its prior opinion in light of recent Supreme Court decisions and once again determined the evidence and findings were insufficient to support conclusions that respondent-mother's actions constituted ongoing neglect or forecast a likelihood of repetition of neglect, or that respondent failed to make reasonable progress, where respondent acknowledged responsibility for the conditions that led to the removal of her children and took numerous steps to improve those conditions and become a better parent. **In re C.N., 20.**

WRONGFUL DEATH

Claims against hospital—respondeat superior—Rule 9(j) compliance—facial validity—In a wrongful death action based on medical malpractice, plaintiffs' claims against the hospital (based on the doctrine of respondeat superior and a theory of corporate negligence) were prematurely dismissed, before discovery was conducted, after the trial court determined plaintiffs failed to comply with Civil Procedure Rule 9(j), because the complaint on its face contained the necessary certification allegations. **Robinson v. Halifax Reg'l Med. Ctr., 61.**

Medical malpractice—Rule 9(j) compliance—facial validity—In a wrongful death action based on medical malpractice, the trial court prematurely dismissed plaintiffs' complaint against two doctors for lack of compliance with Civil Procedure Rule 9(j), prior to discovery being conducted, because, as the trial court itself noted, the complaint on its face met the certification requirements. Assuming the trial court appropriately considered plaintiffs' motion to identify their 9(j) expert, which included the expert's curriculum vitae (CV), nothing in the motion or CV contradicted plaintiffs' certification assertions in the complaint and therefore could not have supported the decision to dismiss. **Robinson v. Halifax Reg'l Med. Ctr., 61.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

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

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PAMELA GAY, EXECUTRIX OF THE ESTATE OF JOAN R. FRANKLIN, PLAINTIFF
v.
SABER HEALTHCARE GROUP, L.L.C., AND AUTUMN CORPORATION,
D/B/A AUTUMN CARE OF RAEFORD, DEFENDANTS

No. COA19-964

Filed 21 April 2020

Arbitration and Mediation—motion to compel arbitration—existence of agreement to arbitrate—ambiguous

In a negligence and wrongful death action filed against an elder care facility by a deceased patient's estate, the trial court properly denied the facility's motion to compel arbitration because the facility failed to prove the existence of an agreement between the parties to arbitrate disputes regarding the patient's care. The arbitration agreement's signature page (which was the only page of the agreement the facility presented to the patient at the time of signing) conflicted with the facility's general admissions agreement (which incorporated the arbitration agreement by reference) where the former stated that the parties waived their right to trial while the latter expressly reserved the parties' right to a bench trial; thus, the arbitration agreement was ambiguous as a matter of law.

Judge TYSON dissenting.

Appeal by defendants from order entered 11 June 2019 by Judge Mary Ann Tally in Hoke County Superior Court. Heard in the Court of Appeals 17 March 2020.

Henson Fuerst, P.A., by Rachel A. Fuerst and Shannon M. Gurwitch, and Britton Law, LLP, by Rebecca J. Britton, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Bradley K. Overcash and Daniel E. Peterson, for defendants-appellants.

ARROWOOD, Judge.

Saber Healthcare Group, L.L.C. and Autumn Corporation ("defendants") appeal from an order denying their Motion to Compel Arbitration and Stay Proceedings. For the following reasons, we affirm the trial court's order.

I. Background

The central issue in this case involves the interpretation of contractual language in a series of documents signed in the admissions process for defendants' elder care facility. Janine Lightner ("Ms. Lightner") was referred to Autumn Care of Raeford, defendants' facility, ("the facility" or "Autumn Care") after determining that her mother's health required more advanced elder care than that which could be provided in her current placement. Ms. Lightner's mother, Joan R. Franklin ("decedent"), had lived for five years in a nearby assisted living facility following a stroke. Decedent also suffered from Parkinson's disease and Lewy Body dementia. On 18 April 2017, Ms. Lightner signed the relevant admission paperwork and decedent was admitted to Autumn Care. Decedent subsequently suffered from a series of falls while at Autumn Care and died on 14 June 2017.

These events gave rise to the cause of action in this case. Pamela Gay ("plaintiff"), decedent's other daughter, is the executrix of her estate. On 30 April 2019 plaintiff filed a complaint on behalf of decedent's estate, asserting claims of negligence and wrongful death arising from defendants' allegedly improper response to decedent's falls. In response to plaintiff's complaint, defendants filed a Motion to Compel Arbitration and Stay Proceedings. Defendants' motion claimed that plaintiff was required to arbitrate any dispute related to care of decedent because Ms. Lightner signed an arbitration agreement on the day decedent was admitted to the facility.

Plaintiff filed a memorandum in opposition to defendants' motion, maintaining (a) that Ms. Lightner never entered an arbitration agreement with defendants on the day of decedent's admission to Autumn Care, or, alternatively, (b) that any such agreement was void because defendants

owed decedent a fiduciary duty at the time her representative signed the admissions paperwork. Among other items, plaintiff attached Ms. Lightner's affidavit and the relevant admissions paperwork as exhibits to her memorandum in opposition to defendants' motion.

On 10 June 2019, the trial court held a hearing on defendants' motion to compel arbitration. Plaintiff introduced the exhibits from her memorandum into evidence. Defendants presented no evidence at the hearing in support of their contention that the parties had agreed to arbitration. Plaintiff's evidence tended to show the following.

Ms. Lightner's affidavit detailed the process she underwent to admit decedent to Autumn Care. Ms. Lightner averred that she toured the facility on 10 April 2017. She returned to the facility with decedent on 18 April 2017. After further reviewing the facility, Ms. Lightner and decedent met with two members of Autumn Care's admissions staff to complete the admission application and other documents. Ms. Lightner alleged one of the staff members informed her the facility's admissions process was new, "it was her first day in admissions at Autumn Care," and the other staff member was there "to train her." Ms. Lightner stated that "the whole process seemed disorganized: almost like they did not know what they were doing."

Ms. Lightner asserted the facility staff presented her with "an iPad and a few loose papers with the admissions information." Most of the documents Ms. Lightner signed were presented on the iPad "but some were on random loose pieces of paper." She was presented some pages of paper documents to sign that appeared to be ripped out of a binder of other materials. Many documents presented on the iPad were in "footnote-sized font" and could not be magnified for ease of reading. Such documents included the signature pages of an "Admission Agreement" ("the admission agreement") and a separate "Resident and Facility Arbitration Agreement" ("the arbitration agreement").

Ms. Lightner signed both of these documents, but stated that the pages of the arbitration agreement preceding its signature page were not presented to her before or after her signature on the day decedent was admitted to Autumn Care. She stated that the facility's admissions staff "did not explain documents in detail." She did not recall the staff "ever discussing any arbitration agreement or using the words arbitration agreement at any point."

Ms. Lightner requested printed copies of the documents she signed on the iPad, but the employees handling her onboarding were unable to furnish physical copies. Months after decedent's admission, she received

what she characterized as a disorganized "packet of paperwork." She did not recall ever seeing the full arbitration agreement in that packet and asserted she did not see it until after decedent's death.

In its order, the trial court made a finding adopting the version of events averred in Ms. Lightner's affidavit:

> Ms. Lightner's sworn affidavit described the events that transpired when she signed the admission paperwork for [decedent]. The content and format of the documents she signed reveals that only the signature paragraph . . . was presented to Ms. Lightner for electronic signature in very small print on an iPad and pages 1 and 2 of the purported 3 page document were never available, shown or explained to Ms. Lightner prior to her electronic signature. Pages 1 and 2 of the purported arbitration agreement were provided, amongst a mixed up package of documents . . . at a later time after [decedent] was residing at Defendant's [sic] facility. Ms. Lightner did not remember ever seeing the purported arbitration agreement until her attorney showed it to her long after [decedent] had passed away.

The trial court also found that defendants had presented no evidence in support of their claim that the parties had agreed to arbitrate. Reviewing the admission agreement and the arbitration agreement's signature page, the trial court found the following:

> The Admission Agreement, page 8, paragraph J, . . . incorporated into the Admission Agreement by reference: "all documents You signed or received in the Admission Packet during the admission process to the facility."
>
> . . . .
>
> Defendants' Admission Agreement, specifically within the terms of the Admission Agreement's signature page, states: "The resident/representative and facility hereby mutually agree to irrevocably waive any and all rights to a trial by jury (while expressly preserving any and all rights to a bench trial) . . . ."

Based upon these findings, the trial court concluded that: (1) the admission agreement and arbitration agreement were internally conflicting, "one purporting to agree to expressly reserve the right to a bench trial and another purporting to agree to arbitration[;]" and, (2) defendants owed and violated a fiduciary duty to provide decedent

specialized care. On these grounds, the trial court denied defendants' motion to compel arbitration. Defendants timely filed their notice of appeal to this Court.

II. Jurisdiction

"An order denying defendants' motion to compel arbitration is not a final judgment and is interlocutory. However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418-19, 637 S.E.2d 551, 554 (2006) (internal quotation marks and citations omitted). This Court possesses jurisdiction over this interlocutory appeal. N.C. Gen. Stat. §7A-27(b)(3)(a) (2019).

III. Standard of Review

"A dispute can only be settled by arbitration if a valid arbitration agreement exists." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citation omitted). "If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists." *Id.* (citation omitted). "The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Id.* (internal quotation marks, alterations, and citations omitted). "The trial court's determination of whether the language of a contract is ambiguous is a question of law" that we review *de novo*. *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690, 564 S.E.2d 641, 643 (2002) (citation omitted).

IV. Discussion

Defendants argue that the trial court erred by denying their motion to compel arbitration based upon its reasoning that (a) the relevant provisions were ambiguous regarding an agreement to arbitrate disputes or, alternatively, (b) that even an unambiguous arbitration agreement would have been unenforceable due to a fiduciary duty owed to decedent at the time the agreement was made.

We hold that the trial court did not err in denying defendants' motion. The findings of fact in its order are supported by competent evidence. These findings in turn support its legal conclusion that the arbitration agreement was ambiguous, and therefore defendants failed to meet the

burden of proving the existence of an agreement to arbitrate between plaintiff and defendants at the time Ms. Lightner signed the documents at issue. Because this conclusion of law is supported, we do not reach the court's second ground for denying defendants' motion regarding the breach of a purported fiduciary duty owed by defendants.

A. Findings of Fact

In its order, the trial court found that defendants presented no evidence to refute the claims in Ms. Lightner's affidavit or otherwise support their contention that the parties had agreed to arbitrate. This finding is supported by the record. Defendants did not attach the arbitration agreement to their motion, furnish any affidavit supporting its existence or inclusion within the documents viewed and signed by Ms. Lightner, or even attempt to enter the document itself into evidence. The document itself was furnished by plaintiff as an exhibit to her memorandum opposing arbitration. The trial court also made findings accepting the version of events averred in Ms. Lightner's affidavit. Because they were supported by the affidavit, these findings are conclusive on appeal. *See Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580.

The pages of the arbitration agreement preceding its signature page, which Ms. Lightner was not shown at the time of signing, detailed the requirements to arbitrate any dispute arising with Autumn Care. The signature page had headings reading "Resident and Facility Arbitration Agreement" and "Resident Understanding & Acknowledgement Regarding Arbitration" in small font, but made no further reference to the details of arbitration. It simply stated that "[t]he parties understand that by entering into this agreement the parties are giving up their constitutional right to have any claim decided in a court of law before a judge and a jury, as well as any appeal from a decision or award of damages."

The court found that, in contrast, the signature page of the admission agreement stated that the parties "mutually agree to irrevocably waive any and all rights to a trial by jury (while expressly preserving any and all rights to a bench trial)[.]" The court also found that the admission agreement contained a clause "incorporat[ing] into the Admission Agreement by reference: 'all documents [Ms. Lightner] signed or received in the Admission Packet during the admission process to the facility.' " These findings are also supported by the record evidence.

B. Conclusion of Law

Based on its findings concerning the aforementioned clauses in the materials presented to Ms. Lightner on the day she signed the relevant

documents, as well as the version of events Ms. Lightner averred in her affidavit, the trial court found that "the Admission Agreement Signature Page and Resident and Facility Arbitration Agreement[ ] are internally in conflict with one another, one purporting to agree to expressly reserve the right to a bench trial and another purporting to agree to arbitration." Furthermore, the court found that "Defendants' use of the terms 'jury trial' and 'bench trial' within the same sentence [of the admission agreement's signature page] would not give a reasonable person notice of arbitration and would not be understood by someone who does not have training in the interpretation of legal documents." These findings are more appropriately read as a conclusion of law that no valid agreement to arbitrate was formed between the parties, due to an ambiguity regarding the right to have any dispute determined by a court of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.") (internal citations omitted).

> An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.

Salvaggio, 150 N.C. App. at 690, 564 S.E.2d at 643 (internal quotation marks, alterations, and citations omitted). "[I]t is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so. Contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (internal quotation marks, alterations, and citations omitted). Where no other reasonable, nonconflicting interpretation is possible, "the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language." *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) (citation omitted).

Defendants cite to *Rouse and Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 553 S.E.2d 84 (2001), arguing that similarities between the arbitration agreements and clauses governing litigation in those cases and the instant case compel a conclusion

that their agreement with plaintiff to arbitrate disputes was unambiguous. We find these cases inapposite.

In *Internet East*, we held that a forum selection clause granting "courts of North Carolina . . . sole jurisdiction over any disputes" did not conflict with an arbitration clause in the same contract. *Id.* at 403, 553 S.E.2d at 86. We reasoned that the clauses could be read such that the "forum selection clause should . . . be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration." *Id.* at 407, 553 S.E.2d at 88. Based upon similar reasoning, in *Rouse* our Supreme Court held that choice of law and consent to jurisdiction clauses did not conflict with an arbitration clause within the same contract. 331 N.C. at 94-97, 414 S.E.2d at 33-35.

Defendants argue that these cases support a nonconflicting reading of the admission agreement's clause preserving the right to a bench trial and the arbitration agreement's signature page waiving the right to bring disputes before a court of law. Defendants contend that these clauses should be interpreted such that arbitration of disputes is required, but "in the event of judicial intervention, the Admission Agreement stipulates that neither party would seek a jury trial, and instead, would seek a bench trial." We are not persuaded. Unlike the forum selection, choice of law, and consent to jurisdiction clauses at issue in *Rouse* and *Internet East*, here the admission agreement's clause expressly reserving the right to a bench trial cannot be read in harmony with the arbitration agreement's clause expressly foreclosing the same. Given the trial court's finding that the pages of the arbitration agreement providing all the details of the procedures for arbitration were not presented to Ms. Lightner when she signed its signature page, such an interpretation would be unreasonable.[1]

The dissent bases its argument in large part upon our precedent holding that parties to an arm's length contractual agreement are charged with knowledge and understanding of the contents of documents they sign, when the parties could have reviewed the provisions from which they seek relief. *See*, *e.g.*, *Leonard v. Power Co.*, 155 N.C.

1. We also note that Part IV, Section K of the admission agreement provides that headings in the contract "are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement." Thus, the two references to "arbitration" in the headings on the arbitration agreement's signature page are of no effect. The signature page thus fails to mention arbitration at all.

10, 13-14, 70 S.E. 1061, 1064 (1911). This principle misses the point: The trial court found that Ms. Lightner was not presented with the contents of the arbitration agreement other than the signature page and, despite her requests, was unable to avail herself of full printed copies for review at the time she signed the contracts. Thus, this case is not one in which a party had constructive notice of and opportunity to review a contractual provision from which they seek relief. The facts of the instant case belie the dissent's reliance on this principle.[2]

The trial court found that Ms. Lightner was not presented with or able to review the contents of the arbitration agreement other than its signature page. The arbitration agreement's signature page provides no detail on the suggested methods of nonjudicial resolution of disputes between the parties. It fails to even mention arbitration. Rather, the signature page only provides that the parties waive the right to a trial. In contrast, the admission agreement expressly waives the right to a jury trial and reserves the right to a bench trial. Based upon these findings, the trial court correctly concluded that the parties' arbitration agreement was ambiguous as a matter of law. *See Novacare*, 137 N.C. App. at 476, 528 S.E.2d at 921 (construing contractual ambiguity against drafting party). Therefore, the trial court did not err by denying defendants' motion to compel arbitration.

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2. Furthermore, ignoring the fact that no objection was made below nor error raised on appeal, the dissent mistakenly suggests that the parol evidence rule would prohibit the trial court's consideration of Ms. Lightner's affidavit in determining issues of contract formation and ambiguity. The parol evidence rule is inapplicable to such determinations. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 560, 681 S.E.2d 770, 774 (2009) ("[I]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties.") (internal quotation marks and citation omitted); *Z.A. Sneeden's Sons, Inc., v. ZP No. 116, L.L.C.*, 190 N.C. App. 90, 101, 660 S.E.2d 204, 211 (2008) ("Extrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.") (internal quotation marks, alteration, and citation omitted); *Ingersoll v. Smith*, 184 N.C. App. 753, 755, 647 S.E.2d 141, 143 (2007) ("The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict the terms of an integrated written agreement, though an ambiguous term may be explained or construed with the aid of parol evidence.") (internal quotation marks and citations omitted).

The dissent's implied invocation of the parol evidence rule to the circumstances of the instant case would have illogical and unjust consequences. Under its conception of the doctrine, once a party signs a written document, they are barred from contesting their lack of agreement to later-furnished, additional terms not within the document presented to them at the time of signing. Such an application of the parol evidence rule would invite fraud and upheave the well-settled jurisprudence of contract formation.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendants' Motion to Compel Arbitration and Stay Proceedings.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion ignores fundamental principles and interpretation of contract law, disregards our nation's and our state's public policies in favor of arbitration, and misapplies the *de novo* standard of review to affirm the trial court's order. The trial court's order is properly reversed and remanded for entry of an order to stay the proceeding and to compel arbitration as the parties agreed. I respectfully dissent.

I. Standard of Review

Our review of the trial court's order and the Admission and Arbitration Agreements is *de novo*. Precedents governing our review of contracts are long established:

> Because the law of contracts governs the issue of whether there exists an agreement to arbitrate, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's determination of whether a dispute is subject to arbitration is a conclusion of law reviewable *de novo*.

T.M.C.S., Inc. v. Marco Contr'rs, Inc., 244 N.C. App. 330, 339, 780 S.E.2d 588, 595 (2015) (citations, alterations, and internal quotation marks omitted).

Our Supreme Court held:

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or

> mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953) (citations omitted). More recently, this Court reiterated:

> It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. 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.

Bank of Am., N.A. v. Rice, 230 N.C. App. 450, 456, 750 S.E.2d 205, 209 (2013) (citation omitted).

II. Existence of the Arbitration Agreement

Our Supreme Court has also held:

> North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Johnston County v. R. N. Rouse & Co., 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (citation and internal quotation marks omitted). "A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 419, 637 S.E.2d 551, 554 (citations omitted). "[A]ny doubt concerning the *existence* of such an agreement must also be resolved in favor of arbitration." *Rouse*, 331 N.C. at 92, 414 S.E.2d at 32 (emphasis supplied).

This policy in favor of arbitration has also been codified as national policy in federal law. *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration");

Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir. 2001); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742, 750 (2011) (explaining Congress enacted the Federal Arbitration Act "in 1925 in response to widespread judicial hostility to arbitration agreements").

The majority's opinion concludes Defendants failed to establish the existence of an Arbitration Agreement between the parties. Purportedly reviewing the agreements *de novo* and as a matter of law, the majority's opinion affirms the trial court's order and its erroneous conclusion of law that "the arbitration agreement was ambiguous, and therefore defendants failed to meet the burden of proving the existence of an agreement to arbitrate between plaintiff and defendants at the time Ms. Lightner signed the documents at issue." This analysis does not confine itself to the four corners of the separate agreements and apply the plain language *de novo* as a matter of law. *See Bank of Am., N.A.*, 230 N.C. App. at 456, 750 S.E.2d at 209.

This conclusion is also unsupported by the four corners of the written agreements. The trial court neither disputes nor concludes the proffered and admitted evidence is invalid or insufficient to prove the Arbitration Agreement. If it had, the Admission Agreement and the asserted "non-existent" Arbitration Agreement could not be "internally in conflict with one another."

Here, Plaintiff submitted all the evidence needed to prove not only the existence of, but also mutual assent between the parties to, the Arbitration Agreement. This agreement is separate and distinct from the Admission Agreement. Plaintiff submitted into evidence the Admission Agreement and the Arbitration Agreement, signed by Lightner as Decedent's authorized representative, along with her affidavit.

The Arbitration Agreement contains multiple pages. Lightner avers several pages were never been shown to her. Even if so, the signature page of the Arbitration Agreement, which is admittedly signed by Lightner as Decedent's representative, agrees to arbitration as the exclusive forum to resolve any disputes arising between the parties and contains a complete waiver of the right to trial by judge and a jury in a court of law. It also states and admonishes the signatory prior to signing: "**NOT A CONDITION OF ADMISSION – READ CAREFULLY**."

Our Supreme Court held over one hundred years ago that, "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could

inform himself and has not done so." *Leonard v. Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911).

"The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted. Persons entering contracts have a duty to read them and ordinarily are charged with knowledge of their contents." *Raper*, 180 N.C. App. at 420-21, 637 S.E.2d at 555 (citations, alterations, and internal quotation marks omitted).

Once the documents are signed, any events preceding the execution and signatures are merged into the final document, which becomes the final expression of the parties' intent. *Neal*, 239 N.C. at 77, 79 S.E.2d at 242. "[P]arol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent." *Id.*

The majority's opinion asserts the parol evidence rule is inapplicable to the issue in this case, and claims "no objection was made below nor error raised on appeal." Defendant's appeal challenges and brings all of the trial court's conclusions of law, which fail to enforce the parties' two separate, distinct, written, and executed contracts, before us for *de novo* review. Both agreements were executed by the same parties, at the same time, at the same place. Defendant provided performance and Plaintiff accepted the benefits and burdens under both agreements.

The four corners of the documents are properly before us in reviewing the trial court's order failing to enforce the agreements. Plaintiff has asserted none of the traditional contract defenses, e.g., forgery, fraud, duress, incapacity, or unconscionability, to excuse enforcement of the express agreements her decedent's representative admittedly signed. The denial of the parties' agreed-upon forum of arbitration and the *de novo* proper construction of these agreements is clearly before us.

In *Evangelistic Outreach Ctr. v. General Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007), the proponent of the alleged arbitration agreement submitted in its unverified motion a one-page purchase order signed by the party to be charged, which noted the agreement was subject to the terms and conditions on its face and on the reverse side. The proponent also submitted a copy of the reverse side, which contained an arbitration clause. *Id.*

The party opposing arbitration submitted a verified response denying receipt of the reverse side. *Id.* at 727, 640 S.E.2d at 843. Both parties

submitted affidavits in support of their positions. *Id.* at 726-27, 640 S.E.2d at 843. This Court upheld the trial court's conclusion that "proof of the very *existence* of an arbitration agreement was lacking." *Id.* at 727, 640 S.E.2d at 843 (emphasis original). The reasoning in that case is inapplicable to the admitted facts and plain meanings of the provisions before us.

Plaintiff submitted all the evidence needed to prove the existence of, her signature on, and the parties' mutual assent to the Arbitration Agreement, which is separate and distinct from the Admission Agreement. The law will enforce agreements as written and signed. Plaintiff is not relieved from liability upon a written contract, upon allegation Lightner did not read or "understand the purport of the writing" when she could have informed herself and failed to do so, or simply have refused to sign the Arbitration Agreement without jeopardizing her mother's admission to the Facility. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

Parties to private contracts are free to set forth, demand, and enforce the time, place, and type of forum where disputes between the parties are to be resolved. *See Rouse*, 331 N.C. at 92, 414 S.E.2d at 32. Nothing in our law requires or compels that choice to be a judicial or even a public forum, or to include all options or remedies available in that public or private forum. *See id.* Sufficient evidence shows an express Arbitration Agreement exists, signed by Decedent's representation and Defendants while Decedent was present, which she was free to reject without risking her non- admission to the Facility. Plaintiff cannot successfully argue she is not bound by terms stated on the very page Decedent's representative admittedly signed with her mother present. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

III. Construing the Agreements

A. "Internally in Conflict"

The trial court concluded and the majority's opinion agrees, the separate and distinct Admission Agreement and the Arbitration Agreement were "internally in conflict with one another." The Admission Agreement preserves the right to a bench trial to the parties, but waives both parties' right to a trial by jury and to punitive damages. The Arbitration Agreement is separate from the Admission Agreement and declares arbitration to be the exclusive and mandatory method for dispute resolution between the parties and waives both parties' constitutional rights to a bench trial before a judge and a trial by jury.

The Admission Agreement provides, in pertinent part:

> The Resident/Representative and Facility hereby mutually agree to irrevocably waive any and all rights to trial by jury (while expressly preserving any and all rights to a bench trial) and forego any and all rights to claim for punitive damages in any action or proceeding arising out of or relating to this agreement, the transactions relating to its subject matter, or care and treatment provided to Resident at Facility. This agreement does not limit the ability of the Resident/Representative from filing formal and informal grievances with the Facility or state or federal government, including the right to challenge a proposed transfer or discharge.

Significantly, this condition and waiver is also stated on the page where Lightner, as Decedent's authorized representative, and Defendants' representative signed the Agreement for Decedent to be admitted. The Admission Agreement also incorporates by reference "all documents that You signed or received in the Admission Packet during the admission process to [the] FACILITY."

On and near the bottom of the signature page, the Arbitration Agreement in bolded, capitalized, and italicized text provides in pertinent part:

> ***THE PARTIES UNDERSTAND THAT BY ENTERING INTO THIS AGREEMENT, THE PARTIES ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.***

In *Rouse*, our Supreme Court considered and rejected an argument asserting a consent-to-jurisdiction clause and an arbitration clause in a single construction contract were "in irreconcilable conflict, as they both purport to establish the exclusive forum for resolution of disputes arising under the contract." *Rouse*, 331 N.C. at 92, 414 S.E.2d at 33. Our Supreme Court reasoned the parties had agreed to arbitrate any disagreement arising out of the contract, and the contractor had consented to the jurisdiction of North Carolina courts in the event of any litigation to enforce either the arbitration agreement or an award resulting from arbitration. *Id.* at 96-97, 414 S.E.2d at 35.

This Court has similarly construed the forum selection and arbitration clauses contained in a single contract to avoid conflict and asserted

ambiguity between those provisions. *See Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 407, 553 S.E.2d 84, 88 (2001) ("The forum selection clause should be read to be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration."); s*ee also Tomaszewski v. St. Albans Operating Co., LLC*, No. 2:18-CV-01327, 2018 WL 5819601, at *4 (S.D. W. Va. Nov. 6, 2018) (an arbitration agreement "only changes the forum of the lawsuit.").

The majority's opinion disagrees with and fails to apply these precedents, and also fails to offer any factors or cases to distinguish them. The reasoning and precedents in *Neal*, *Leonard*, *Raper*, *Rouse*, and *Internet East* express and exhort how we are to review, construe, apply, and enforce the separate contracts before us.

Presuming the provisions contained in the separate agreements are ambiguous, the Admission Agreement and Arbitration Agreement may also be harmonized as were the provisions contained in a single contract in those precedents. The Admission Agreement expressly reserves both parties' right to a bench trial to adjudicate disputes, but excludes trial by jury and the recovery of punitive damages in the absence of an agreement to arbitrate.

B. Not a Condition of Admission

Defendants also assert an additional and equally harmonious reading of the two provisions in their appellate brief. The Arbitration Agreement clearly and emphatically states across the top of each page, including its signature page, that it is "**NOT A CONDITION OF ADMISSION – READ CAREFULLY**." Defendants argue the bench trial clause in the Admission Agreement simply applies if Decedent's authorized representative had rejected and declined to execute the Arbitration Agreement. Rejecting the Arbitration Agreement was without risk to Decedent's admission to the Facility.

Our Supreme Court has re-stated the "fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so. Contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Rouse*, 331 N.C. at 94, 414 S.E.2d at 34 (citations, alterations, and internal quotation marks omitted).

The majority's opinion asserts without citing support, "the admission agreement's clause expressly reserving the right to a bench trial

cannot be read in harmony with the arbitration agreement's clause expressly foreclosing the same." This conclusion is erroneous and does not follow the precedents set forth by our Supreme Court in *Rouse* and this Court in *Internet East*.

Decedent, through her authorized representative, expressly agreed to arbitration as the forum to resolve disputes between the parties. Defendants exercised their statutorily and contractually guaranteed right to have the parties' disputes resolved through arbitration. The trial court erred in denying Defendants' motion to compel arbitration and to stay the proceedings. *See Rouse*, 331 N.C. at 96-97, 414 S.E.2d at 35; *Internet East*, 146 N.C. App. at 407, 553 S.E.2d at 88. The trial court's unlawful order is properly reversed and remanded for entry of an order to compel arbitration as agreed and to stay proceedings pursuant to the Arbitration Agreement.

IV. Fiduciary Duty to Decedent

The majority's opinion fails to address Defendants' second asserted error in the trial court's order. The trial court also apparently concluded Defendants owed a fiduciary duty of specialized care to Decedent.

> For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. . . . In general terms, a fiduciary relation is said to exist wherever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence.

King v. Bryant, 369 N.C. 451, 464, 795 S.E.2d 340, 348-49 (citations, alterations, and internal quotation marks omitted), *cert. denied*, __ U.S. __, 199 L. Ed. 2d 233 (2017).

This Court recently stated: "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, __ N.C. App. __, __, 826 S.E.2d 567, 571, *disc. review denied*, 373 N.C. 253, 835 S.E.2d 446 (2019) (citation omitted). Although the trial court's order is unclear upon which basis it ruled, the only reasonable conclusion from the order is it concluded a *de facto* fiduciary relationship existed between Decedent and Defendants.

Our Supreme Court stated: "The list of relationships that we have held to be fiduciary in their very nature is a limited one, and we do not add to it lightly." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 660 (2016) (citation omitted). The physician-patient relationship is among the recognized *de jure* fiduciary relationships. *Hager*, __ N.C. App. at __, 826 S.E.2d at 572 (citing *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985)).

This Court in *Hager* considered and rejected expanding a fiduciary duty "to include assisted living facilities with memory wards and their residents, as licensed memory wards possess special knowledge and skill concerning the care of those afflicted with cognitive impairments." *Id.* (citation, alteration, and internal quotation marks omitted).

This Court then considered whether a *de facto* fiduciary relationship existed. *Id.* Our Supreme Court's fact-specific analysis in *King* was reviewed for guidance. *Id.* In *King*, our Supreme Court concluded a *de facto* fiduciary physician-patient relationship existed because the patient:

> (1) was referred to the surgeon by his primary care physician, who already had a de jure fiduciary duty to the patient; (2) sought out the surgeon for his specialized skill and knowledge; (3) provided the surgeon with confidential information on arrival and prior to being seen; and (4) had received a limited education and had little to no experience interpreting legal documents.

Id. at __, 826 S.E.2d at 573 (citations and footnote omitted).

This Court in *Hager* applied the analysis from *King* to the facts before it. Significantly, in considering the fourth factor, the patient in *Hager*:

> was not asked to sign the Arbitration Agreement before she could evaluate the care offered by [the facility]; prior to signing the agreement, she toured the facility and was provided the opportunity to ask questions. She signed the agreement after assessing the facility with her friend . . . who also had the opportunity to offer her independent thoughts on the facility.

Id.

The Arbitration Agreement in this case is essentially identical to the one this Court upheld in *Hager*. *See id.* at __, 826 S.E.2d at 570. Both agreements contain the same capitalized, bolded, and italicized waiver of

the right to trial by judge and jury, as well as the same bolded and underlined admonishment across the top of the page: "**NOT A CONDITION OF ADMISSION — READ CAREFULLY**". *Id.*

This Court in *Hager* concluded the language of these agreements "outlined the nature of arbitration, identified the rights [the patient] was relinquishing, and encouraged [his representative] to seek the advice of legal counsel before signing." *Id.* at __, 826 S.E.2d at 574.

The analysis in *Hager* is on point. As Decedent's condition debilitated, she required *more* specialized care than available at her previous assisted living residence. Her daughter was referred by a worker at that previous facility to the Facility for this higher specialized care. Like in *Hager*, Decedent's representative had the opportunity to and did perform her own due diligence by touring the Facility. In fact, Lightner had far *more* opportunity to perform her own due diligence than the patient's representative in *Hager*. Lightner toured the Facility a week before returning with Decedent, while the representative in *Hager* admitted her patient the same day following the tour. *Id.* at __, 826 S.E.2d at 569.

Considering both *Hager* and the factors our Supreme Court laid out in King, these facts align to those in *Hager*, which rejected any fiduciary duty. Defendants did not maintain or violate any fiduciary duty owed to Decedent. The trial court erred in concluding a fiduciary relationship existed between Decedent and Defendants.

V. Conclusion

Plaintiff submitted evidence of an express and mutual Arbitration Agreement, signed by Defendants and Decedent's authorized representative. The law will not relieve Plaintiff from her agreements, and the courts will enforce and compel her to honor and perform her obligations in a binding written contract. Plaintiff does not allege or show she did not understand the purport of the writing or, even if so, that she could not have informed herself prior to signing. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

By failing to apply four corners and *de novo* review as a matter of law, the majority's opinion erroneously construes the Admission Agreement and the separate Arbitration Agreement to be "internally in conflict with one another." This conclusion is: (1) contrary to the express terms of the parties' separate and private contracts; (2) contrary to the clear public policy of our nation and North Carolina favoring arbitration; and, (3) contrary to the fundamental rule of interpretation to avoid construing

contract provisions as conflicting, unless no other reasonable interpretation can be applied.

The trial court also erred in concluding as a matter of law that a fiduciary relationship existed between Defendants and Decedent or her representative at admission. *See Hager*, __ N.C. App at __, 826 S.E.2d at 574. The trial court further erred by concluding as a matter of law Defendants had violated any fiduciary duty of care at the pre-admission relationship.

The parties are contractually and lawfully bound, and Defendants are entitled to resolve the parties' disputes through the forum of arbitration as agreed. It is the duty of this Court to enforce the parties' private agreements. The trial court's erroneous order is properly reversed and remanded for entry of an order to compel arbitration and stay the proceedings. I respectfully dissent.

IN THE MATTER OF C.N., A.N.

No. COA18-1031-2

Filed 21 April 2020

Termination of Parental Rights—grounds for termination—neglect—probability of future neglect

In a termination of parental rights case, the Court of Appeals reconsidered its prior opinion in light of recent Supreme Court decisions and once again determined the evidence and findings were insufficient to support conclusions that respondent-mother's actions constituted ongoing neglect or forecast a likelihood of repetition of neglect, or that respondent failed to make reasonable progress, where respondent acknowledged responsibility for the conditions that led to the removal of her children and took numerous steps to improve those conditions and become a better parent.

Appeal by respondent from order entered 3 July 2018 by Judge J. H. Corpening II in New Hanover County District Court. This case was originally heard in the Court of Appeals 27 June 2019. *In re C.N., A.N.*, ___ N.C. App. ___, 831 S.E.2d 878 (2019). Upon remand from the Supreme Court of North Carolina.

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother.

Womble Bond Dickinson (US) LLP, by Jessica Gorczynski, for guardian ad litem.

TYSON, Judge.

The Supreme Court of North Carolina remanded this case for this Court "to reconsider its holding in light of *In re B.O.A.*, 372 N.C. 372, 831 S.E.2d 305 (2019) and *In re D.W.P. and B.A.L.P.*, ___ N.C. ___, ___ S.E.2d. ___ (2020)." We have reviewed both decisions as analyzed herein, and hold these opinions, together or individually, do not change or affect this Court's the earlier mandate.

I. Factual and Procedural Background

The facts underlying the petition and adjudication to terminate Respondent-mother's parental rights are fully set forth in this Court's opinion in *In re C.N., A.N.*, ___ N.C. App. ___, 831 S.E.2d 878 (2019). The pertinent facts and procedural background are set out below.

During May 2016, the New Hanover County Department of Social Services ("DSS") received a report that Respondent-mother's minor daughter "Anne" was found wandering alone behind a store on Carolina Beach Road in New Hanover County. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

On or about 28 June 2016, Respondent-mother called 911. Respondent-mother reported her other minor daughter, "Carrie," had pulled up on a table and spilled an open bottle of Mr. Clean liquid detergent onto herself. EMS and law enforcement, who responded to the 911 call, reported conditions inside the home were dirty and in poor shape. Carrie was treated for corneal abrasions and chemical burns on her tongue.

DSS obtained nonsecure custody of eleven-month-old Carrie and two-year-old Anne and filed a juvenile petition alleging they were neglected juveniles. Respondent-mother stipulated to the allegations that Carrie and Anne were neglected, on the basis they did not receive proper care, supervision, or discipline, and lived in an environment injurious to their welfare, in the juvenile petition at the adjudication hearing. The trial court adjudicated Carrie and Anne to be neglected juveniles based upon Respondent-mother's stipulation.

On 8 February 2018, DSS filed a petition to terminate Respondent-mother's parental rights to Carrie and Anne. DSS alleged the following

grounds for termination of Respondent-mother's parental rights: neglect and willful failure to make reasonable progress. The petition was heard on 23 and 26 April 2018.

The trial court made the following findings of fact:

> 3. . . . Both children have been in the legal custody of [DSS] since June 28, 2016, were residing in a kinship placement with a maternal aunt and have currently been residing with licensed foster parents since being placed in an out of home placement.
>
> . . . .
>
> 10. That [Carrie] and [Anne] were adjudicated neglected Juveniles within the meaning of G.S. 7B-101(15) at a hearing held on August 24, 2016 where Respondent-Parents stipulated to the allegations in the petition. Respondent-Mother was ordered to comply with her Case Plan; obtain and maintain stable income and housing; submit to a substance abuse assessment and to comply with all recommendations; complete a mental health assessment and comply with all recommendations; successfully complete parenting classes; and participate in random drug screens. . . .
>
> 11. That from June 2016 through February 2018 Respondent-Mother demonstrated a pattern of instability in housing and income. She has lived with several different boyfriends within New Hanover and Bladen County and earns income by cleaning houses and selling things on eBay. For the past year, Respondent-Mother has primarily resided with a boyfriend in Carolina Beach. She is financially dependent on her boyfriend for transportation, income and housing. Respondent-Mother has been inconsistent with her communication with [DSS], has not provided a current, working telephone number, has not provided an email address, does not return phone calls, has missed appointments and was not engaged when she did attend. [DSS] has provided her with bus passes and offered individual transportation. Respondent-Mother completed her substance abuse assessment but not the recommended treatment consisting of intensive out-patient, community support, 12 step program, individual therapy, skill set, SAIOP, after care and relapse

> prevention. Respondent-Mother started to participate in her treatment plan then elected to detox at home in August 2016. She disengaged with services, moved from her service area, and then sporadically re-engaged with services in early 2018. She accessed mental health treatment in August 2017 and out-patient therapy was recommended to help her cope with her depressive order, ADHD, alcohol and Opioid use. Respondent-Mother self-reports that she "has so much going on", that she has depression and runs from or ignores her problems, copes with it by sleeping for days and not eating. She stopped attending classes at Coastal Horizons because she "thought they were a joke" and would have enrolled in substance abuse treatment if she thought it was important. Respondent-Mother completed her parenting classes and participated in 13 out of 38 drug screen requests with mixed negative and positive results for benzodiazepines and amphetamines. During a home visit, Respondent-Mother was unable to account for her missing medication and thought she may have taken extra. Respondent-Mother had multiple phone issues during the underlying matter. Her boyfriend pays for her phone and has taken it from her when she texted someone else. Respondent-Mother and her boyfriend have broken up a few times over the past year when she texts other people. To date, Respondent-Mother has not been consistent with any treatment, is not compliant with her case plan and re-engaged in some services at lunch time on the first day of this hearing.
>
> . . . .
>
> 15. . . . Respondent-Mother was late to visits in November 2017 and December 2017 and did not notify anyone when she did not attend visits in August 2017, September 2017, January 2018, and March 2018. When visits with Respondent-Mother occurred, she would bring snacks and gifts for the children and interact appropriately with the children.

The trial court found grounds of neglect and willful failure to make reasonable progress existed to terminate Respondent-mother's parental rights. The trial court concluded Carrie and Anne's best interests required termination of Respondent-mother's parental rights in an order entered 3 July 2018. Respondent-mother timely appealed.

When initially reviewed on appeal, this Court unanimously held the evidence presented and the trial court's findings were insufficient to support the conclusion that Respondent-mother's "neglect is ongoing, and there is a probability of repetition of neglect." We further concluded DSS' evidence failed to show Respondent-mother had failed to make reasonable progress to support the conclusion to terminate her parental rights on this ground.

II. *In re B.O.A.*

In the case of *In re B.O.A.*, the Supreme Court of North Carolina held that the respondent-mother's parental rights were subject to termination on the ground that she had failed to make reasonable progress in correcting the conditions that led to her daughter's removal from her home pursuant to N.C. Gen. Stat. §7B-1111(a)(2). *In re B.O.A.*, 372 N.C. at 373, 831 S.E.2d at 306.

In that case, "Bev" had been removed from her mother's home after local law enforcement had responded to the respondent-mother's call for assistance due to assaultive behavior by Bev's father and a "lengthy bruise" was discovered on Bev's arm. *Id.* at 373, 831 S.E.2d at 307. After a hearing, Bev was adjudicated neglected and the respondent-mother was required to comply with a case plan. *Id.* at 374, 831 S.E.2d at 307.

The case plan included requirements that respondent-mother: "obtain a mental health assessment; complete domestic violence counseling and avoid situations involving domestic violence; complete a parenting class and utilize the skills learned in the class during visits with the child; remain drug-free; submit to random drug screenings; participate in weekly substance abuse group therapy meetings; continue to attend medication management sessions; refrain from engaging in criminal activity; and maintain stable income for at least three months." *Id.* at 373-74, 831 S.E.2d 307.

Eventually, DSS petitioned to terminate the respondent-mother's parental rights. In the termination order, the trial court made findings, which included that the respondent-mother had not demonstrated the skills she was to learn in her domestic violence class. The trial court found "[i]n the last six months, [respondent-mother] has called the police on her live-in boyfriend and father of her new born child," and that she had "not remained free of controlled substances, and has continued to test positive for controlled substances (even during her recent pregnancy)." *Id.* at 374-75, 831 S.E.2d 307. The trial court further found the respondent-mother had declined a visit with her child, was hostile towards her social worker, revoked her consent to allow DSS access to

her mental health records, and told the trial court that she “could pass the Bar today.” *Id.* at 375-76, 831 S.E.2d 308.

Here, the evidence and the findings support the conclusion that Respondent-mother made progress on her case plan. Respondent-mother’s progress is in contrast the respondent-mother’s behaviors and lack of progress in *In re B.O.A.* Further, our Supreme Court held in *In re B.O.A.* that this Court had adopted a restrictive construction of N.C. Gen. Stat. § 7B-1111(a)(2) in defining the conditions which led to a juvenile’s removal. *Id.* at 385, 831 S.E.2d at 314.

In the present case, the panel of this Court reviewing the trial court’s order properly reviewed the facts as found on the evidence presented and determined they were insufficient to support conclusions to satisfy the statutory definitions of neglect and failure to make reasonable progress to terminate Respondent-mother’s parental rights. This Court’s prior decision contained no “restricted” reading of the conditions which led to Carrie and Anne’s removal. *Id.* The background, analysis, and conclusions in *In re B.O.A.* are distinct from and not controlling of the present case.

III. *In re D.W.P.*

This Court was also directed to review and reconsider our holding in light of *In re D.W.P.*, ___ N.C. ___, ___ S.E.2d ___, 2020 WL 967615 (2020). In this recent case, our Supreme Court affirmed the trial court’s termination of a respondent-mother’s parental rights based upon her lack of reasonable progress to remedy the conditions that led to the removal of her children. ___ N.C. at ___, ___ S.E.2d at ___, 2020 WL 967615, at *1.

In *In re D.W.P.*, our Supreme Court recognized that the trial court’s order relied upon the following:

> past abuse and neglect; failure to provide a credible explanation for [the child’s] injuries; respondent-mother’s discontinuance of therapy; respondent-mother’s failure to complete a psychiatric evaluation; respondent-mother’s violation of the conditions of her probation; the home environment of domestic violence; respondent-mother’s concealment of her marriage from GCDHHS; and respondent-mother’s refusal to provide an explanation for or accept responsibility for [the child’s] injuries.

___ N.C.at ___, ___ S.E.2d at ___, 2020 WL 967615, at *8.

The Supreme Court also recognized the respondent-mother had made some progress in completing her plan, but indicated the findings showed she had been "unable to recognize and break patterns of abuse that put her children at risk." *Id.* The Court stated it was "troubled by [the respondent-mother's] continued failure to acknowledge the likely cause of [the child's] injuries." *Id.*

The facts of the present case are inapposite to those of *In re D.W.P.* Nothing indicates Respondent-mother has continued to place her children at risk or failed to acknowledge her neglect was the cause of the initial injury to Carrie and the instance of lack of supervision of Anne. Respondent-mother stipulated to the allegations that Carrie and Anne were neglected, in that they did not receive proper care, supervision, or discipline, and lived in an environment injurious to their welfare, in the juvenile petition at adjudication.

In the order remanding this case for further consideration, our Supreme Court cited *In re D.W.P.*, and noted "the need for a court to review all applicable evidence, including historical facts and evidence of changed conditions to evaluate the probability of future neglect." We conclude no evidence or findings show the "neglect is ongoing, and there is a probability of repetition of neglect," or Respondent-mother's failure to make "reasonable progress." We reaffirm the analysis and reasoning, as extended herein, and result reached in our earlier opinion to reverse and remand.

IV. Conclusion

Respondent-mother completed a parenting class, completed her substance abuse assessment, participated in individual therapy sessions to address her mental health, had re-engaged in treatment, was employed, submitted to drug testing, had established more reliable communications with DSS, had obtained stable housing and transportation to become a better parent, and showed reasonable progress to reduce or remove the likelihood of future neglect.

Respondent-mother's minor daughters were removed from her care after the youngest child had spilled Mr. Clean onto herself and Respondent-mother had immediately sought medical assistance. No evidence shows and the trial court made no finding indicating either Respondent-mother had denied responsibility or a probability that her actions were likely to be repeated. *See In re D.W.P.*, ___ N.C. at ___, ___ S.E.2d at ___, 2020 WL 967615, at *8; *In re B.O.A.*, 372 N.C. at 373, 831 S.E.2d at 306. The evidence and the trial court's findings support the opposite conclusion.

The trial court's order terminating Respondent-mother's parental rights is reversed and remanded to the trial court for disposition in accordance with the opinion and mandate of this Court filed 6 August 2019. *It is so ordered.*

REVERSED AND REMANDED.

Judges DILLON and BERGER concur.

IN THE MATTER OF THE ESTATE OF PAUL WILLIAM MALLIE WORLEY,
A/K/A PAUL WORLEY, DECEASED. BRENDA WORLEY MOSS, BARBARA WORLEY INGLE,
AND LESTER WORLEY, PETITIONERS

v.

PATRICIA SPROUSE, DARLENE WATERS, LAVONDA GRIFFIN, DANNY MATHIS,
AND JORDAN HAWKINS, RESPONDENTS

No. COA19-345

Filed 21 April 2020

1. Estates—jurisdiction—transfer to superior court—section 28A-2A-7(b)—validity of will

In an estate proceeding where decedent's siblings sought an order revoking probate of a holographic document submitted by decedent's long-time companion, the clerk of court properly dismissed the action for lack of jurisdiction pursuant to N.C.G.S. § 28A-2A-7(b)—therefore requiring the siblings to appeal to superior court—because the siblings' petition raised the issue of devisavit vel non (by arguing the submitted document was not decedent's will).

2. Estates—probate—holographic document—testamentary intent —issue of material fact

In an estate proceeding filed by decedent's siblings to revoke probate of a holographic document submitted by decedent's long-time companion titled "Last Will" and giving the companion "power of attorney" over all of decedent's possessions, the superior court erred by determining the document lacked testamentary intent as a matter of law where the document's language was sufficiently ambiguous to create a genuine issue of material fact regarding whether the document was meant to effectuate a transfer of property upon decedent's death and therefore constituted decedent's will.

Appeal by Respondents from order entered 5 December 2018 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 16 October 2019.

Long, Parker, Payne, Anderson & McClellan, P.A., by Ronald K. Payne and Thomas K. McClellan, for Petitioner-Appellee.

Frank G. Queen, PLLC, by Frank G. Queen, and Smathers & Smathers, by Patrick U. Smathers, for Respondent-Appellant.

DILLON, Judge.

This matter concerns the estate of Paul Worley, who died in 2017 unmarried and without lineal descendants. Respondent Patricia Sprouse ("Ms. Sprouse" or "Pat"), Mr. Worley's long-time companion, offered a certain document for probate which she contends is Mr. Worley's will and which leaves her his entire estate. She appeals the Superior Court's order concluding that this document "does not constitute a Last Will and Testament of [Mr. Worley]" and revoking the Certificate of Probate and Order Authorizing Issuance of Letters. After careful review, we vacate this order and remand for further proceedings.

I. Background

Mr. Worley died on 14 January 2017. He had no spouse or children but was survived by three of his four siblings.

Petitioners are Mr. Worley's three surviving siblings (the "Siblings"). Ms. Sprouse is Mr. Worley's alleged partner for the last thirty-six (36) years of Mr. Worley's life. The other Respondents are the descendants of Mr. Worley's sibling who predeceased him.

Following Mr. Worley's death, Ms. Sprouse offered a short document for probate, a document which purports to be in Mr. Worley's handwriting, which read:

> March 13, 2001
>
> Last Will of Paul Worley:
>
> I want Pat [Sprouse] to have the power of attorney of all that I own. That means land, cars, money, guns, clothing and anything else!
>
> I don't want Grace Price Worley to have none.

Signed March 13, 2001 9:00pm
Paul Worley

(This document is hereinafter referred to as the "Holographic Document.")[1]

The Clerk admitted the Holographic Document to probate. However, while the matter was pending before the Clerk, the Siblings filed a petition, commencing an estate proceeding, seeking an order revoking the probate of the Holographic Document. In their petition, the Siblings contended that the Holographic Document is not Mr. Worley's will. All interested parties were served in accordance with Rule 4 of our Rules of Civil Procedure. *See* N.C. Gen. Stat. § 28A-2-6(a) (2017).

After a hearing on the matter, the Clerk dismissed the Siblings' petition, concluding that she lacked subject-matter jurisdiction to determine whether the language in the Holographic Document exhibits testamentary intent. The Clerk's dismissal order was appealed to the Superior Court.

After a hearing on the matter, the Superior Court concluded that the Holographic Document was not Mr. Worley's will and directed the Clerk on remand to revoke probate of the Holographic Document.

Ms. Sprouse timely appealed that order to this Court.

II. Analysis

The Superior Court held, as a matter of law, that the Holographic Document was not Mr. Worley's last will because it "makes no testamentary disposition of [Mr. Worley's] property [but] merely appoints [Ms.] Sprouse as Power of Attorney," an appointment which lost all effect upon Mr. Worley's death.

This appeal raises a number of interesting issues. We address these issues in turn below.

A. Clerk's Jurisdiction vs. Superior Court's Jurisdiction

[1] The parties raise issues concerning the respective jurisdictions of the Clerk and of the Superior Court in considering the Siblings' petition to revoke probate. For the following reasons, we conclude that the Clerk properly determined that she lacked jurisdiction and that the matter was properly brought up before the Superior Court.

1. The phrase "Witness by Carolyn S. Surrett" in another's handwriting appears below Paul Worley's purported signature.

In some estate proceedings, there is no dispute as to the validity of the document offered to probate as being the will of the decedent. Rather, in those proceedings, the dispute concerns the interpretation of the will.

But in other estate proceedings, interested parties dispute the testamentary value of the document being offered for probate. In such cases, the matter must be transferred to Superior Court to resolve whether the document is, in fact, the will of the decedent. Specifically, our General Assembly directs that "[u]pon the filing of a caveat *or raising of an issue of devisavit vel non*, the clerk shall transfer the cause to the superior court, and the matter shall be heard as a caveat proceeding." N.C. Gen. Stat. § 28A-2A-7(b) (emphasis added).

"*Devisavit vel non*" is a Latin phrase meaning "he devises or not," *In re Estate of Pickelsimer*, 242 N.C. App. 582, 587, 776 S.E.2d 216, 219 (2015), and, when invoked, raises an issue "of whether or not the decedent made a will and, if so, whether [the document] before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987).

In this matter, the Siblings did not file a formal caveat with the Clerk. However, they did otherwise raise the issue of *devisavit vel non* in their petition, contending that the Holographic Document is not Mr. Worley's will. Therefore, since the Siblings raised the issue of *devisavit vel non* in their petition, the Clerk was correct in concluding that she lacked jurisdiction to decide the issue, and the matter was properly brought before the Superior Court.

B. Superior Court's Exercise of Jurisdiction in Deciding Testamentary Intent

[2] Having determined that the matter was properly before the Superior Court, we now address whether that Court properly determined, *as a matter of law*, that the Holographic Document should not be probated, without submitting any issue to a jury. As explained below, we conclude that there is an issue of material fact which the Superior Court should have submitted to a jury and that, therefore, the Superior Court erred in deciding the issue as a matter of law.

Our Supreme Court recognizes the authority of a superior court judge to decide the issue of *devisavit vel non*, without submitting the issue to a jury, when there is no material issue of fact raised:

> Where, as here, propounder fails to come forward with evidence from which a jury might find that there has been

> a testamentary disposition it is proper for the trial court under Rule 50 of the Rules of Civil Procedure to enter a directed verdict in favor of the caveators and adjudge, as a matter of law, that there can be no probate.

In re Will of Mucci, 287 N.C. 26, 36, 213 S.E.2d 207, 214 (1975).[2] Accordingly, we conclude that a judge of the Superior Court may determine that a document is not a decedent's will *as a matter of law* in the appropriate case.

In this case before us today, the Superior Court decided, as a matter of law, that the Holographic Document was not Mr. Worley's will, reasoning that the language Mr. Worley used fails to accomplish any testamentary purpose. Indeed, the Holographic Document merely appoints "Pat" as Mr. Worley's "power of attorney" over his property, a power which by law ceases when Mr. Worley dies. *See* N.C. Gen. Stat. § 32C-1-110(a)(1) (2017) (stating that "[a]power of attorney terminates when . . . [t]he principal dies.").

The Siblings contend that the Superior Court got it right (in which case they would stand to inherit as Mr. Worley's heirs at law), citing "[t]he most instructive case" on point as being *In re Seymour's Will*, 184 N.C. 418, 114 S.E. 626 (1922). *Seymour's Will* involved a document whereby the decedent appointed her husband as her power of attorney and contained language indicating that the decedent intended the document to be her last will and testament. *Id.* at 418, 114 S.E. at 626. We agree with the Siblings that *Seymour's Will* is highly instructive; however, we do not agree that *Seymour's Will* necessarily requires the result reached by the Superior Court.

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2. *See In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576 (2008) (suggesting that summary judgment on the issue of *devisavit vel non* is proper where there is no issue of material fact on the issue). *See also In re Will of McNeil*, 230 N.C. App. 241, 243, 749 S.E.2d 499, 501-02 (2013) (recognizing the propriety of summary judgment on the issue of *devisavit vel non*).

Some older cases from our Supreme Court held that the issue of *devisavit vel non had to be* decided by a jury and could *never be* decided by the judge as a matter of law. *See In re Ellis' Will*, 235 N.C. 27, 32, 69 S.E.2d 25, 28 (1952) (caveat proceeding "must proceed to judgment, and a motion for judgment as of nonsuit, or for a directed verdict, will not be allowed."). However, it was held in other older cases that a judge could determine the validity of a document as being a will, as a matter of law. *See In re Johnson's Will*, 181 N.C. 303, 306, 106 S.E. 841, 842 (1921) (holding that "[t]he refusal to submit an issue as to the [testamentary] intention of the deceased was not erroneous, as this intent must be gathered from the letter and the surrounding circumstances, and a finding of the jury contrary to the language used in the letter could not be sustained.").

The document offered for probate in *Seymour's Will* was signed by Mrs. Seymour and, like the Holographic Document here, contains language appointing someone as a "power of attorney," stating:

> This is to certify that I, [Mrs. Seymour] do this 26 July 1921, invest my husband, [ ], with full power of attorney over [all of my property] for the purpose of acting for me in all business matters[.]
>
> This also constitutes my last will.

Id. at 418, 114 S.E. at 626. The Superior Court determined as a matter of law that no part of the two-sentence document operated as a will, a determination which was affirmed by our Supreme Court. *Id.* at 421, 114 S.E. at 628.

Our Supreme Court held that the first sentence did not operate as a will. *Id.* at 420-21, 114 S.E. at 627. In reaching that conclusion, the Supreme Court was *not* so troubled by Mrs. Seymour's use of the words "power of attorney," recognizing that the words used by a testatrix need not be "technically appropriate" to be legally effective in creating a *testamentary* disposition of one's property:

> It is true that no particular form of words is necessary to express an intention to dispose a person's property after his death, *and the use of inartificial language will not be permitted to defeat an apparent intention expressed in an instrument* which [otherwise] complies with the formalities of law. . . . This [intention] may be manifested by an intention [that the power granted or disposition made not] to take effect in any way until the testator's death.

Id. at 420, 114 S.E. at 627 (emphasis added). Rather, our Supreme Court so held because the words used by Mrs. Seymour clearly evinced an intent that the power granted would take effect immediately, during her lifetime:

> One of the essential elements of a will is a disposition of property *to take effect after the testator's death*. . . .
>
> [However,] a written instrument to be a will must make some positive disposition of the testator's property [or make an appointment of an executor or guardian of the testator's minor children], and if it fails to do this, it is not a will and testament. . . .
>
> If under the instrument any interest vests, or if such interest fails to vest merely because of lack of delivery of the

> instrument, then it is not a will. In other words, if any interest either vests or is capable of vesting prior to the death of the maker, the instrument is not a will.

Id. at 419-20, 114 S.E. at 627.

Our Supreme Court further reasoned that the second sentence – "This also constitutes my last will" – likewise was not effective in creating a valid will, notwithstanding that Mrs. Seymour may have so intended. *Id.* at 420-21, 114 S.E. at 627-28. The Court reasoned that the word "This" could, at best, refer back to the first sentence, but that, a document titled a "will" of a maker, which only makes dispositions taking effect before the maker's death, does not create a will:

> The clause "This also constitutes my last will" does not operate as a disposition of the maker's property to take effect after her death, because the word "this" refers to the instrument in controversy, which is merely a power of attorney relating to the management of her property *in her lifetime*. Probably Mrs. Seymour intended to make a will and thought she had accomplished her purpose; but a will cannot be established by merely showing an intent to make one. Nor can this conclusion in any wise be affected by evidence offered to show that the alleged testatrix said "she wanted Fred to have what she had," and treated the instrument as her will. . . .
>
> It is a settled principle that the construction of a will must be derived from the words in it, and not from extrinsic averment."

Id. at 421, 114 S.E. at 627-28 (emphasis added) (internal quotation marks omitted).

Ultimately, our Supreme Court concluded that there was no need to submit to a jury whether Mrs. Seymour *intended* the document as a will: even if a jury so determined, such determination would be meaningless to the case, as the language used was unambiguous in granting the power to her husband during her lifetime. *See id.* at 421, 114 S.E. at 627-28 (noting that "[p]robably Mrs. Seymour intended to make a will and thought she had accomplished her purpose; but a will cannot be established by merely showing an intent to make one.").

In the present case, we conclude that a jury *could* reasonably infer from the language that Mr. Worley intended the document to be his will. For instance, the Holographic Document is titled "Last Will of Paul

Worley." We further conclude that, unlike in *Seymour's Will*, it would not be a waste of time to submit the issue to a jury, as the language in the Holographic Document is sufficiently ambiguous to allow a construction to effectuate a testamentary transfer of property.

If the jury determines that Mr. Worley drafted the document with *animo testandi*, that is, with testamentary intent, *see In re Will of Mucci*, 287 N.C. at 30, 213 S.E.2d at 210, then it could reasonably be construed *from the language used in the Holographic Document* and perhaps from other competent evidence presented that Mr. Worley intended to grant "Pat" with some power over his property to take effect only after he died. *See Institute v. Norwood*, 45 N.C. 65, 69 (1852) (internal quotation marks omitted) (explaining that a court, "under the maxim *ut res majis valeat quam pereat* will try to give" meaning to every clause in a will). For instance, the language could be construed an expression of intent to grant Pat with a power of appointment over his property at his death, pursuant to Chapter 31D of our General Statutes. *See* N.C. Gen. Stat. § 31D-2-201 cmt. (2017) (recognizing the appropriateness of conferring a power of appointment over one's property in a will). Indeed, one could reasonably construe from the language employed by Mr. Worley, presumably a non-lawyer, that he wanted Pat to have absolute discretion to dispose of his estate in any way she saw fit, so long as she did not give any of his estate to "Grace Price Worley."[3] Alternatively, it might be reasonable to construe the language as an expression of intent to grant Pat with the power of an executrix over his estate. Or, it could be determined that the language could be subject to reformation pursuant to N.C. Gen. Stat. § 31-61 (2017) to change to language altogether to conform the language to Mr. Worley's true intent.[4] (We do not express any opinion regarding any of these or other possible interpretations. We simply express that there are ways to construe the Holographic Document to give it testamentary meaning and effect, should a jury determine the Document to be a will.)

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3. Of course, it could be reasonably construed that Mr. Worley did not intend to limit Pat's authority in the sentence regarding Grace, but that he was merely expressing a nonbinding desire to Pat that Pat not give any of the estate to Grace.

4. It has long been the law of this State that a "patent" ambiguity could not be explained by evidence outside the language of the will, and if there is no way to give language that is "patently" ambiguous any meaning, then the language must be ignored. *See Institute*, 45 N.C. at 68 (explaining the difference between patent and latent ambiguities). However, with the adoption of N.C. Gen. Stat. § 31-61 by our General Assembly, courts may consider any clear and convincing evidence to decipher language that is even patently ambiguous, so long as the language is determined to be ambiguous in the first instance. That is, Section 31-61 does not empower a court to reform unambiguous provisions in a will.

III. Conclusion

We, therefore, reverse the Superior Court's order directing that probate be revoked, and we remand the matter for further proceedings. There is an issue of fact as to whether Mr. Worley intended the Holographic Document to be his will and, otherwise, whether the Document meets the other statutory requirements of a holographic will. The issues of *devisavit vel non* are for a jury to decide, not the Superior Court as a matter of law at this point.

Should it be determined that the Holographic Document is not Mr. Worley's valid will, then the Superior Court shall direct the Clerk to revoke probate. However, should it be determined that the Holographic Document does meet the statutory requirements of a holographic will (assuming those requirements are put at issue) and that the document was executed with testamentary intent and is otherwise valid, this estate proceeding shall continue, including the resolution as to the construction that is to be given to the language contained in the Holographic Document.

REVERSED AND REMANDED.

Judges STROUD and BERGER concur.

CHRISTI SEAL KLEOUDIS, Plaintiff
v.
DEMETRIOS BASIL KLEOUDIS, Defendant

No. COA19-145

Filed 21 April 2020

1. Child Custody and Support—support order—section 50-13.4(c)—findings

In a non-guideline child support matter, the trial court did not abuse its discretion where it made sufficient findings pursuant to N.C.G.S. § 50-13.4(c) (which the father did not challenge as being unsupported by evidence) indicating it gave "due regard" to the parties' (approximately equal) estates, earnings, conditions, and accustomed standard of living, despite not using some of the statutory language. The court was not required to make detailed findings about each individual asset and liability of the parties, and the court's findings were supported by evidence in the form of testimony and the parties' financial affidavits.

2. Child Custody and Support—support order—expenses for child—trial court's determination

In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the child's expenses where it explained its methodology, its findings were supported by evidence, and it took into account expenses attributed to the child on the father's financial affidavit. Some of the father's arguments would have actually led to a higher child support obligation than what was calculated.

3. Child Custody and Support—support order—father's expenses—determination based on affidavit

In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the father's expenses, despite the father's argument that a portion of his household expenses should have been attributed to the child, because the trial court's determination on the father's ability to pay was based on all the expenses listed in the father's financial affidavit, and any reduction in the father's expenses could actually increase the amount he would be required to pay.

4. Child Custody and Support—support order—custodial schedule—findings

The trial court's findings in a child support order regarding the child's custodial schedule gave appropriate consideration to the amount of custodial time granted to the father in the permanent custody order.

5. Child Custody and Support—support order—arrears—miscalculation—de minimis

In a non-guideline child support matter, the trial court's miscalculation of one month's child support arrears owed by the father did not merit reversal where the de minimis error amounted to less than two percent of the father's total arrears.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from order entered 21 September 2018 by Judge Michael J. Denning in District Court, Wake County. Heard in the Court of Appeals 20 August 2019.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellee.

Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for defendant-appellant.

STROUD, Judge.

Defendant-father appeals the trial court's permanent child support order. Because the trial court made sufficient findings of fact to support its determination of defendant-father's child support obligation, we affirm.

I. Background

On 7 July 2016, plaintiff-mother filed a verified amended complaint against defendant-father for equitable distribution, permanent child support, and absolute divorce. The parties have two children, one of whom reached the age of majority before the custody claim was filed, and a son, Neal, who was born in 2004.[1] On 8 August 2016, Father filed an amended answer to the amended complaint and counterclaimed for custody and equitable distribution. On 16 September 2016, a judgment of divorce was entered, and, on 24 October 2016, the trial court entered an interim distribution order. On 25 October 2016, the trial court entered a temporary child custody order granting the parties joint legal custody. The temporary custody order provided that Neal would reside primarily with Mother during the school year and set out a detailed schedule for physical custody for weekends, summers, and holidays. On 9 November 2017, the trial court entered an Order Appointing Parenting Coordinator based upon its finding that this "action is a high-conflict case" and the appointment of a parenting coordinator would be in the child's best interest. The order specifically authorized the parenting coordinator to "adjust Defendant's visitation (both the regular schedule and the holiday/special time schedule) to accommodate Defendant's flight schedule,"[2] which would be set out in more detail in the permanent custody order.

On 23 October 2017, the trial court heard the parties' claims for permanent child custody and child support. On 19 January 2018, the trial court entered a Memorandum of Judgment/Order setting out "custodial provisions to be followed by the parties until such time as entry of a permanent custody order" and noting that the terms were "rendered to the parties at the close of the evidence at their trial on permanent custody." This custodial schedule gave Mother primary physical custody and Father eight overnights per calendar month, to be exercised

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1. We have used a pseudonym to protect the identity of the minor child.

2. Father is a commercial airline pilot.

based upon Father's availability due to his work schedule. Father was required to provide a copy of his work schedule and overnight visitation dates each month to Mother and the parenting coordinator. On 29 May 2018, the trial court entered the permanent custody order, which set out essentially the same custodial schedule as in the Memorandum. On 21 September 2018, a permanent child support order was entered. Defendant appeals only the child support order.

II. Standard of Review

The trial court found the parties' combined monthly adjusted gross income was more than $25,000 so the trial court did not use the Child Support Guidelines to calculate Father's child support obligation. Where the parties' incomes are above the Guidelines, the trial court must set child support "in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4 (2017).

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Where the child support guidelines do not apply, the trial court must determine "child support on a case-by-case basis" and "the order must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 610, 596 S.E.2d 285, 291 (2004) (citations and quotation marks omitted).

> In determining the relative ability of the parties to pay child support, the trial court must hear evidence and make findings of fact on the parents' incomes, estates and present reasonable expenses. Although the trial court is granted considerable discretion in its consideration of the factors contained in N.C. Gen. Stat. § 50–13.4(c), the trial court's finding in this regard must be supported by competent evidence in the record and be specific enough to enable this Court to make a determination that the trial court took due regard of the particular estates, earnings, conditions, and accustomed standard of living" of both the child and the parents.

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

III. Findings of Fact on Estates, Conditions, and Accustomed Standard of Living

[1] Father first challenges several findings of fact and conclusions of law particularly "as to the estates, conditions, [and] accustomed standard of living of the child and the parties[,]" (original in all caps), but rather than challenging these findings of fact as unsupported by the evidence, he argues the trial court should have made different findings based upon the evidence or failed to make additional necessary findings of fact. However, "[u]nchallenged findings of fact are binding on appeal." *See Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). The binding findings first note that the parties entered into a Separation Agreement and Property Settlement, which is part of the record, resolving all claims of child support up to 30 November 2016. As to specific findings of income and expenses, the trial court found:

> 10. Plaintiff is employed full-time as a statistician with Parexel. Plaintiff's current gross income from employment is $15,781 per month. After mandatory deductions (federal & state taxes, Social Security, Medicare) of $5,818 per month and voluntary deductions (health, dental & vision insurance, life insurance, disability insurance, medical spending account, and retirement) of $2,018 per month, Plaintiff's net after-tax income from employment is $8,035 per month.
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> 11. In prior years, Plaintiff has received a bonus from Parexel that was tied to company performance, but Plaintiff received notification prior to the date of trial that no bonus will be paid in 2017.
>
> 12. Plaintiff received a substantial bonus in 2016 that resulted from work she had performed at GlaxoSmithKline some years prior to the date of separation. This bonus of $156,000 was divided equally between the parties in their equitable distribution settlement and is not considered by the Court as part of Plaintiff's income for purposes of calculating prospective child support.
>
> 13. Defendant is employed full-time as a commercial airline pilot with American Airlines. Defendant's current gross income from employment is $28,917 per month. After mandatory deductions (federal & state taxes, Social Security, Medicare, APA union dues) of $10,973 per month and voluntary deductions (health & dental insurance, life

insurance, retirement) of $2,215 per month, Defendant's net after-tax income from employment is $15,729 per month.

14. Both parties report approximately the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally between the parties as part of their property settlement. Neither party actually takes distributions or withdrawals from these investments, however, and the Court does not find that either party is required to deplete his/her assets to pay child support for the benefit of the minor child as set forth below.

15. The parties' combined gross income exceeds $300,000 per year, so that the parties are "off the Guidelines" for purposes of calculating their respective support obligations for the benefit of the minor child.

16. Plaintiff incurs reasonable and necessary monthly expenses for herself in the amount of $4,107 per month, calculated as follows:

> a. $2,885, or 50% of the Household Expenses from Plaintiff's September 2017 Financial Affidavit (excluding 100% of "Furniture & Household Furnishings" and 100% of "Legal Fees / Divorce Expenses"); plus
>
> b. $1,222, or 100% of the "Part 2: Individual Expenses" for self from Plaintiff's September 2017 Financial Affidavit.

. . . .

19. Defendant earns 65% and Plaintiff earns 35% of the parties' total gross income of $44,698 per month. It is reasonable and appropriate for each party to pay a pro rata share of the child's reasonable and necessary monthly expenses in accordance with his/her pro rata share of their comparative gross income.

20. Defendant's net ability to pay child support for the benefit of the child is $5,916 per month (i.e., $15,729 net income- $9,813 expenses). Defendant has the ability to pay his 65% share of the child's reasonable and necessary monthly expenses of $2,517 per month (i.e., $3,873 x 65%).

> 21. Plaintiff's net ability to pay child support for the benefit of the child is $3,928 per month (i.e., $8,035 net income - $4,107 for "self" expenses). Plaintiff has the ability to pay her 35% share. of the child's reasonable and necessary monthly, expenses of $1,356 per month (i.e., $3,873 x35%).

We will first address Father's argument as to the trial court's findings regarding the parties' estates.

A. Estates

Father first contends the trial court failed to make sufficient findings of fact regarding the parties' "estates:"

> [t]here are no findings made by the Trial Court concerning the value of the parties' assets, including any separate assets that they may own that would not have been included in the marital assets that were distributed between them. No findings were made regarding the value of each parties' investment accounts, bank accounts, real estate retirement accounts or other assets owned by them, all of which would bear on the relative ability of the parties to pay support and the accustomed standard of living of the minor child and the parties.
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> It is not enough that there may be evidence in the record sufficient to support findings which could have been made.

Thus, Father acknowledges that substantial evidence was presented regarding the estates of the parties but contends the findings of fact were not sufficient because the trial court did not make detailed findings as to the values of various assets and accounts.

North Carolina General Statute § 50-13.4(c) sets the standard for child support in cases not covered by the North Carolina Child Support Guidelines:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2017).

The trial court noted its consideration of the estates of the parties and found that neither party would have to deplete his or her estate to support the child. Giving "due regard" to the estates of the parties does not require detailed findings as to the value of each individual asset but requires only that the trial court consider the evidence and make sufficient findings addressing its determination regarding the estates to allow appellate review. The trial court made several findings of fact regarding the parties' estates, and Father does *not* challenge those findings as unsupported by the evidence.

> 11. In prior years, Plaintiff has received a bonus from Parexel that was tied to company performance, but Plaintiff received notification prior to the date of trial that no bonus will be paid in 2017.
>
> 12. Plaintiff received a substantial bonus in 2016 that resulted from work she had performed at GlaxoSmithKline some years prior to the date of separation. This bonus of $156,000 was divided equally between the parties in their equitable distribution settlement and is not considered by the Court as part of Plaintiff's income for purposes of calculating prospective child support.
>
> . . . .
>
> 14. Both parties report approximately the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally between the parties as part of their property settlement. Neither party actually takes distributions or withdrawals from these investments, however, and the Court does not find that either party is required to deplete his/her assets to pay child support for the benefit of the minor child as set forth below.

Before the trial court, Father's argument regarding the parties' estates acknowledged that the parties' estates were approximately equal. Father argued that because of how their property was divided in equitable distribution, Mother received "liquid assets" and he got "non-liquid assets."[3] Because Mother got "liquid assets[,]" Father argued "she

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3. In setting child support, the trial court factored in only Father's income from employment; Father reported income of $2,460.67 monthly as investment income, in addition to his wages from American Airlines, but the trial court used only his wages to determine his ability to pay support.

can use that money to help pay for [the child's] expenses." Father contends the trial court was required to make detailed findings of the values of each of the parties' investments and assets, although he does not explain what difference these findings would make in the child support calculation. But the law does not require these findings. *See generally Kelly v. Kelly*, 228 N.C. App. 600, 607–08, 747 S.E.2d 268, 276 (2013). North Carolina General Statute § 50-13.4(c) requires the trial court to have "due regard" to the factors listed; it does not require detailed evidentiary findings on the parties' assets and liabilities. *See id.*

Father's argument overlooks the importance of the ultimate findings of fact the trial court made. The trial court need not make specific findings of each subsidiary fact supporting its ultimate finding.

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.
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> . . . .
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> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
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> In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.
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> . . . .

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment-and the legal conclusions which underlie it-represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Quick v. Quick, 305 N.C. 446, 451–52, 290 S.E.2d 653, 657–58 (1982) (citations, quotation marks, and ellipses omitted).

Defendant faults the trial court's order for its brevity, stating:

> In the present case, the Court has entered a bare bones three (3) page order, with insufficient evidence to support the findings of fact and conclusions of law, to support its denial of Mr. Kelly's Motion to Modify Alimony. The Court, after hearing three days of testimony involving valuable assets, the finances of a law firm, staggering debt and reviewing extensive financial records made a mere eighteen findings of fact, only twelve of which related to the evidence offered at trial.

But brevity is not necessarily a bad thing; Cicero said that Brevity is the best recommendation of speech, not only in that of a senator, but too in that of an orator, or, we might add, in many instances, a judge. The trial court found the ultimate facts which were raised by the defendant's motion to modify, and where the evidence supports these findings, that is sufficient. The court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment.

Id. at 607–08, 747 S.E.2d at 276 (citations, quotation marks, and brackets omitted).

As in *Kelly*, the trial court's brevity is not a bad thing. *See id.* at 608, 747 S.E.2d at 276. The trial court made two findings of fact which adequately address the estates of the parties: First, the trial court in

finding 12 addressed the bonus of $156,000 received by Mother, which was divided equally between the parties; the trial court did not abuse its discretion in determining that it would not consider this portion of the estates of the parties in its child support determination. *See generally Hinshaw v. Kuntz*, 234 N.C. App. 502, 505, 760 S.E.2d 296, 299 (2014) (noting that our standard of review in child support cases is abuse of discretion). As to the other evidence regarding the parties' estates, the trial court made Finding of Fact 14, noting that both parties' estates were approximately the same, neither party was taking distributions from their investments, and neither would be required to deplete his or her assets to support the child.

Father also relies on *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014), in making his first argument, but this reliance is misplaced. In *Loosvelt*, the trial court made *no* finding of fact as to the father's income or estate:

> There is no finding of fact as to plaintiff's actual income, only that it is "substantial." We can infer that "substantial" here means more than $24,409.66 but we cannot, determine what the trial court found plaintiff's income to be. Furthermore, the trial court found that although plaintiff claims to earn $24,409.66 on average per month, he actually spends an average of $88,617.80 per month. Here, the trial court clearly assumed that the plaintiff's income is quite significantly more than $25,000 per month, but we have no way of knowing what number the trial court had in mind.

Id. at 103, 760 S.E.2d at 360 (brackets and footnote omitted). The trial court in *Loosvelt* also failed to make findings as to the father's estate, other than in the context of his expenses:

> In addition, even though the trial court's order contained some findings as to the estates, N.C. Gen. Stat. § 50–13.4(c), of the parties, particularly plaintiff, it did not make any findings which would permit consideration of plaintiff's estate as supporting his ability to pay child support; rather, the findings of fact addressed only the expenses plaintiff has incurred. For example, the trial court found that "Plaintiff/Father owns and pays for two (2) luxury residences in Los Angeles, California at a cost of approximately $12,000.00 per month." Having a large house payment does not necessarily equate to having a substantial estate; it can mean just the opposite. The trial

> court did not find the value of these "luxury residences," whether plaintiff's indebtedness on these residences equals or exceeds their values, or any other facts regarding the net value of plaintiff's estate.

Id. at 104, 760 S.E.2d at 361 (brackets omitted). The circumstances of this case bear no relevant resemblance to *Loosvelt* as the trial court made detailed findings regarding the parties' incomes and expenses and made an ultimate finding of fact regarding its consideration of the estates of the parties. *Contrast id.*, 235 N.C. App. 88, 760 S.E.2d 351.

In summary, the trial court properly considered the evidence and made sufficient findings of fact showing "due regard" to the estates of the parties. Further, the trial court did not abuse its discretion by determining that it would not base the child support calculation on the estates of the parties because they were essentially equal and neither party would be required to deplete his or her accounts and properties to support the child. *See generally Hinshaw*, 234 N.C. App. at 505, 760 S.E.2d at 299 ("In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." (citation and quotation marks omitted)).

B. Conditions and Accustomed Standard of Living

Father also argues "[t]he trial court failed to make any findings or conclusions regarding the accustomed standard of living of the minor child or the parties" and compares his case to *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014). *Zurosky* involved an appeal from an extensive order addressing an extraordinarily complex case with claims of equitable distribution, alimony, and child support. *See id.* Father argues, "[u]nlike the extensive findings of fact made by the Trial Court in *Zurosky v. Shaffer*, *supra*, the Trial Court in this matter made no findings regarding the child's 'health, activities, educational needs, travel needs, entertainment, work schedules, living arrangements, and other household expenses.' " In *Zurosky*, the "extensive findings of fact" were necessary to address the specific issues and arguments raised by the parties in that case, but there is no requirement that every non-guideline child support order include such extensive detail; all that is required is that the findings of fact address the factors noted by North Carolina General Statute § 50-13.4 to the extent evidence is offered on each factor, particularly those factors in dispute. *See generally* N.C. Gen. Stat. § 50-13.4 (2017).

Mother notes that as to the child "[t]here was no evidence presented at trial by either party regarding the estate or earnings of the minor child, but the child's accustomed standard of living was reflected in the expenses incurred by each party for the benefit of the child, as set out in each party's financial affidavit." "The affidavits were competent evidence in which the trial court was allowed to rely on in determining the cost of raising the parties' children." *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007). Before the trial court, Father did not make an argument regarding any dispute about the child's standard of living; there was no claim of excessive spending or of failure to provide for the child by either party. Findings 17 and 18 address the needs of the minor child based upon the financial affidavits and testimony, and the trial court noted the specific items it excluded from the expenses it determined to be reasonable. Based upon the evidence and record, the trial court's findings demonstrate that it took "due regard" of the conditions and accustomed standard of living of the child and parents. *See Cohen v. Cohen*, 100 N.C. App. 334, 339-40, 396 S.E.2d 344, 347–48 (1990) ("In a child support matter, the trial judge must make written findings of fact that demonstrate he gave due regard to the estates, earnings and conditions of each party. G.S. § 50–13.4(c). . . . Defendant argues that the trial court's refusal to specify the value of plaintiff's estate was error. We disagree. A trial judge must make conclusions of law based on factual findings specific enough to show the appellate courts that the judge took due regard of the parties' estates. The findings referred to above demonstrate the requisite specificity required of a trial judge in a matter such as this despite his understandable reluctance to place an exact dollar figure on plaintiff's estate. Defendant's assignment of error is overruled." (citations, quotation marks, ellipses, and brackets omitted)).

There is no requirement the trial court's findings use "magic words" such as "estates" or "accustomed standard of living" where the findings demonstrate that it did consider the evidence as to these factors in setting the child support obligation. *See generally id.* Father has demonstrated no abuse of discretion in the trial court's consideration of the conditions or accustomed standard of living of the parties or child. *See generally Hinshaw*, 234 N.C. App. at 505, 760 S.E.2d at 299.

IV. Expenses for Child

[2] Father's next argument contends the trial court erred by failing to consider expenses he incurred for the minor child during his secondary

custodial time.[4] Specifically, Father argues that the trial court erred by not including as part of the child's total monthly individual expenses amounts he claimed for the child on his financial affidavit, in addition to the expenses incurred by Mother. Father argues that since the trial court set child support based upon the *pro rata* responsibility of each party for the child's expenses based upon their incomes, all of the child's individual expenses should have been included, whether incurred by him or by Mother. Specifically, he addresses findings of facts 17 and 18:

> 17. Plaintiff incurs reasonable and necessary monthly expenses for the benefit of the minor child of $3,873 per month, calculated as follows:
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> a. $2,885, or 50% of the Household Expenses from Plaintiff's September 2017 Financial Affidavit (excluding 100% of "Furniture & Household Furnishings" and 100% of "Legal Fees / Divorce Expenses"); plus $988, or 100% of the "Part 2: Individual Expenses" for the minor child from Plaintiff's September 2017 Financial Affidavit.
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> 18. Defendant incurs reasonable and necessary monthly expenses for himself in the amount of $9,813 per month, calculated as follows:
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> a. $6,578, or 100% of the Household Expenses from Defendant's September 19, 2017 Amended Financial Affidavit; plus
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> b. $3,235, or 100% of the "Part 2: Individual Expenses" for self from Defendants September 19, 2017 Financial Affidavit (excluding $3,000 of the $3,974 listed for "Professional Fees," which the Court estimates to be primarily related to this litigation and not an ongoing expense;

4. Father's cited cases simply do not apply here. *See generally Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), *superseded by statute as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991). *Jones*, relying on *Goodson* does not address *establishment* of a child support obligation but instead arise in the context of contempt proceedings, where the payor has requested "credit" against court-ordered child support for expenses of the children paid during visitation time. *See Jones*, 52 N.C. App. 104, 278 S.E.2d 260. And *Jones* and *Goodson* now have limited relevance even in the context of contempt proceedings, since they "were decided before N.C.G.S. § 50–13.10 became effective on 1 October 1987. Under this statute, if the supporting party is not disabled or incapacitated as provided by subsection (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. N.C.G.S. § 50–13.10(a)(1) (1987)." *Craig v. Craig*, 103 N.C. App. at 619, 406 S.E.2d at 658 (citation, quotation marks, ellipses, and brackets omitted).

and also excluding the $2,000 listed for "Retirement & Investment" that already was accounted for as a voluntary deduction from Defendant's gross income).

Father has not demonstrated any abuse of discretion in the trial court's calculations. Father's total fixed household expenses would be the same, whether a portion is attributed to the child or not, and in determining his ability to pay child support, the trial court gave Father credit for 100% of his expenses for both of his residences as stated on his affidavit.[5] Furthermore, some of the "individual expenses" attributed to the child on Father's affidavit *were* included in the trial court's calculation. For example, Father's affidavit included the portions of dental, vision and life insurance premiums as attributed to the child and the trial court actually included the *total* deduction for these premiums, including portions for the child, from Father's gross income. Based upon Father's argument his child support obligation could actually be *higher* than the trial court ordered.

Father's trial testimony addressed the two largest individual expenses he incurred for the child. Father's affidavit included an expense of $505 per month for "[w]ork related child care expense[.]" But Father testified he did not actually incur work-related child care expenses. Father testified the $505 on his affidavit was based upon "the Preston Wood Country Club, the fees, and [the child's] camps," and Mother had "asked [him] to do that" but he did not use any child care when the child was with him in the summer.[6] Under these circumstances, where Father testified he did not use work-related day care and the permanent custody order awarded Father an average of eight overnights per month of visitation, the trial court did not abuse its discretion in excluding Father's alleged work-related child care expense from its child support calculations.[7] Father's affidavit also listed an uninsured dental and

5. In his testimony, Father corrected a few numbers on the affidavit, but those corrections are not relevant to the issues on appeal. Father corrected the amounts of Medicare taxes, life insurance premiums (which had been included in two places), and the amount of union dues. Father also testified that his household expenses were for two homes, as he had a home in Cary and a home in Wilmington.

6. Father also received the Preston Wood Country Club membership under the parties' Separation Agreement.

7. Father's visitation schedule was based upon his work schedule, so he would not be working when the child is with him. Father argues that his visitation time will likely increase, as the permanent custody order appointed a parenting coordinator and stated an "ultimate goal" of Defendant having 40% of the overnights each month[.]" But on appeal, this Court can consider only the circumstances existing based upon the orders currently in effect, not the possibility of a different schedule in the future.

orthodontic expense for the child of $650 per month, but he testified this number was based upon a periodontal surgery which cost $7,785 in 2017, not an ongoing expense.

After omitting the expenses for the country club dues and orthodontic care, Father would be left with $827.55 per month in individual child expenses he contends the trial court should have included in its calculation. Using these numbers and based upon Father's argument on appeal, the child's total monthly individual expenses would have been $4700.55, and father's 65% share of these expenses would be $3,055.00 – resulting in a *higher* child support obligation than the trial court ordered. Had the trial court also included Father's income from investments, his share of the total income would have been higher also and thus the monthly child support obligation would be even higher.

Father makes additional arguments, all without citation of authority and without challenging any findings as unsupported by the evidence, regarding the particular expenses included in the calculation of the child's expenses. But Father's arguments demonstrate no abuse of discretion by the trial court. The trial court could have calculated child support differently, resulting in either a higher or lower amount, but there is no abuse of discretion.[8] The trial court's findings clearly demonstrate how the child support was calculated and the findings are supported by the evidence.

V. Finding of Father's Expenses

[3] Father also argues the trial court erred by finding his reasonable and necessary monthly expenses as $9,813.00 per month. Father does not challenge the finding as unsupported by the evidence but again argues that the trial court should have attributed a portion of his household expenses to the child, based upon the expenses he incurs when the child his with him. Father contends that the trial court should be required "to determine a reasonable percentage" of his "Part One Household Expenses that are attributable to the minor child" based upon the

8. Before the trial court, Father's main argument regarding child support was that he should not have to pay *any*. Father testified, "I don't think I should pay anything in child support to Christi." Father made no argument regarding how the trial court should calculate child support; his counsel argued only that Mother is "able to support [the child] by herself[,]" and Father is "capable of supporting [the child] by -- when he's with him and continue to pay the Preston Wood Country Club Membership, can continue to provide -- or provide life insurance for [the child]. If your Honor is going to order some amount of child support, then we would ask you to consider the fact that she's got -- she's got money with which to help defray those costs[,]" referring to assets Mother received under the Property Settlement Agreement.

amount of time he spends with Father. Father claims "[t]his would result in a reduction in the amount of Household Expenses that the Trial Court has found are [his] expenses, and a finding that the minor child's reasonable needs include a portion of those Household Expenses which [he] incurs for the minor child." Father's argument ignores that the trial court found his ability to pay child support based upon all of his expenses based upon his affidavit. A reduction of his individual expenses would increase his ability to pay; it would also increase the child's individual expenses. It is entirely unclear that such a change would decrease his child support obligation; it may even increase it. In any event, he has shown no abuse of discretion in the trial court's findings of his expenses or allocation of those expenses to him.

VI. Finding as to "Worksheet A" Primary Custodial Schedule

[4] Father also argues the trial court's findings that the child would reside primarily with Mother on a "Worksheet A" schedule "are inconsistent with the evidence presented to the Trial Court" and the amounts of time awarded in the Temporary Child Custody Order, Memorandum of Order, and Permanent Child Custody Order. Father's argument challenges findings of fact 8 and 9:

> 8. The child has resided primarily with Plaintiff on a "Worksheet A" schedule since November 30, 2016.
>
> 9. A Permanent Child Custody Order ("Custody Order") has been entered. Pursuant to that Custody Order, Plaintiff will continue to exercise "Worksheet A" primary custody of the minor child.

To be clear, Father does not contend the trial court used Worksheet A of the child support guidelines to calculate child support. There is no dispute the parties' combined incomes fall above the child support guidelines. The trial court used the term "Worksheet A" simply as a shorthand way to describe the custodial schedule.[9] Nor does Father challenge these findings are unsupported by the evidence. Father argues instead that the trial court failed "to give 'due regard' to the significant custodial time" he was awarded in the custody order.

The Permanent Custody Order provides the child "shall reside primarily with Plaintiff. The minor child shall be with Defendant for eight (8) overnights per calendar month[.]" The custody order addresses details

9. Under Worksheet A, the parent with secondary custody or visitation has the child fewer than 123 overnights per year. Eight overnights per month equals 96 overnights per year.

of the schedule. Since Father is an airline pilot with a complex work schedule and the conflict between the parties required appointment of a Parenting Coordinator, the order provides for the Parenting Coordinator to assist the parties in the details of the visitation schedule.[10] Father is correct that the order states an "ultimate goal" of more visitation time, but the child support order is properly based upon the actual custodial schedule stated in the permanent custody order. Father's argument is without merit.

VII. Child Support Arrears

[5] Last, Father argues the trial court erred by basing his child support arrears based upon the same calculations as it did for determining his prospective child support obligation.[11] Father was ordered to pay $52,659 in arrearages from 1 December 2016, to 30 September 2018. Father contends the trial court erred by failing to consider the parties' 2016 incomes in determining the child support arrearage, since the arrearages encompassed a portion of 2016.

Based upon Husband's argument, the only potential basis for any difference in the monthly child support calculation over this period is the parties' respective incomes. "Child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). Mother concedes that

> Even if Defendant's argument is correct – that the trial court should have calculated his arrears for 2016 based upon the parties' 2016 income – then only one month of arrears was calculated incorrectly by the trial court (i.e., for the month of December 2016), resulting in an overpayment by Defendant of $736 for that month. The remaining arrears, however, accrued during calendar year 2017 and continuing after the date of trial through the date of entry of the Permanent Child Support Order, so that the trial court properly calculated child support between the

10. As evidenced by the appointment of a Parenting Coordinator, this case has been a "high conflict" case as defined by North Carolina General Statute § 50-90. The permanent custody order includes many findings regarding Father's intense and openly expressed "anger about the separation to the minor child" and conflicts with both Mother and the child.

11. Father also contests the ultimate amount he was ordered to pay as prospective child support, but this argument is based on the issues already addressed.

> parties for that period using their respective gross incomes for calendar year 2017.

The rest of the child support arrears accrued after 2016, and Mother's income as of the date of trial as found by the trial court is supported by the evidence.[12]

A miscalculation of $736.00 for the month of December 2016 does not require reversal and remand to the trial court. $736.00 is less than 2% of the total arrears of $52,659.00. The parties would likely each incur more than $736.00 in attorney fees in a remand for the trial court to make this small change to the arrears ordered; this *de minimis* error does not warrant reversal. *See generally Cohoon v. Cooper*, 186 N.C. 26, 28, 118 S.E. 834, 835 (1923) ("Even if the difference of 95 cents (as to award of $663.96) if award if had been against the defendant, the time of the court, both below and here, costs too much to the public to debate that matter, *De minimis non curat lex.*"); *see also Comstock v. Comstock*, 240 N.C. App. 304, 313, 771 S.E.2d 602, 609 (2015) ("The $1,675.05 value is 0.6% of the adjusted value of the marital estate, which constitutes a *de minimis* error. As such, the trial court's erroneous calculation does not warrant reversal.").

VIII. Conclusion

The trial court's findings of fact and conclusions of law demonstrate "due regard" to the factors required by North Carolina General Statute § 50-13.4(c), and the trial court did not abuse its discretion in the calculation of the child support obligation. We therefore affirm the order.

AFFIRMED.

Chief Judge McGEE concurs.

Judge MURPHY concurs in part and dissents in part.

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12. The trial was in October 2017, although the child support order was entered on 21 September 2018. The evidence in the record and upon which the trial court based the child support order was for 2016 and 2017. Father does not argue he was prejudiced by any delay in entry of the order.

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

In cases where the parents earn more than $25,000.00 per month, the trial court must determine what amount of support is necessary to meet the reasonable needs of the child based on the individual facts of the case. The trial court must give due regard to the estates, earnings, conditions, and accustomed standard of living of the parties and the child in order to reach such a determination. Where the trial court fails to consider even one of those factors in entering a child support order, the order amounts to an abuse of discretion and must be vacated. Here, the trial court failed to consider the respective estates of the parties in reaching its conclusion as to the amount of child support necessary to meet the needs of the minor child, and the child support order must be vacated in part and remanded. The remainder of the trial court's order in this matter should be affirmed. I respectfully dissent in part.

BACKGROUND

Defendant-Appellant Demetrios Kleoudis ("Father") challenges the trial court's *Permanent Child Support Order* entered 21 September 2018 ("the Support Order"). The Plaintiff-Appellee in this matter, Christi Kleoudis ("Mother"), and Father were married in 1986 and two children were born of the nearly thirty-year marriage. The parties separated on 6 July 2015 and subsequently entered into a Separation Agreement and Property Settlement on 30 November 2016.

On 29 May 2018, the trial court entered a *Permanent Child Custody Order* as to Father and Mother's one minor child, Wilfred.[1] This Custody Order provides Father with eight overnight visits per month and fourteen overnights during the Summer, and stipulates that Wilfred's Thanksgiving, Christmas, and Spring Break holidays shall be equally divided between the parties. The trial court stated its ultimate goal was for Father to have 40% of the overnights with Wilfred, as was recommended by the Parenting Coordinator. On 21 September 2018, the trial court entered the Support Order, ordering Father to pay $2,517.00 per month in child support beginning the following month and $52,659.00 in child support arrearage for December 2016 through September 2018. Father timely appeals the Support Order on numerous grounds.

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1. We use a pseudonym throughout this opinion to protect the juvenile's identity and for ease of reading.

ANALYSIS

A. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and [appellate] review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). The 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." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). We will only overturn the trial court's ruling and remand for a new child support order where the challenging party can show that the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Father's Child Support Obligation

Father's first argument on appeal is that the Support Order must be vacated and remanded because "the Trial Court failed to make appropriate findings and conclusions as to the accustomed standard of living of the parties and the minor child, the reasonable needs of the minor child, or the estates of the parties[.]" In contrast, Mother offers:

> The trial court may not have used the specific terms "estates" or "accustomed standard of living" in its Permanent Child Support Order but there can be no genuine dispute that the trial court properly considered the accustomed standard of living of the child and each party in making the detailed calculations set out in Findings of Fact 16 through 23.

The record demonstrates that the trial court failed to consider the parties' estates, and therefore abused its discretion in reaching its conclusion regarding the reasonable needs of the child.

Our child support statute provides that:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, . . . and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019). Where, as here, the parents combined income is greater than $25,000.00 per month, the Child Support Guidelines are inapplicable and the trial court must instead make a case-specific determination giving "due regard" to the reasonable needs of the child and the parents' respective ability to pay. *Meehan v. Lawrance*, 166 N.C. App. 369, 383-84, 602 S.E.2d 21, 30 (2004) (describing the inapplicability of the Child Support Guidelines in "High Combined Income" cases).

As both parties correctly note in their briefs, the trial court did not use the specific terms "estates" or "accustomed standard of living" in reaching its conclusions regarding child support. Our caselaw does not allow us to conclude that the trial court's consideration of the parties' estates may be implied from its ultimate decision in this case; likewise, we cannot conclude the trial court complied with its statutory mandate to do so.

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (internal quotation marks and citation omitted). It is well-established that the trial court's conclusions regarding the reasonable needs of the child and the parties' relative ability to pay

> must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned. In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*.

Id. (emphasis added) (internal quotation marks, alterations, and citations omitted).

Although the reference appears in the section discussing "Conditions and Accustomed Standard of Living," the majority's opinion cites *Cohen v. Cohen*, 100 N.C. App. 334, 396 S.E.2d 344 (1990), to advance the recurring argument that the trial court's findings took "due regard" of the statutorily required factors. In *Cohen*, we addressed trial court findings regarding a party's total estate that, while lacking numerical specificity, still demonstrated the trial court took due regard of the statutory factors and satisfied the statutory requirements. *Cohen*, 100 N.C. App. at 339-40, 396 S.E.2d at 347–48.

However, the trial court in *Cohen* made significant detailed findings that are lacking in this case. In *Cohen*, while the trial court was "understandabl[y] reluctan[t] to place an exact dollar figure on [mother's] *estate*," the trial court made specific findings concerning the dollar amounts of mother's current debts and the stock father transferred to mother "during the course of the trial." *Id.* at 340, 396 S.E.2d at 347–48 (emphasis added). Additionally, the trial court acknowledged "equitable distribution had not yet been made," and the stock liquidation necessary to determine the exact dollar amount of the estate rendered "any effort to determine the true net worth of [mother's] assets . . . speculative and inappropriate." *Id.* at 340, 396 S.E.2d at 347.

Unlike the trial court's specific dollar amount findings concerning important and current parts of the mother's estate in *Cohen*, the trial court in this case did not find an exact dollar amount concerning debts or marital investment income, interest, or dividends. Instead, the trial court *approximated* the "investment income, interest, and dividends resulting from marital investments" and made no findings regarding the parties' other assets or lack thereof. None of the trial court's factual findings quoted by the Majority constitute sufficiently specific factual findings showing due regard to the parties' estates. Findings 10, 13, 15, and 19 relate to the parties' income. Finding 11 references bonuses Mother received in prior years, without a specific consideration or dollar amount. Finding 12 notes a specific dollar amount of a bonus that Mother received in 2016; since the parties divided the 2016 bonus equally, the trial court did not consider the bonus as "[Mother's] income for purposes of calculating prospective child support." However, these funds are certainly a portion of their "estates." Finding 14 approximates that the parties had "the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally." Finding 14 is the closest reference to the parties'

estates, but the trial court provided no dollar amount based on the evidence. Finding 16 addresses Mother's expenses. Findings 20-21 reference the parties' "net ability to pay child support for the benefit of the child." None of these findings are specific enough concerning the parties' estates to satisfy the statutory requirement.

As we reiterated in *Cohen*, "[a] trial judge must make conclusions of law based on factual findings *specific enough* to show the appellate courts that the judge took *due regard* of the parties' estates." *Cohen*, 100 N.C. App. at 340, 396 S.E.2d at 347-48 (first emphasis added, second emphasis in original). The trial court's findings fall far short of the statutory mandate.

Although the trial court's findings of fact comply with most of the statutory requirements, those findings are silent as to the estates of the parties. Without such findings, we cannot determine whether the Support Order is adequately supported by competent evidence and must vacate and remand for further consideration consistent herewith. As a result of such a remand, Father's arguments on appeal regarding the amount of child support he was ordered to pay (sections V and VI in his brief) would be moot and should be dismissed.

C. Wilfred's Monthly Expenses

Father's next argument on appeal is that the trial court failed to consider the expenses he incurred for Wilfred during visitations and therefore abused its discretion by not giving Father a visitation credit, which is a credit to the obligor for expenses incurred for the benefit of the minor child during visitation. It is important to note that Father tries to avoid framing his argument on this issue as seeking a visitation credit, but that would be the ultimate effect of ruling for Appellant on this issue.

We afford trial courts wide latitude in deciding whether a visitation credit is appropriate. *Jones v. Jones*, 52 N.C. App. 104, 109, 278 S.E.2d 260, 264 (1981) ("The trial court has a wide discretion in deciding initially whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded."); *Goodson v. Goodson*, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977) (superseded by statute on other grounds) (holding that a visitation credit may be allowed "when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case."). Our caselaw also dictates that visitation credits are permitted only where justice requires a credit for the obligor. *See Brinkley v. Brinkley*, 135 N.C. App. 608, 612, 522 S.E.2d 90, 93 (1999) (noting "the imposition of

a credit is not an automatic right”). Generally, that might be the case where the non-custodial parent has the child for more than a third of the year. *Cohen*, 100 N.C. App. at 346, 396 S.E.2d at 351 (1990).

Here, Father has custody of the minor child for eight overnights a month and on various holidays. The trial court’s “ultimate goal” in setting the custody schedule was to provide Father with “40% of the overnights each month.” In reviewing this issue for abuse of discretion, we must be satisfied that “[t]he trial court [has made] 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.” *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682. I am not satisfied Father has shown the trial court’s decision on this issue is manifestly unsupported by reason, as it did not make any findings of fact or conclusions of law that allow us to review this issue. On remand, we must direct the trial court to make specific findings regarding this issue to clarify its decision. *See, e.g.*, *Embler v. Embler*, 159 N.C. App. 186, 189, 582 S.E.2d 628, 630-31 (2003) (remanding “for further findings” without holding the trial court committed error or abused its discretion).

D. Father’s Monthly Expenses

Next, Father argues the trial court erroneously found, in Finding 18, that he incurs reasonable and necessary monthly expenses for himself in the amount of $9,813.00 per month. The trial court reached this finding by taking the amount Father claimed as his reasonable and necessary monthly expenses in his financial affidavit ($14,812.68) less (1) $3,000.00 of the $3,974.00 in “Professional fees (CPA, Attorney Fees, etc.)” listed therein, which the trial court found was related primarily to this litigation rather than any ongoing monthly expense, and (2) the $2,000.00 listed under “Retirement/Investment[,]” which had already been accounted for as a voluntary deduction from Father’s gross income. N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, 3 (2015) (defining “gross income” as “income before deductions for . . . retirement contributions, or other amounts withheld from income”). That left the court with the following equation:

$14,812.68 - $3,000.00 - $2,000.00 = $9,812.68.

Again, “our review is limited to a determination [of] whether the trial court abused its discretion. Under this standard of review, the trial court’s ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682 (internal citation omitted). Finding 18, regarding Father’s reasonable and necessary monthly

expenses, is not manifestly unsupported by reason. The trial court explained exactly how it reached that figure and its analysis is legally sound. Finding 18 is properly affirmed.

E. Wilfred's Primary Residence

Finally, Father argues the trial court erred by finding Wilfred had resided primarily with Mother on a "Worksheet A" schedule since 30 November 2016 and that, pursuant to the Permanent Child Custody Order, Mother would continue to exercise "Worksheet A" primary custody of the minor child. Father's argument is purely semantic and incorrect; he contends the trial court's reference to "Worksheet A" indicates improper reliance on the Child Support Guidelines rather than the factors governing high income cases.

It is clear from the record the trial court's reference to "Worksheet A" in Finding 8 was shorthand for the fact that Wilfred resided primarily with Mother for at least 243 overnights per year. This reference does not, as Father alleges, reveal that the trial court was improperly influenced by the guidelines instead of the factors for high income cases. *Meehan*, 166 N.C. App. at 383, 602 S.E.2d at 30 (stating the trial court's order for child support in a high-income case "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount"). This is apparent from the trial court's other Findings of Fact and Conclusions of Law, all of which are appropriate for a high-income case rather than a traditional child support matter governed by the guidelines and calculated pursuant to Worksheet A. The trial court's use of the term "Worksheet A" custody in Finding 8 was imprecise but, despite Father's argument to the contrary, its use of that term is not indicative of an abuse of discretion.

CONCLUSION

The trial court failed to consider the parties' estates in reaching its conclusion regarding Father's child support payments. Such a finding is required, and we must vacate that portion of the trial court's order and remand for further consideration. We should also direct the trial court to reconsider its findings and conclusions regarding a potential visitation credit for Father. In all other regards, the trial court's order should be affirmed. For these reasons, I respectfully concur in part and dissent in part.

RENE ROBINSON, individually and as ADMINISTRATRIX of the ESTATE OF VELVET FOOTE, Plaintiffs

v.

HALIFAX REGIONAL MEDICAL CENTER; DR. JUDE OJIE, DR. SIMBISO RANGA, and MEGAN ORREN ROGERSEN, individually and as employees, agents, of HALIFAX REGIONAL MEDICAL CENTER, Defendants

No. COA18-1300

Filed 21 April 2020

1. Wrongful Death—medical malpractice—Rule 9(j) compliance—facial validity

In a wrongful death action based on medical malpractice, the trial court prematurely dismissed plaintiffs' complaint against two doctors for lack of compliance with Civil Procedure Rule 9(j), prior to discovery being conducted, because, as the trial court itself noted, the complaint on its face met the certification requirements. Assuming the trial court appropriately considered plaintiffs' motion to identify their 9(j) expert, which included the expert's curriculum vitae (CV), nothing in the motion or CV contradicted plaintiffs' certification assertions in the complaint and therefore could not have supported the decision to dismiss.

2. Negligence—res ipsa loquitur—broken jaw—sufficiency of allegations—applicability of Rule 9(j)

In a wrongful death action, plaintiffs' personal injury claim asserted against a nurse under the doctrine of res ipsa loquitur was properly dismissed where plaintiffs' allegations failed to show the decedent's injury, a broken jaw suffered while decedent was in the hospital and under the nurse's care, was the type of injury that could only occur due to a negligent act or omission of the nurse. Therefore, the claim required a Rule 9(j) certification under the Rules of Civil Procedure, but plaintiffs' failure to include Rule 9(j) allegations regarding the nurse's actions or the broken jaw subjected the claim to dismissal.

3. Statutes of Limitation and Repose—wrongful death—voluntary dismissal—tolling period—new claim not asserted in first complaint

In a wrongful death action, plaintiffs' claim against a nurse was barred by the two-year statute of limitations for wrongful death actions based on medical malpractice (N.C.G.S. § 1-53(4)) where plaintiffs' initial action, timely filed within two years of decedent's

death, only included claims against other defendants but not the nurse. Therefore, the tolling provision of Civil Procedure Rule 41(a), invoked when plaintiffs took a voluntary dismissal, only applied to claims asserted in the initial complaint and not the claim against the nurse that was added to the re-filed complaint.

4. Wrongful Death—claims against hospital—respondeat superior—Rule 9(j) compliance—facial validity

In a wrongful death action based on medical malpractice, plaintiffs' claims against the hospital (based on the doctrine of respondeat superior and a theory of corporate negligence) were prematurely dismissed, before discovery was conducted, after the trial court determined plaintiffs failed to comply with Civil Procedure Rule 9(j), because the complaint on its face contained the necessary certification allegations.

5. Appeal and Error—notice of appeal—jurisdiction—limited to order appealed from

In a wrongful death action, the Court of Appeals lacked jurisdiction to review plaintiffs' arguments related to their Rule 59 and 60 motions (filed after the trial court dismissed their complaint) where plaintiffs' notice of appeal only referenced the order dismissing their complaint.

Judge BERGER concurring by separate opinion.

Appeal by Plaintiffs from order entered 23 May 2018 by Judge Alma Hinton in Halifax County Superior Court. Heard in the Court of Appeals 8 May 2019.

Richard E. Batts, PLLC, by Richard E. Batts, for Plaintiffs- Appellants.

Harris, Creech, Ward & Blackerby, PA, by Christina J. Banfield, C. David Creech, and Jay C. Salsman, for Defendants-Appellees.

DILLON, Judge.

Plaintiffs appeal from the trial court's order granting Defendants' motion to dismiss Plaintiffs' complaint. We affirm in part and reverse in part.

I. Background

Plaintiff Rene Robinson is the daughter of Velvet Foote, deceased, and the administratrix of Ms. Foote's estate. On 15 January 2015, Ms.

Foote died at Halifax Regional Medical Center (the "Hospital"), where she had been attended by Drs. Jude Ojie and Simbiso Ranga (the "Doctors") and Nurse Megan Orren Rogersen.

Two years and two days later, on 17 January 2017, Plaintiffs brought a wrongful death action against the Hospital and the Doctors.[1] However, six months later, Plaintiffs voluntarily dismissed that first action.

On 16 January 2018, Plaintiffs, represented by a different attorney, filed this present wrongful death action against the Doctors and the Hospital, but added Nurse Rogersen as a defendant. Also, Plaintiffs added a tort claim against Nurse Rogersen for a broken jaw injury Ms. Foote suffered while at the Hospital.

Defendants moved to dismiss Plaintiffs' claims. Defendants' motion was largely based on their contention that Plaintiffs did not comply with Rule 9(j) of our Rules of Civil Procedure. After a hearing on the matter, the trial court granted Defendants' motion. Plaintiffs timely appealed.

II. Analysis

A. Claims Against the Doctors – Rule 9(j) Compliance

[1] In its order, the trial court dismissed the wrongful death claims against the Doctors and the Hospital based on Plaintiffs' failure to comply with Rule 9(j) of our Rules of Civil Procedure. Based on our reasoning below, we hold that the trial court erred in dismissing Plaintiffs' claims against the Doctors based on a failure to comply with Rule 9(j) *at this stage of the litigation*. In short, Plaintiffs' complaint complies with Rule 9(j) and there has been no discovery conclusively establishing that Plaintiffs were not reasonable in expecting their Rule 9(j) expert would qualify as an expert at the time they filed their complaint. Our holding should not be construed to foreclose a Rule 9(j) dismissal if future discovery justifies such dismissal.[2]

Rule 9(j) requires a plaintiff alleging a medical malpractice claim to specifically plead in her complaint that the medical care and all

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1. The statute of limitations for a wrongful death action is two years. N.C. Gen. Stat. § 1-53(4) (2014). The day the first complaint was filed, 17 January 2017, was the day after Martin Luther King, Jr., Day.

2. Plaintiffs argue an alternate ground to support the trial court's dismissal, a ground not relied upon by the trial court; namely, that no Rule 9(j) certification was necessary because the Doctors had committed *intentional* torts in causing Ms. Foote's death when they placed DNR orders in Ms. Foote's file. Plaintiffs contend that, therefore, Ms. Foote's death was not caused by the provision of medical care. However, based on our resolution of the 9(j) issue, we need not reach this issue.

medical records pertaining to the care available to the plaintiff have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014).

Here, Plaintiffs filed two documents at the commencement of this action. First, Plaintiffs filed their complaint. This complaint contains the required Rule 9(j) language, alleging that "[t]he medical care and all medical records pertaining to the alleged negligence that are available to the Plaintiffs . . . have been reviewed by a person who is reasonably expected to qualify as a witness under Rule 702 . . . and who is willing to testify that the medical care did not comply with the applicable standard of care," and that the review occurred prior to 17 January 2017,[3] when the first complaint was filed.

Second, Plaintiffs filed a motion which identified their Rule 9(j) expert as Dr. Edward Mallory and sought to qualify him as an expert to testify at trial under Rule 702 of our Rules of Evidence. Attached to the motion was a one-page *curriculum vitae* ("CV") of Dr. Mallory. This CV outlined Dr. Mallory's career as an accomplished *emergency room doctor* in Florida, where he lived. (Plaintiffs' complaint referenced to this motion to qualify.)

Before filing an answer or engaging in any discovery, Defendants moved to dismiss Plaintiffs' complaint. Defendants also filed and served an affidavit from each of the Doctors, in which each averred that he was not an emergency room doctor, but rather an internist and hospitalist, and did not provide any care to Ms. Foote in the capacity of an emergency room doctor.

After a hearing on Defendants' motion to dismiss, the trial court entered its order. In its dismissal order, the trial court stated that it was relying on the complaint; Plaintiffs' unverified motion to qualify Dr. Mallory, including Dr. Mallory's CV; "the materials submitted by the

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3. Our Supreme Court has held that the Rule 9(j) expert must have conducted his review prior to the running of the statute of limitations. *See Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (explaining that review must occur before filing the complaint); *see also Vaughan v. Mashburn*, 371 N.C. 428, 438-39, 817 S.E.2d 370, 377-78 (2018) (clarifying that where the plaintiff takes advantage of a procedural rule that allows her to file a complaint after the running of the statute of limitations, then the pleading must allege that the Rule 9(j) expert review occurred before the running of said statute of limitations). Our Supreme Court's holding in *Vaughan* is consistent with its holdings in prior opinions from that Court as explained in *Boyd v. Rekuc*, 246 N.C. App. 227, 782 S.E.2d 916 (2016).

parties," which presumably were <u>the affidavits of the Doctors</u>; and the arguments of counsel.[4]

The trial court concluded that Plaintiffs' complaint *on its face* regarding Dr. Mallory's review does comply with Rule 9(j), stating that "Plaintiffs did include a certification, which on its face meets the requirements of Rule 9(j)[.]"

However, the trial court, nonetheless, dismissed Plaintiffs' claims for three reasons: (1) the CV attached to Plaintiffs' unverified motion showed that Dr. Mallory practiced in a different specialty than the Doctors' specialty as indicated in their affidavits; (2) there was nothing in the CV or otherwise which indicated that Dr. Mallory was familiar with the standard of care in Halifax County; and (3) there was nothing in the CV or otherwise which indicated that Dr. Mallory had experience admitting patients into a hospital or entering DNR orders to patients admitted to hospitals:

> [B]ased on the information submitted to the Court contained in Plaintiff[s'] Complaint and Motion [to qualify Dr. Mallory as a Rule 702 expert], the Court finds that [Dr. Mallory] is an emergency room physician, and that Defendants [Doctors] practice internal medicine as hospitalists[.] Accordingly, Dr. Mallory does not practice in the same specialty as Defendant [Doctors].
>
> . . . The Court further finds that nothing submitted with Plaintiff[s'] Motion [to qualify Dr. Mallory as a Rule 702 expert] indicates that Dr. Mallory is or could be familiar with the standard of care for internal medicine physicians in Halifax County or similarly situated communities, and further nothing indicates that Dr. Mallory has experience in admitting patients or entering [DNR] Orders for patients admitted to hospitals, both of which constitute the substance of Plaintiff[s'] claim against [the Doctors].
>
> Further, Plaintiffs have neither alleged or demonstrated any extraordinary circumstances that would justify the Court qualifying Dr. Mallory under Rule 702(e). The Court

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4. Specifically, the order states that the trial court was relying on "the pleadings, including Plaintiff[s'] Motion to Qualify [Dr. Mallory as an] Expert Witness and the documents attached thereto, [ ] other materials submitted by the parties and upon hearing argument of counsel[.]" The only "document[ ]" attached to Plaintiffs' Motion was a one-page CV of Dr. Mallory. The only "other materials" that are part of the record before us are the affidavits of the Doctors.

> specifically finds that Plaintiffs could not have reasonably expected that Dr. Mallory would qualify under Rule 702[,] and therefore [she has] not complied with Rule 9(j)[.]

In so ruling, as explained below, we conclude that the trial court "jumped the gun" in determining that Plaintiffs failed to comply with Rule 9(j).

Our Supreme Court has explained that Rule 9(j) is a gatekeeping rule and should be viewed differently than a motion to qualify an expert under Rule 702:

> Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to control pleadings rather than to act as a general mechanism to exclude expert testimony. Whether an expert will ultimately qualify to testify [at trial] is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that [Rule 702].
>
> However, the preliminary, gatekeeping question of whether a proffered expert witness is reasonably expected to qualify as an expert witness under Rule 702 is a different inquiry from whether the expert *will actually* qualify under Rule 702.

Moore v. Proper, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original) (internal quotation marks and citation omitted). That is, under Rule 9(j), to get past the gate into the courthouse, a plaintiff must have the opinion of an expert *who at the time she files her complaint she reasonably expects will qualify* under Rule 702. However, once in the courtroom, the plaintiff (typically) must offer the opinion of an expert who, in fact, qualifies under Rule 702 to get to the jury. Accordingly, it is possible for a plaintiff to get through the initial pleading Rule 9(j) gate with one expert and then later, even if the trial judge rules that her Rule 9(j) expert does not qualify under Rule 702, for that plaintiff to satisfy her burden of proof at trial through the testimony of another expert.

To comply with Rule 9(j), our Supreme Court instructs that the plaintiff must have exercised "reasonable diligence under the circumstances" to formulate a reasonable belief at the time she files her complaint that her certifying expert will qualify under Rule 702. *Id.* at 31, 726 S.E.2d at 817.

A plaintiff's complaint is certainly subject to dismissal *if* the pleading *on its face* does not comply with Rule 9(j), akin to a Rule 12(b)(6) dismissal. *See Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (requiring dismissal when the plaintiff's pleading is not in compliance with the Rule's requirements). For instance, in *Vaughan* our Supreme Court held that an amended complaint which fails to plead that the expert review occurred before the statute of limitations ran must be dismissed, construing the language in Rule 9(j) that the medical care and records "have been reviewed":

> Next, we addressed an issue for which we granted discretionary review . . . whether an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). Consistent with our prior discussion of legislative intent, we held that it does not.

Vaughan, 371 N.C. at 439, 817 S.E.2d at 377 (internal citation omitted). And our Court has held that a complaint which pleads that the certifying expert only reviewed "certain" medical records instead of "all" medical records as required by Rule 9(j) must be dismissed. *Fairfield v. WakeMed*, ___ N.C. App. ___, ___, 821 S.E.2d 277, 281 (2018) (Judge, now Justice, Davis, writing for the Court).

Also, our Supreme Court instructed that "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate[,]" akin to a Rule 56 summary judgment. *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

For example, if discovery shows that the plaintiff's expectation was not reasonable that her Rule 9(j) expert would qualify as an expert under Rule 702, based on what she reasonably should have known at the time she filed her complaint, her complaint must be dismissed for failing to satisfy the gatekeeping requirement, irrespective of whether she later procures a Rule 702-qualified expert. The Court explained that a dismissal at this summary judgment-like stage, though, should be rare, instructing that the trial court is to draw all reasonable inferences from the discovery in favor of the plaintiff and only dismiss based on discovery if "no reasonable person" would have relied on the expert based on what was known when the complaint was filed:

> [T]o evaluate whether a party reasonably expected its proffered expert witness to qualify under Rule 702, the trial court must look to all the facts and circumstances that were known or should have been known by the party at the time of filing.
>
> Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials.
>
> But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court **should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage** of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702.
>
> When the trial court determines that [the plaintiff's] reliance on [its proffered expert] was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence. . . . We note that because a trial court is not generally permitted to make factual findings at the summary judgment stage, **a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely**.

Moore, 366 N.C. at 32, 726 S.E.2d at 817-18 (emphasis added in bold) (internal quotation marks and citation omitted).[5]

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5. There are a number of cases from our Court which are arguably at odds with the holding in our Supreme Court's *Moore* opinion, that a trial judge is to draw all reasonable inferences in favor of the plaintiff. Specifically, in *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, our Court held that a trial judge had no duty to review matters outside the complaint in the light most favorable to the plaintiff when considering a Rule 9(j) dismissal motion. 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009). *See also McGuire v. Riedle*, 190 N.C. App. 785, 787-88, 661 S.E.2d 754, 757 (2008). In any event, we apply *Moore*.

And in further support of our holding here, we note that our Supreme Court has recently affirmed the standard articulated in *Moore*, holding that the trial court is to view the evidence "in the light most favorable to plaintiff" and that the appellate court should conduct a *de novo* review, not "deferring [ ] to the findings of the trial court." *Preston v. Movahed*, ___ N.C. ___, ___ (2020), 2020 N.C. LEXIS 272, at *17 (reversing dismissal of complaint based on Rule 9(j)). As of the filing of our opinion here, however, the mandate for *Preston* has not yet issued.

In the present case, the trial court did consider matters outside the face of the complaint, such as the Doctor's affidavits and Dr. Mallory's CV which was attached to Plaintiffs' unverified motion to qualify Dr. Mallory under Rule 702. But at this hearing, Plaintiffs' motion to qualify Dr. Mallory was not before the trial court, just Defendants' Rule 9(j) dismissal motion. At the hearing, Defendants established that the Doctors were internists and hospitalists and reiterated that Plaintiffs' complaint against them was based on their failure to admit Ms. Foote into the Hospital more quickly once Ms. Foote presented herself to the Hospital's emergency room and to properly care for her once she was admitted.

Assuming, *arguendo*, it was appropriate for the trial court to consider Dr. Mallory's CV attached to an unverified motion at the hearing,[6] there was nothing in the CV which contradicted the assertion made in Plaintiffs' Rule 9(j) statement in their complaint. Though the CV outlined Dr. Mallory's extensive experience as an emergency room doctor, there is nothing in the CV which conclusively demonstrates that he has no expertise as an internist or hospitalist or otherwise that his expertise as an emergency room doctor does not include "the performance of the procedure that is the subject of the complaint and [ ] prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(b) (2014).

Further, there is nothing in the CV to contradict Plaintiffs' assertion in their complaint that Dr. Mallory is familiar with the applicable standard of care, notwithstanding that the CV only indicates that Dr. Mallory practices in Florida. It just may be that Plaintiffs' expert has familiarity with the standard of care in Halifax County. *See Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009) (holding that summary judgment was inappropriate where plaintiff's expert, an Arizona doctor, testified that he had reviewed information concerning medical care in Goldsboro and was, thus, familiar with the standard of care in Goldsboro).

But it may alternatively be that discovery will, indeed, demonstrate that Plaintiffs should have not reasonably believed that their expert would qualify under Rule 702. Indeed, after deposing Dr. Mallory or conducting other discovery, Defendants may be able to show that when Plaintiffs filed their complaint, they could not have reasonably expected Dr. Mallory to qualify, at which point, dismissal under Rule 9(j) would be appropriate. However, at this point, Defendants have simply not

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6. It could be argued that consideration of the CV was appropriate since it was attached to a motion filed by Plaintiffs and that motion, otherwise, was referred to in Plaintiffs' complaint.

met their burden of showing that they are entitled to a dismissal under Rule 9(j). The trial court must reasonably infer that it was reasonable for Plaintiffs to expect Dr. Mallory would qualify as an expert under Rule 702, as they allege in their complaint, unless and until the discovery shows, even in the light most favorable to them, that they could not have so reasonably expected.

B. Personal Injury Claim Against Nurse Rogersen – *Res Ipsa Loquitur*

[2] Plaintiffs asserted a personal injury claim under the doctrine of *res ipsa loquitur* against Nurse Rogersen arising from Ms. Foote's broken jaw, an injury which was discovered during Ms. Foote's autopsy. Plaintiffs do not allege how Ms. Foote's jaw came to be broken, but only that it became broken while in Nurse Rogersen's care. The trial court dismissed this claim, concluding that Plaintiffs had "failed to state an actionable *res ipsa loquitur* claim" as to negate the heightened pleading requirements pursuant to Rule 9(j). We conclude that the trial court did not err in its ruling.

Certification under Rule 9(j) is not required in a medical malpractice action where "[t]he pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*." N.C. Gen. Stat. § 1A-1, Rule 9(j)(3). This Court "consider[s] *de novo* whether [a plaintiff's] complaint alleges facts establishing negligence under the doctrine of *res ipsa loquitur* pursuant to Rule 9(j)(3)." *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 224, 747 S.E.2d 321, 328 (2013).

For the doctrine to apply, the plaintiff must, in part, "allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Id.* at 224, 747 S.E.2d at 329; *see Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 252 (2005) ("[I]n order for the doctrine to apply, not only must [the] plaintiff have shown that the injury resulted from [the] defendant's . . . act, but [the] plaintiff must be able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in the absence of some negligence by [the] defendant.").

In the instant case, the allegations of Plaintiffs' complaint fail to demonstrate that the broken jaw suffered by Ms. Foote is the type of injury that would not ordinarily occur but for some negligent act or omission by an attending nurse. There may be any number of circumstances under which a broken jaw could occur in an elderly patient at a hospital, despite the provider's most diligent adherence to the applicable standard of care. Such determinations are not appropriately subject to inference based on a jury's common knowledge or experience, but instead

fall squarely within those classes of situations in which reference to at least some degree of expert medical testimony is required. We, therefore, agree with the trial court that Plaintiffs' complaint fails to state a personal injury claim against Nurse Rogersen under this doctrine.

And because the trial court properly concluded that Plaintiffs' personal injury claim was not actionable under *res ipsa loquitur*, certification under Rule 9(j) was required. Plaintiffs' Rule 9(j) certification contains no Rule 9(j) allegations pertaining to Nurse Rogersen or Ms. Foote's broken jaw. Therefore, the trial court did not err in dismissing Plaintiffs' personal injury claim against Nurse Rogersen.

C. Wrongful Death Claim Against Nurse Rogersen – Statute of Limitations

[3] Plaintiffs asserted a wrongful death claim against Nurse Rogersen in their second complaint filed three years after Ms. Foote's death.

Wrongful death actions based on medical malpractice are subject to a two-year statute of limitations, which accrues as of the date of death. N.C. Gen. Stat. § 1-53(4) (2014). However, where an action is commenced within the applicable statute of limitations period and the plaintiff subsequently takes a voluntary dismissal pursuant to Rule 41(a), the plaintiff may refile the same action within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). "The effect of this provision is to extend the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (1999).

Rule 41(a)'s tolling provision, however, does not apply to claims that were not asserted in the first complaint. *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, ___, 822 S.E.2d 565, 577 (2018). "If the actions are fundamentally different or not based on the same claims, the new action is not considered a continuation of the original action, and Rule 41(a) may not be invoked." *Brannock v. Brannock*, 135 N.C. App. 635, 640, 523 S.E.2d 110, 113 (1999) (internal quotation marks and citation omitted).

Here, Plaintiffs' first complaint was filed within two years of Ms. Foote's death. However, their first complaint did not allege *any* claims against Nurse Rogersen, as she was not named as a defendant in that action. Therefore, Plaintiffs' wrongful death claim against Nurse Rogersen was properly dismissed.

D. Claims Against the Hospital

[4] Next, Plaintiffs sought to hold the Hospital liable for Ms. Foote's death based on the doctrine of *respondeat superior* and on a "corporate

negligence" theory. The trial court dismissed Plaintiffs' *respondeat superior* claim on the grounds that they failed to comply with Rule 9(j). As we held that the trial court "jumped the gun" on the Rule 9(j) issue, we hold that the trial court erred in dismissing the claims against the Hospital. *See Blanton v. Moses H. Cone Mem. Hosp.*, 319 N.C. 372, 374-76, 354 S.E.2d 455, 457-58 (1987) (discussing a hospital's liability under the theories of *respondeat superior* and corporate negligence).

E. Remaining Issues

Plaintiffs also asserted a personal injury claim for injuries that *they* allegedly suffered as a result of Defendants' treatment of Ms. Foote, which the trial court dismissed pursuant to Rule 12(b)(6). Because Plaintiffs do not contest the trial court's dismissal of this claim on appeal, any potential challenges thereto have been abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

[5] Lastly, Plaintiffs present arguments in their brief relating to Rule 59 and Rule 60 motions that Plaintiffs filed following the trial court's order dismissing their complaint. However, Plaintiffs' notice of appeal only designates appeal from the trial court's order granting Defendants' motion to dismiss. Accordingly, we lack jurisdiction to address any arguments related to their motions under Rules 59 and 60. *See Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994) ("[T]he appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.").

III. Conclusion

We affirm the trial court's dismissal of all claims against Nurse Rogersen. We also affirm the trial court's dismissal of Plaintiff Rene Robinson's personal injury claim asserted in her individual capacity, as she has abandoned that issue on appeal.

We reverse the trial court's dismissal of Plaintiffs' remaining claims against the Doctors and the Hospital. This reversal does not prejudice any right Defendants may have to seek dismissal under Rule 9(j) at a later time after discovery has occurred. We remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

Judge ZACHARY concurs.

Judge BERGER concurring by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority in result only as to Section II B (*res ipsa* claim against Nurse Rogersen); Section II C (wrongful death claim against Nurse Rogersen); Section II D (claims against the hospital); and Section II E (miscellaneous remaining issues). As to Section II A, I disagree with the majority's reasoning. However, because the result will be the same upon remand, I concur in result only.

The majority concludes that the trial court should not have considered Dr. Mallory's resume, which was attached to a motion specifically referenced in Plaintiffs' amended complaint.[1] Although Section II A is short on citing to any legal authority, the majority seemingly concludes that a trial court should never consider evidence outside the complaint when making determinations for medical malpractice claims pursuant to Rule 12(b)(6) and Rule 9(j).

Rule 10(c) plainly states that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C. Gen. Stat. § 1A-1, Rule 10(c) (2019). Moreover, "[w]hen reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true. In conducting our analysis, we also consider any exhibits attached to the complaint." *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018) (citations and quotation marks omitted). *See also Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citation and quotation marks omitted) ("When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment. Although it is true that the allegations of plaintiff's complaint are liberally construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint."); *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (citation and quotation marks omitted) ("[T]his Court has held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.").

The majority is stuck on the notion that discovery must be conducted before the trial court can rule on a defendant's Rule 12(b)(6)

1. However, the majority appears unsure of its reasoning with its contradictory statement in footnote 6.

motion. Under the majority's reasoning, the certification requirement in Rule 9(j) becomes meaningless, and litigation costs associated with frivolous claims would explode.

"Rule 9(j) serves as a gatekeeper . . . to prevent frivolous malpractice claims." *Estate of Wooden v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012). The Rule 9(j) certification requirement would not have any teeth if plaintiffs could simply parrot the boilerplate language and then wait until after discovery to speak with their purported expert. Attorneys would be given license to sign pleadings with Rule 9(j) certifications even if the attorneys had not spoken with an expert.

This is exactly what happened here.

On August 22, 2018, Plaintiffs' Rule 60 motion was heard in the trial court. Plaintiffs' counsel was asked by the trial court if he had spoken with Dr. Mallory about his qualifications. Plaintiffs' counsel responded, "I have not talked to him. But the person who filed the [original] complaint talked to him, which he was required to do before filing the complaint, and that he did."[2] The trial court then asked:

> THE COURT: Before you signed this complaint filed in March of this year, did you speak with Dr. Mallory?
>
> [Plaintiffs' Counsel]: I did not.

Defendants argued to the trial court that, among other things, Plaintiffs' counsel never spoke with Dr. Mallory prior to filing the amended complaint. At the conclusion of Defendants' argument, the trial court again asked Plaintiffs' counsel if he had spoken with Dr. Mallory prior to filing the amended complaint. Plaintiffs' counsel responded:

> [Plaintiffs' Counsel]: Your honor, I did talk to Dr. - - I mean, what I - -
>
> THE COURT: You did talk to who[m]?
>
> [Plaintiffs' Counsel]: I did talk to Dr. Mallory.
>
> THE COURT: Did you not just tell me you didn't talk to him?
>
> [Plaintiffs' Counsel]: I made a note here to stand up and clarify that to the Court. I made a note when I -- as I was

2. The original complaint contained a defective Rule 9(j) certification.

> sitting here and sat here for a moment and I remembered that -- I didn't talk to him about -- I merely called him on the phone to chat with him. I just wanted to clarify that. I called him on the phone, and I chatted with him a couple of times. But the information regarding the review of the records, that took place by [plaintiffs' former attorney], not by me.
>
> THE COURT: You had a general conversation?
>
> [Plaintiffs' Counsel]: I had a general conversation.
>
> THE COURT: But not about the case?
>
> [Plaintiffs' Counsel]: About the case but not the medical record.
>
> THE COURT: Not anything to gain your -- help your reasonableness in relying on him as an expert?
>
> [Plaintiffs' Counsel]: Your Honor, I relied upon the attorney who brought the case to me. And I talked to him. Again, I verified that Dr. Mallory existed, because I talked to him on the phone more than once.

Plaintiffs' counsel acknowledged that he relied on the defective Rule 9(j) certification in the original complaint, and never spoke with Dr. Mallory about his qualifications.[3] This may explain why Plaintiffs alleged in the amended complaint that their expert "*specialize[d] in the same specialty of internal medicine*, a general practitioner, as [Drs. Ojie and

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3. Plaintiffs' counsel filed a memorandum of law in opposition to Defendants' motion to dismiss which stated:

> Plaintiff Robinson and her attorney reviewed the provided Vitae of Dr. Mallory *and talked to him over the telephone* during his review of provided medical records and concluded his area of medical specialty entails the same as that of the medical doctors complained of and is eminently qualified to testify about the decision-making process required before entering a DNR[.]
>
> . . .
>
> It was reasonable for Plaintiffs to conclude *from talking to Dr. Mallory and from information that he provided them that his active clinical practice was of the same specialty or a similar specialty which includes within its specialty the performance of the procedures that subject (sic) of the complaint* and have prior experience treating similar patients.

(Emphasis added).

Ranga]." (Emphasis added). Plaintiffs' expert was not a specialist in internal medicine. Rather, he was a purported expert in emergency medicine.

As specifically referenced in the amended complaint, Plaintiffs attached a motion pursuant to Rule 702(e) to the complaint seeking to use Dr. Mallory as their expert. Plaintiffs alleged in their motion that Dr. Mallory had "over 25 years of being an attending physician in Emergency Medicine, as it continues to be his line of work; also, since 2014, he provides his expertise and services as a medical expert for jury trials. SEE EXHIBIT A – RESUME OF DR. EDWARD MALLORY."

Dr. Mallory's resume stated that his experience was as owner and president of "Emergency Expert for You.com," and that he had experience as an attending physician in emergency medicine and pediatric emergency medicine. He is board certified in emergency medicine. Dr. Mallory's education included a residency in emergency medicine and an internship and medical degree in osteopathic medicine. Thus, Plaintiffs' complaint, on its face, provided contradictory information concerning the expert that they had certified conducted the review of Plaintiff's records. Further, despite Plaintiffs' counsel's admission that he had never spoken with Dr. Mallory about his qualifications, Plaintiffs' complaint alleged that they reasonably believed Dr. Mallory would qualify as an expert witness.

Again, Rule 9(j) serves a gate-keeping function. This Rule was "enacted by the legislature[] to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original).

> In considering whether a plaintiff's Rule 9(j) statement is supported by the facts, a court must consider the facts relevant to Rule 9(j) and apply the law to them. In such a case, this Court does not inquire as to whether there was any question of material fact, nor do we view the evidence in the light most favorable to the plaintiff. Rather, our review of Rule 9(j) compliance is de novo, because such compliance clearly presents a question of law.

Barringer v. Wake Forest Univ. Baptist Med. Ctr., 197 N.C. App. 238, 255-56, 677 S.E.2d 465, 477 (2009) (citations and quotation marks omitted). "When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them." *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506 (citation and quotation marks omitted).

Plaintiffs' amended complaint alleges medical malpractice for which a proper Rule 9(j) certification was required. Plaintiffs' counsel acknowledged that he did not comply with Rule 9(j). The record demonstrates that the Rule 9(j) certification was defective. An attorney cannot reasonably expect their expert to qualify as an expert for purposes of Rule 9(j) when that attorney has never spoken with the purported expert about his qualifications. Even if we assume the trial court "jumped the gun," the admissions by counsel demonstrate that Plaintiffs were not prejudiced by any possible error. The end result when the next round of costly motions are filed will again be in Defendants' favor.

STATE OF NORTH CAROLINA

v.

KELVIN ALPHONSO ALEXANDER, Defendant

No. COA19-202

Filed 21 April 2020

1. Criminal Law—post-conviction relief—DNA testing—availability after guilty plea

Defendant's guilty plea to second-degree murder did not disqualify him from post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(b)(2). Although that section requires a "reasonable probability that a verdict would have been more favorable" had DNA testing been done, and there is no verdict after a guilty plea, the General Assembly intended for "verdict" to be broadly construed to mean "resolution," "judgment," or "outcome." Further, there is a reasonable probability an innocent defendant would not have pleaded guilty to second-degree murder to avoid a first-degree murder conviction if DNA evidence had been available pointing to someone else as the killer.

2. Criminal Law—post-conviction relief—DNA testing—materiality

The trial court properly denied defendant's motion for post-conviction DNA testing (after pleading guilty to second-degree murder) for lack of materiality where there was substantial evidence of defendant's guilt, and where the fact that two people were involved in the killing meant that any DNA found could have come from an accomplice and would not necessarily exonerate defendant.

Judge BERGER concurring by separate opinion.

Appeal by Defendant from order entered 1 October 2018 by Judge Henry W. Hight, Jr., in Warren County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez and Nicholas C. Woomer-Deters, for the Defendant.

DILLON, Judge.

Defendant Kelvin Alphonso Alexander appeals an order denying his post-conviction motion to test DNA evidence and fingerprints in relation to a murder he pleaded guilty to almost three decades ago in 1993.

I. Background

Early one morning in September 1992, two men robbed a gas station in Norlina. During the robbery, one of the men shot and killed the gas station attendant. A witness told police that she saw the two men fleeing the scene and that one of the men was Defendant, someone she had been acquainted with most of her life.

In October 1992, Defendant was indicted for first-degree murder and armed robbery in connection with the incident. Defendant pleaded guilty to second-degree murder, and the State dismissed the robbery charge as part of a plea deal.

In March 2016, Defendant filed a motion to test the DNA and fingerprints on the shell casings/projectile found at the gas station after the killing. He alleged in his motion that in 2004 an informant who was pleading guilty to an unrelated federal crime told authorities that a Mr. Terry had admitted to him to the 1992 Norlina murder/robbery shortly after it had occurred. Further, Defendant alleged that the informant helped Mr. Terry retrieve the murder weapon from some woods near the gas station. However, the record reflects that Mr. Terry testified at a hearing that he was not involved in the incident, that he never confessed to the informant or anyone else to the Norlina murder/robbery, and that he did not even know Defendant.

The trial court denied Defendant's motion for post-conviction, DNA testing. Defendant appealed.

II. Analysis

There are essentially two issues before us. First, may a defendant who has pleaded guilty seek post-conviction DNA testing under N.C. Gen. Stat. § 15A-269 (2015)? Second, if so, has Defendant here met his burden of showing that the results of such testing would be material to his defense?

A. Availability of Post-Conviction Testing Following a Guilty Plea

[1] The State argues that, even if the results of any testing would prove material to show Defendant's innocence, Defendant is not entitled to seek testing under Section 15A-269 because he pleaded guilty to the murder. Indeed, the Section states that a defendant must show that testing would be "material to the defendant's *defense*," N.C. Gen. Stat. § 15A-269(a)(1) (emphasis added), and that testing is warranted only if "there exists a reasonable probability that *the verdict* would have been more favorable to the defendant" had the requested DNA been tested earlier. N.C. Gen. Stat. § 15A-269(b)(2) (emphasis added). The State argues in its brief that "[t]he plain meaning of 'defense' and 'verdict' [in Section 15A-269] presupposes the existence of a trial and a determination of guilt based on evidence presented to the fact finder," and that a defendant who pleads guilty has put up no defense and results in a conviction without a verdict.

Based on controlling precedent, we conclude that Defendant is not disqualified from seeking post-conviction DNA testing merely for having pleaded guilty. Specifically, in June 2018, our Court held that a defendant was not automatically barred from seeking post-conviction DNA testing merely because he entered a plea of guilty. *State v. Randall*, 259 N.C. App. 885, 887, 817 S.E.2d 219, 221 (2018). In reaching this conclusion, the *Randall* panel relied on language from an opinion by our Supreme Court that " '[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant.' " *Id.* at 887, 817 S.E.2d at 220 (quoting *State v. Lane*, 370 N.C. 508, 518, 809 S.E.2d 568, 575 (2018)). The *Randall* panel then reasoned that there may be rare situations where there is a reasonable probability that a defendant would not have pleaded guilty in the first instance and would have not otherwise been convicted had he had the results of DNA testing when faced with the charges. *See id.* at 887, 817 S.E.2d at 221.

For example, suppose that an innocent person is charged with a murder based on the statements of several (mistaken) eyewitnesses. It may be that this innocent defendant will plead guilty to second-degree

murder rather than risk being found guilty of first-degree murder and sentenced to death. However, suppose further that certain DNA found at the scene conclusively belonged to the actual killer. In that situation, there is a reasonable probability that the outcome would have been different had the results of DNA testing been available to the innocent defendant before he decided to plead guilty. There is a reasonable probability that he would have pleaded not guilty and that the DNA would point to someone who merely looked like him, leading to his acquittal or to the charges being dropped.

We recognize the argument that the word "verdict" appearing in Section 15A-269 suggests that our General Assembly intended for post-conviction, DNA testing to be available *only where* there has been an actual *verdict* rendered. And there is no verdict in a matter where a defendant has pleaded guilty. But there is a strong counter-argument that the General Assembly did not intend for the word "verdict" to be construed in such a strict, legal sense. Rather, the General Assembly intended for "verdict" to be construed more broadly, to mean "resolution," "judgment" or "outcome" in a particular matter. To read "verdict" in a strict, legal sense would lead to an absurd result, clearly not intended by the General Assembly. That is, any defendant who pleads "not guilty" but convicted by a *judge* after a *bench* trial would not be eligible to seek post-conviction DNA testing if a strict interpretation of "verdict" is applied: only *juries* (and not judges) render verdicts in a strict, legal sense.[1]

We note that a few months after our Court decided *Randall*, our Supreme Court in September 2018 affirmed, *per curiam* without any explanation, an unpublished opinion of our Court in which we suggested that post-conviction DNA testing was *not* available to defendants

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1. Our Supreme Court has defined "verdict" as "the unanimous decision made *by the jury* and reported to the court." *State v. Hemphill*, 273 N.C. 388, 389, 160 S.E.2d 53, 55 (1968) (emphasis added). Our Rules of Civil Procedure describe the decisions of juries as "verdicts," *see* N.C. Gen. Stat. § 1A-1, Rule 49 (2015), and decisions by judges in bench trials as "findings" by the court. *See* N.C. Gen. Stat. § 1A-1, Rule 52. Black's Law Dictionary recognizes that the technical definition of "verdict" is a decision rendered by a jury, and not a judge:

> The formal and unanimous decision or finding of a jury . . . . The word "verdict" has a well-defined signification in law. It is the decision of the jury, and it never means the decision of a court or a referee or a commissioner [though] in common language, the word "verdict" is sometimes used in a more extended sense, but in law it is always used to mean the decision of a jury.

Verdict, Black's Law Dictionary (7th ed. 1999).

who had pleaded guilty. *State v. Sayre*, 255 N.C. App. 215, 803 S.E.2d 699, 2017 N.C. App. LEXIS 696 (2017) (unpublished), *aff'd per curiam*, 371 N.C. 468, 818 S.E.2d 101 (2018).

Specifically, in that case, we held that a defendant was not entitled to post-conviction DNA testing because (1) the defendant failed to show how testing would be material to show that he was not the perpetrator and (2) "by entering into a plea agreement with the State and pleading guilty, defendant presented no 'defense' pursuant to N.C. Gen. Stat. § 15A-269(a)(1)." *Id.* at *5. However, only the first issue was before the Supreme Court on appeal, as that issue was the only basis for the dissent from our Court, and the defendant did not seek review of the second issue. *See id.* at *6 (Murphy, J., dissenting); *see also* N.C. R. App. P. 16(b); *see also Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984) ("When an appeal is taken pursuant to [N.C. Gen. Stat. § 7A-30(2)], the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent."). Therefore, the Supreme Court's *per curiam* affirmance was only on this first issue, that the defendant failed to show that testing would be material in that case.

B. Materiality

[2] Section 15A-269 permits a defendant to obtain post-conviction DNA testing if he meets his burden of showing that the results of such testing, among other things, would be "material" to his defense. N.C. Gen. Stat. § 15A-269.

Our Supreme Court has held that "[a] trial court's determination of whether defendant's request for postconviction DNA testing is 'material' to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review *de novo* the trial court's conclusion that defendant failed to show the materiality of his request." *State v. Lane*, 370 N.C. 508, 517-18, 809 S.E.2d 568, 574 (2018).

Further, whether evidence is "material" to a defendant's defense is determined by whether "there exists a reasonable probability that the verdict would have been more favorable to the defendant." *Id.* at 519, 809 S.E.2d at 575. It is the defendant's burden, though, to show such materiality is present. *Id.* at 518, 809 S.E.2d at 574.

Here, Defendant contends that the requested DNA and fingerprint testing is material because the evidence "would exculpate [Defendant] by corroborating [the informant's] testimony" about Mr. Terry's involvement in the murder/robbery. We note, however, there was substantial

evidence of Defendant's guilt, including (1) the eyewitness who saw Defendant fleeing the scene; (2) Defendant's admission that he was at the scene during the investigation of the crime; and (3) Defendant's admission, through his guilty plea, that he, in fact, committed the crime.

We conclude that Defendant has failed to show how it is reasonably probable that he would not been convicted of at least second-degree murder based on the results of the DNA and fingerprint testing. That is, the presence of another's DNA or fingerprints on this or other evidence would not necessarily exclude Defendant's involvement in the crime. The presence of another's DNA or fingerprints could be explained by the possibility that someone else handled the casings/projectile prior to the crime or that the DNA or fingerprints are from Defendant's accomplice, as there were two involved in the murder. Our jurisprudence sets a high bar to establish materiality in such cases, especially for those who have pleaded guilty. *See State v. Tilghman*, ___ N.C. App. ___, ___, 821 S.E.2d 253, 256 (2018) (stating that "a guilty plea increases a defendant's burden to show materiality"). Thus, we conclude that Defendant has failed to meet his burden of showing materiality.[2]

III. Conclusion

Defendant has failed to demonstrate that the evidence he seeks to have tested is material to his defense. As such, we affirm the trial court's denial of his motion.

AFFIRMED.

Judge BROOK concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur only in the result reached by the majority. I write separately because a defendant who pleads guilty is not entitled to post-conviction DNA testing. *See State v. Sayre*, No. COA17-68, 2017 WL 3480951 (N.C. Ct. App. Aug. 15, 2017), *aff'd per curiam*, 371 N.C. 468, 818 S.E.2d 101 (2018).

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2. We note the State's argument that the issue regarding the testing of the fingerprints is not before us on appeal, contending that the trial court only ruled on the DNA evidence, and not the fingerprint evidence. However, the record shows that in his motion, Defendant sought testing for both and that in its order, the trial court denied Defendant's motion, without any limiting language.

On November 16, 1993, Defendant pleaded guilty to second degree murder. Defendant signed a standard Transcript of Plea, in which he acknowledged that he was “in fact guilty” of murdering Carl Eugene Boyd. Following a colloquy with the trial court, Defendant’s plea was accepted upon findings that there was a factual basis for Defendant’s plea of guilty and that the plea was entered freely, voluntarily, and understandingly by Defendant.

A defendant may make a motion for post-conviction DNA testing if the biological evidence

> (1) Is material to the defendant’s defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2019). A trial court shall grant a defendant’s motion for post-conviction DNA testing if

> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(b).

A defendant who has pleaded guilty cannot establish that post-conviction DNA testing would be material to his defense as required by N.C. Gen. Stat. § 15A-269(a)(1). This Court has previously determined that “by entering into a plea agreement with the State and pleading guilty, defendant presented no ‘defense’ pursuant to N.C. Gen. Stat. § 15A-269(a)(1).” *Sayre*, 2017 WL 3480951, at *2.

The majority contends that our Supreme Court affirmed only that portion of *Sayre* addressing appointment of counsel. According to the

majority, the affirmance by our Supreme Court did not address the issue of guilty pleas under Section 15A-269, and, therefore, is not binding on this Court.

It is correct that review by our Supreme Court is generally limited to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. 16(b) (2019). In *Sayre*, Judge Murphy states that he dissents from the majority opinion because the defendant's allegations of materiality under Section 15A-269 entitled him to appointment of counsel. However, Judge Murphy's dissent correctly addresses the materiality standard under subsection (a)(1). The dissent discusses *State v. Cox*, 245 N.C. App. 307, 781 S.E.2d 865 (2016), in which the defendant argued the trial court erred in denying him counsel pursuant to Section 15A-269(c).

The defendant in *Cox* sought post-conviction DNA testing following his plea of guilty to statutory rape. This Court held that a showing of materiality under subsection (a)(1) was "a condition precedent to the trial court's authority to grant his motion and appoint him counsel." *Cox*, at 312, 781 S.E.2d at 868.

Further, this Court has stated,

> [W]e reject [d]efendant's contention that the threshold materiality requirement for the appointment of counsel for purposes of N.C. Gen. Stat. § 15A-269(c) is less demanding than that required for actually ordering DNA testing pursuant to N.C. Gen. Stat. § 15A-269(a)(1) and hold that, in order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).

State v. Gardner, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013) (citation and quotation marks omitted).

Even though Judge Murphy indicated he was dissenting on the issue of appointment of counsel, his reasoning and the law on materiality under subsection (a)(1) are so intertwined that the *per curiam* opinion from our Supreme Court in *Sayre* can only be read as affirming the entire majority opinion from this Court.[1] *See Tinajero v. Balfour Beatty*

1. This case illustrates at least one of the reasons why *per curiam* decisions can be problematic. Judges and practitioners benefit from certainty and clearly developed jurisprudence. The issue in this case could have been settled with a full opinion from our

Infrastructure, Inc., 233 N.C. App. 748, 761, 758 S.E.2d 169, 177-78 (2014) (citation and quotation marks omitted) ("*Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written.").

Our Supreme Court has stated that a defendant's plea of guilty is a "formal confession[] of guilt." *State v. Caldwell*, 269 N.C. 521, 524, 153 S.E.2d 34, 36 (1967). *See also State v. Elliott*, 269 N.C. 683, 685, 153 S.E.2d 330, 332 (1967) ("Defendant's plea of guilty in open court is [a] confession[.]"). Further,

> "[a] valid guilty plea . . . serves as an admission of all the facts alleged in the indictment or other criminal process." *State v. Thompson*, 314 N.C. 618, 623-24, 336 S.E.2d 78, 81 (1985) (citations omitted). A guilty plea is "[a]n express confession" by a defendant who "directly, and in the face of the court, admits the truth of the accusation." *State v. Branner*, 149 N.C. 559, 561, 63 S.E. 169, 170 (1908).

State v. Chandler, ___ N.C. App. ___, ___, 827 S.E.2d 113, 116 (2019). In addition, it is well settled that a plea of guilty "leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense." *State v. Smith*, 279 N.C. 505, 506, 183 S.E.2d 649, 650 (1971) (citation and quotation marks omitted).

Defendant here did not enter an *Alford* plea. Therefore, his plea of guilty served as a confession to the murder of Carl Eugene Boyd and an admission to the truthfulness of all of the facts surrounding his involvement. Accordingly, Defendant waived all defenses available to him, and he cannot show materiality under Section 15A-269(a)(1).

The majority relies on *State v. Randall*, 259 N.C. App. 885, 817 S.E.2d 219 (2018) in determining that a defendant who pleads guilty may seek post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269. However, as set forth above, *Sayre* should be viewed as controlling in this case. "The Court of Appeals has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court," thus this Court's decision should be controlled by *Sayre*. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (*purgandum*).

Supreme Court in *Sayre*. However, our case law has developed around *Randall*. Courts have likely invested unnecessary time, energy, and resources handling motions for post-conviction DNA testing where defendants entered guilty pleas.

In addition, the majority misses the mark on its discussion of the term "verdict" in N.C. Gen. Stat. § 15A-269(b). The majority defines "verdict" and even quotes case law from our Supreme Court telling us what that term means. But, the majority, without any citation or attribution, simply declares that "the General Assembly intended for 'verdict' to be construed more broadly, to mean 'resolution,' 'judgment,' or 'outcome' in a particular matter."

"When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 107, 804 S.E.2d 486, 492 (2017) (citation and quotation marks omitted). Legislative intent "may be found first from the plain language of the statute . . . . If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and quotation marks omitted). "The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." *Burnham v. Adm'r, Unemployment Comp. Act*, 184 Conn. 317, 325, 439 A.2d 1008, 1012 (1981).

The majority finds no ambiguity in the term "verdict;" it simply laments the plain meaning of the statute.

If the plain language of Section 15A-269 is not clear enough, the General Assembly has established what a verdict is. N.C. Gen. Stat. § 15A-1237, titled "Verdict," states that:

> (a) The verdict must be in writing, signed by the foreman, and made a part of the record of the case.
>
> (b) The verdict must be unanimous, and must be returned by the jury in open court.
>
> (c) If the jurors find the defendant not guilty on the ground that he was insane at the time of the commission of the offense charged, their verdict must so state.
>
> (d) If there are two or more defendants, the jury must return a separate verdict with respect to each defendant. If the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees.
>
> (e) If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect

> to any offense, including a lesser included offense on which the judge charged, as to which it agrees.

N.C. Gen. Stat. § 15A-1237 (2019).

Accordingly, for there to be "a reasonable probability that the *verdict* would have been more favorable to the defendant," under Section 15A-269, there must have been a verdict returned by a jury. N.C. Gen. Stat. § 15A-269(b)(2) (emphasis added). Use of the term "verdict" obviously has a "single, definite and sensible meaning." *Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. at 107, 804 S.E.2d at 492. The majority should be faithful to the plain language of the statute, and not rewrite it with its own definition.

Also, the requirement of an affidavit of innocence in Section 15A-269(b)(3) is inconsistent with a defendant's plea of guilty. Defendants provide sworn answers to the questions on their transcript of plea. A defendant who, under oath, admits guilt to a charged offense, cannot thereafter provide a truthful affidavit of innocence. Allowing sham affidavits makes a mockery of the procedure established by the General Assembly.

Defendant here swore under oath that he was in fact guilty of murdering and robbing Carl Eugene Boyd in September 1992. Twenty-three years later he signed a document and swore that he was innocent. It cannot be both. This demonstrates just another reason why a defendant cannot plead guilty and later be entitled to post-conviction DNA testing pursuant to the plain language of N.C. Gen. Stat. § 15A-269.

STATE OF NORTH CAROLINA
v.
MARCUS DOMINIQUE CHADWICK

No. COA19-271

Filed 21 April 2020

Probation and Parole—special conditions of probation—drug assessment and treatment—discretionary authority

After convictions for multiple illegal drug offenses, a special condition of probation requiring defendant to undergo a drug assessment and comply with any treatment recommendations was within the trial court's discretionary authority under N.C.G.S. § 15A-1343(b1)(10) since the requirement bore a reasonable relationship to defendant's crimes and tended to reduce his exposure to crime and assist in his rehabilitation.

Appeal by defendant from judgments entered 7 November 2018 by Judge Joshua W. Willey Jr. in Onslow County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Edward Eldred for defendant.

DIETZ, Judge.

Defendant Marcus Chadwick was convicted of multiple offenses, including offenses related to illegal drug use. As a condition of Chadwick's supervised probation, the trial court ordered him to undergo an assessment by a drug treatment program and to comply with any treatment recommendations from that program.

Chadwick challenges this probation condition on appeal. As explained below, that special condition was reasonably related to Chadwick's rehabilitation and thus well within the trial court's sound discretion. We therefore affirm the trial court's judgments.

Facts and Procedural History

On 16 September 2016, a police officer arrived at Defendant Marcus Chadwick's home to arrest him for failure to appear in court. As Chadwick went inside to get his shoes, the officer smelled a strong

odor of marijuana and noticed a measuring scale and a shotgun in Chadwick's bedroom. The officer tried to detain Chadwick, but Chadwick fled. Law enforcement ultimately arrested Chadwick and found 62 grams of marijuana, digital scales, and other drug paraphernalia in his possession.

Chadwick was found guilty of felony possession of marijuana, misdemeanor possession of drug paraphernalia, felony assault on a law enforcement officer inflicting physical injury, and misdemeanor resisting a public officer. At sentencing, the trial court consolidated Chadwick's felony convictions and the drug paraphernalia conviction into one judgment and imposed a sentence of five to fifteen months in prison. The court suspended that sentence and placed Chadwick on supervised probation for thirty months.

The court also imposed a special probation condition because of the evidence of Chadwick's drug use. The court ordered Chadwick to "[r]eport for initial evaluation by TASC up to and includ[ing] inpatient treatment[,] participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation, and comply with all other therapeutic requirements of those programs until discharged." "TASC" is an acronym for "Treatment Accountability for Safer Communities," a drug treatment network that specializes in services for people involved in the justice system and suffering from substance abuse.

Chadwick appealed, challenging this special condition of his supervised probation.

Analysis

Chadwick argues that the trial court lacked authority to order him to be evaluated by the drug treatment program and then to comply with any treatment recommendations from the program. "A challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard." *State v. Allah*, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013). Under this standard, we can reverse only if "the trial court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In addition to the regular conditions of probation, the trial court may require a probationer to comply with one or more "special conditions" described by statute. N.C. Gen. Stat. § 15A-1343(b1). Some of these special conditions require probationers to participate in medical,

psychiatric, or substance abuse treatment. *See*, *e.g.*, N.C. Gen. Stat. § 15A-1343(b1)(1)–(2b). Chadwick argues that, under these provisions, only the trial court can require a probationer to undertake a specific drug treatment action. Thus, he reasons, the trial court improperly delegated its authority by ordering that Chadwick undergo a drug treatment *evaluation* (not a specific course of drug treatment) and then ordering Chadwick to comply with whatever course of treatment the *program* (not the trial court) determined to be appropriate after that evaluation.

We need not decide whether Chadwick's statutory analysis is correct because this condition of probation is permissible under a separate section of the statute. In addition to the enumerated special conditions, the statute permits the trial court to require a probationer to "[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation." N.C. Gen. Stat. § 15A-1343(b1)(10).

Trial courts have wide discretion to formulate conditions under this provision. *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). The extent to which a condition of probation may be imposed under this provision "hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

Here, Chadwick was convicted of several crimes that suggest he suffers from substance abuse issues. A special probation condition requiring Chadwick to submit to evaluation through a drug treatment program, and to comply with any treatment recommendations stemming from that evaluation, bears a reasonable relationship to Chadwick's drug-related crimes and is reasonably likely to reduce Chadwick's exposure to drug crimes and assist in his rehabilitation. Accordingly, the trial court's decision to impose this condition was well within the trial court's sound discretion.

Conclusion

We affirm the trial court's judgments.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL JIMMY COLEMAN

No. COA19-844

Filed 21 April 2020

1. Appeal and Error—lack of notice of appeal in record—jurisdiction—petition for writ of certiorari—motion to amend record

Where the record on appeal did not include a notice of appeal giving the Court of Appeals jurisdiction, the court, in its discretion, granted defendant's petition for writ of certiorari and granted his motion to amend the record to reflect his notice of appeal.

2. Drugs—trafficking—jury instructions—lesser-included charge of selling a controlled substance—total weight of tablets—plain error analysis

Where defendant was charged with trafficking opium pursuant to N.C.G.S. § 90-95(h)(4) (which requires at least 4 grams), and the evidence showed defendant sold hydrocodone tablets with a total weight of 8.47 grams, the trial court did not commit plain error by failing to ex mero motu instruct the jury on the lesser-included charge of selling opium even though the State's witness testified she purchased twenty 10-milligram tablets of hydrocodone from defendant. There was no conflict in the evidence regarding the weight of the hydrocodone tablets because 10 milligrams referred to the amount of the active ingredient, not the total weight of the tablets. Under section 90-95(h)(4), the total weight of tablets, pills, and other mixtures—not just the weight of their active ingredient—determines whether the amount possessed constitutes trafficking.

Appeal by defendant from judgment entered 22 April 2019 by Judge Carla Archie in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Edward Eldred for defendant-appellant.

TYSON, Judge.

Michael Jimmy Coleman ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of trafficking opium; possession with intent to manufacture, sell, and distribute a schedule-III-controlled substance; and to sell/deliver a schedule-III-controlled substance. We find no error.

I. Background

A confidential informant ("CI") worked with the Cleveland County Sherriff's Department Narcotics Division Sergeant Travis Hamrick ("Sgt. Hamrick") to identify and provide names of illicit drug dealers located in Cleveland County from whom she could buy illegal narcotics. The CI informed Sgt. Hamrick that Defendant "was selling pills, hydrocodone and Xanax in particular."

The CI agreed to participate in a controlled buy of narcotics from Defendant on 1 February 2016. Sgt. Hamrick, along with Narcotics Division, Lieutenant Judy Seagle ("Lt. Seagle") met the CI in a supermarket's parking lot in Kings Mountain near Defendant's home.

Sgt. Hamrick and Lt. Seagle confirmed the CI did not have any narcotics on her person or in her vehicle. The CI was wired with a button camera underneath her shirt and given a cell phone to record audio. Sgt. Hamrick gave the CI $82.00 in U.S. currency to purchase the narcotics.

Sgt. Hamrick and Lt. Seagle followed the CI from the supermarket's parking lot to Defendant's home. The detectives parked at a neighboring home, while the CI went to Defendant's home. Once the CI was inside of Defendant's home, she told Defendant she needed to buy pills for her brother, who she claimed was waiting back at the nearby parking lot. Defendant sold the CI six Xanax tablets and five oxycodone tablets for $80.00.

After the CI left Defendant's home, the detectives followed her back to the same parking lot. The CI gave the six Xanax tablets, five oxycodone tablets, and $2.00 in change to the detectives. Sgt. Hamrick and Lt. Seagle again searched the CI's person and vehicle to "make sure that she didn't keep anything." Laboratory testing later confirmed the tablets contained alprazolam (Xanax), a schedule-IV-controlled substance, and dihydrocodeinone, which is hydrocodone, a schedule-III-controlled substance.

The CI conducted two further buys from Defendant at his home. On 4 February 2016, the CI bought twenty hydrocodone tablets for $200.00. Laboratory tests confirmed the tablets contained hydrocodone and had a total weight of 8.47 grams. On 5 February 2016, the CI purchased an

additional twenty hydrocodone tablets for $160.00. Laboratory testing confirmed the tablets contained hydrocodone and weighed 8.46 grams.

The State presented the testimony of Deborah Chancey, an analyst at the North Carolina State Crime Laboratory. Analyst Chancey selected and analyzed one tablet that contained dihydrocodeinone or hydrocodone. This tablet weighed ".42 grams, and the net weight of the remaining tablets was 8.05 grams plus or minus 0.03 grams."

Sgt. Hamrick and Lt. Seagle visited Defendant at his home on 24 February 2016 to discuss his potential cooperation with the Narcotics Division in their investigation of his narcotics supplier. During this visit, Defendant allowed the officers to search his home. Lt. Seagle located a pill bottle with Defendant's sister's name thereon, which contained a "mixture of pills." Sgt. Hamrick visually inspected the pills and found "[s]ome of the pills that were in the bottle were consistent with what [Defendant] had sold" to the CI in the controlled purchases.

Defendant was indicted for possession with intent to manufacture, sell, deliver hydrocodone; selling and delivering hydrocodone, possession with intent to manufacture, sell, deliver alprazolam; and selling and delivering alprazolam for the 1 February 2016 transactions. Defendant was indicted for two counts of trafficking opium for the transactions on 4 February and 5 February 2016.

On 16 April 2019, the jury returned verdicts and convicted Defendant of all charges, except the trafficking in opium indictment for the 5 February 2016 transaction. Defendant was acquitted of that charge.

The trial court consolidated the convictions and sentenced Defendant to an active term of 70 to 93 months of imprisonment on 22 April 2019. The trial court prepared appellate entries on that same date.

II. Jurisdiction

[1] The record on appeal does not include any reference to Defendant entering an oral or written notice of appeal. The trial court's appellate entries are included. On 30 December 2019, Defendant petitioned this Court to issue a writ of certiorari to hear his belated appeal. Defendant also filed a motion to amend the record on appeal to offer proof of his written notice of appeal.

A writ of certiorari may be issued "when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). "*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) (alteration original), *cert denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

In an exercise of discretion, this Court grants Defendant's petition for writ of certiorari to hear his belated appeal. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019); N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

Our Supreme Court has held whether to grant or deny a motion to amend the record is "a decision within the discretion of the Court of Appeals" which constitutes a legitimate application of our appellate rules absent an "abuse of discretion." *State v. Petersilie*, 334 N.C. 169, 177, 432 S.E.2d 832, 837 (1993). The State argues the purported document is not an appropriate entry or statement showing an appeal taken orally. In support of this assertion, the State cites *State v. Hughes*, wherein this Court dismissed an appeal because the appealing party failed to comply with Rule 4 of our Rules of Appellate Procedure. This failure deprived this Court of jurisdiction to consider the appeal. *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778-79 (2011). However, the reasoning in *Hughes* is distinguishable from the facts of this case. In *Hughes*, the defendant did not petition this court for a writ of certiorari or to amend the record. *Id.* Contemporaneously filed with this motion to amend was Defendant's now-allowed petition for writ of certiorari. Having acquired jurisdiction, and in the exercise of our discretion, this Court allows Defendant's motion to amend the record to reflect his notice of appeal.

III. Issue

Defendant argues the trial court committed plain error by not instructing the jury *ex mero motu* on the lesser-included offense of selling hydrocodone. Defendant acknowledges he did not request the lesser-included offense and review of this argument is limited to plain error.

IV. Lesser-Included Instruction

A. Standard of Review

Under our Rules of Appellate Procedure: "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action

questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

This Court's review under plain error is "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" to overcome dismissal for a defendant's failure to preserve. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). To constitute plain error, Defendant carries and maintains the burden to show "not only that there was error, but that absent the error, the jury probably would have reached a different result" to demonstrate prejudice. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

[2] Defendant argues the trial court plainly erred by not instructing the jury on the lesser-included offense of selling a controlled substance. Defendant asserts the State's evidence conflicted on the weight of the hydrocodone the CI had purchased from him during the 4 February 2016 transaction.

Our Supreme Court has held: "Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence*." *State v. Jones*, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981) (emphasis original).

"[O]nly where there is evidence from which the jury reasonably could find that the defendant committed the lesser offense" is the trial court required to instruct the jury on a lesser included offense. *State v. Bagley*, 321 N.C. 201, 210, 362 S.E.2d 244, 249-50 (1987). "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than the defendant's denial that he committed the offense, [the] defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000) (citation omitted).

To determine if the lesser-included offense instruction is necessary, the test is "whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Chaves*, 246 N.C. App. 100, 103, 782 S.E.2d 540, 543 (2016) (internal citation and quotation marks omitted).

Our General Statutes provide a defendant is guilty of trafficking in opium or heroin when he "sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound,

derivative, or preparation of opium or opiate . . . including heroin, or any mixture containing such substance." N.C. Gen. Stat. § 90-95(h)(4) (2019). "[T]he legislature's use of the word 'mixture' establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking." *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (1987). The two essential elements of trafficking in opium are a defendant must (1) knowingly sell (2) a specified amount of opium (or any preparation thereof). *State v. Hunt*, 249 N.C. App. 428, 432, 790 S.E.2d 874, 878 (2016).

Our Supreme Court has held "tablets and pills of prescription pharmaceutical drugs" are mixtures under N.C. Gen. Stat. § 90-95(h)(4). *State v. Ellison*, 366 N.C. 439, 444, 738 S.E.2d 161, 163-64 (2013). A defendant's criminal liability under N.C. Gen. Stat. § 90-95(h)(4) is "based on the total weight of the mixture involved." *Id.* at 440, 738 S.E.2d at 162. The total weight of the pills or tablets determines whether the amount possessed constitutes trafficking. *See id.*

Analyst Chancey testified the total weight of the twenty tablets from the 4 February purchase weighed 8.47 grams, plus or minus 0.03 grams. Defendant argues the CI's testimony that she had purchased "$200 worth of pain pills, 20 of them, 10-milligram hydrocodone" provides sufficient conflicting evidence to require the trial court to issue the lesser-included instruction *ex mero motu*.

This testimony does not create a conflict to warrant the lesser-included instruction. The "10-milligram hydrocodone" merely relates to the dosage or strength of the hydrocodone, the active ingredient in the tablets. Under *Ellison*, the total weight of the pills is considered to determine whether the statutory threshold is met, not just the weight of the active ingredient. *Ellison*, 366 N.C. at 442, 738 S.E.2d at 163-64. The CI was not referencing the total weight. Analyst Chancey's testimony provided the total weight of the tablets from her laboratory analysis to meet the State's burden.

The evidence presented at trial tended to show Defendant sold to the CI twenty tablets containing hydrocodone weighing a total of 8.47 grams, satisfying all essential elements of the trafficking in opium charge from the 4 February 2016 incident. We find no error, and certainly no plain error, in the trial court not instructing the jury *ex mero motu* on the lesser-included offense of selling a controlled substance. Defendant's argument for plain error review is overruled.

V. Conclusion

Defendant's argument that the trial court committed any error, including plain error, by not instructing the jury *ex mero motu* on the lesser-included offense of selling a controlled substance is without merit. Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdicts or in the judgment entered upon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and BROOK concur.

STATE OF NORTH CAROLINA

v.

ROGELIO ALBINO DIAZ-TOMAS, Defendant

No. COA19-777

Filed 21 April 2020

1. Appeal and Error—petition for a writ of mandamus—not a substitute for appeal—motion to take judicial notice—failure to make argument

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license and the district court denied defendant's motion to reinstate the charges, the Court of Appeals denied defendant's two petitions for a writ of mandamus compelling the district court to reverse its decision because the proper means to review that decision would have been to file an appeal or petition for certiorari with the superior court. The Court of Appeals also denied defendant's motion to take judicial notice of local judicial rules because defendant made no argument explaining why it should do so.

2. Courts—superior court—denial of petition for certiorari—discretionary decision

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license and the district court denied defendant's motion to reinstate the charges, the superior court did not abuse its discretion by denying defendant's petition for certiorari seeking review of the district

court's ruling. Defendant failed to show that the superior court's decision was arbitrary or manifestly unsupported by reason, and his argument that the superior court was obligated to grant certiorari lacked merit because such decisions are discretionary in nature.

3. Appeal and Error—petition for certiorari—granted as to one court decision—review unavailable for other court decision—moot argument

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license, the district court denied defendant's motion to reinstate the charges, and the superior court denied defendant's petition for certiorari seeking review of the district court's ruling, the Court of Appeals dismissed defendant's argument challenging the district court's ruling where it had only granted certiorari to review the superior court's ruling. Moreover, defendant's arguments regarding the district court's ruling became moot where the Court of Appeals had already affirmed the superior court's ruling.

Judge ZACHARY concurring in part and dissenting in part.

Appeal by defendant from order entered 24 July 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 January 2020.

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

Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for defendant-appellant.

YOUNG, Judge.

Where defendant failed to demonstrate that the Superior Court abused its discretion in denying his petition for certiorari, we affirm that decision. Where the District Court's denial of defendant's motion to reinstate charges is not properly before us, we dismiss such argument. Where mandamus is not an appropriate remedy, we deny defendant's petitions for writ of mandamus. Where defendant requests that we take judicial notice of local rules, but declines to show for what purpose we must do so, we deny defendant's motion to take judicial notice. We affirm in part and dismiss in part.

I. Factual and Procedural Background

On 5 April 2015, Rogelio Albino Diaz-Tomas (defendant) was cited for driving while impaired and without an operator's license. Defendant was told to appear in Wake County District Court for a hearing on the citation. On 25 February 2016, the Wake County District Court issued an order for arrest due to defendant's failure to appear. On 11 July 2016, the State entered a dismissal with leave of the charges.

On 24 July 2018, defendant was arrested and ordered to appear. On 13 November 2018, the court issued another order for defendant's arrest due to his failure to appear. On 12 December 2018, he was again arrested and ordered to appear.

On 28 January 2019, defendant filed a motion in Wake County District Court to reinstate the charges that the State had previously dismissed with leave. Defendant sought a writ of mandamus from the North Carolina Supreme Court, which the Court denied on 26 February 2019. On 15 June 2019, the Wake County District Court denied defendant's motion to reinstate the charges, holding that the State acted within its discretion and statutory authority by entering a dismissal with leave.

On 22 July 2019, defendant filed a petition for writ of certiorari in Wake County Superior Court, seeking review of the District Court's denial of his motion to reinstate the charges. On 24 July 2019, the Superior Court, in its discretion, denied and dismissed defendant's petition for writ of certiorari.

Defendant filed a petition for writ of certiorari to this Court. On 15 August 2019, this Court granted defendant's petition for the purpose of reviewing the order of the Superior Court denying defendant's petition for certiorari filed in that court.

II. Preliminary Motions

[1] In addition to his arguments on appeal, defendant has filed two petitions for writ of mandamus and one motion to take judicial notice. For the following reasons, we deny all three.

With respect to his petitions for writ of mandamus, defendant seeks a writ compelling the District Court to grant his motion to reinstate the charges. In essence, he seeks to attack the District Court's denial of his motion collaterally, rather than on appeal, by requesting that we compel the District Court to reverse itself.

However, "[a]n action for *mandamus* may not be used as a substitute for an appeal." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160

S.E.2d 719, 727 (1968). Our Supreme Court has held that "*mandamus* is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Warren v. Maxwell*, 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943). Rather, if statute provides no right of appeal, "the proper method of review is by *certiorari*." *Id.* As such, defendant's petitions – seeking to reverse the decision of the District Court – are not properly remedied by mandamus, but by appeal or certiorari, the latter of which defendant in fact pursued in Superior Court.

Moreover, even if mandamus offered an appropriate remedy, this Court would not be the appropriate venue. "Applications for the writ[] of mandamus . . . shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause[.]" N.C.R. App. P. 22(a). From a final judgment entered in Wake County District Court, appeal of right lies to Wake County Superior Court. *See* N.C. Gen. Stat. § 7A-271(b) (2019). As such, a petition for writ of mandamus would properly have been filed with the Superior Court, not with this Court. For these reasons, we deny defendant's petitions for writ of mandamus.

With respect to defendant's motion to take judicial notice, defendant requests that this Court take judicial notice of the Wake County Local Judicial Rules. While defendant is correct that these rules are of a sort of which this Court may properly take judicial notice, defendant offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning, as shown below. As such, we decline to take judicial notice of the Wake County Local Judicial Rules, and deny this motion as well.

III. Petition for Certiorari

[2] In his second argument on appeal, which we address first, defendant contends that the Superior Court erred in denying his petition for certiorari. We disagree.

A. Standard of Review

"The authority of a superior court to grant the writ of certiorari in appropriate cases is . . . analogous to the Court of Appeals' power to issue a writ of certiorari[.]" *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (1993). "*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). "[I]n our review of the superior court's grant or denial of certiorari to an inferior tribunal, we

determine only whether the superior court abused its discretion. We do not address the merits of the petition to the superior court in the instant case." *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

"Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Defendant, in his brief, concedes that the decision whether to grant certiorari is discretionary. He argues, nonetheless, that "just because *certiorari* is a discretionary writ does not mean that the Superior Court can deny the writ for any reason."

While defendant is certainly correct in essence – the discretion of a trial court is not blanket authority, and must have some basis in reason – his argument goes too far afield. Defendant proceeds to argue, in essence, that the trial court abused its discretion in denying the writ because he was *entitled* to it. Defendant argues, for example, that he demonstrated "appropriate circumstances" for the issuance of a writ "to review this compelling interlocutory issue[;]" that the court should have allowed the petition due to its potential influence on the outcome of other Wake County cases; and ultimately that the Superior Court apparently had an obligation to grant certiorari.

These arguments must fail. The Superior Court is under no obligation to grant certiorari. While certainly it must have some reason for denying the writ, that does not equate to an affirmative duty to grant it. Even assuming *arguendo* that the District Court's denial of defendant's motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.

On appeal, defendant bears the burden of showing that the decision of the Superior Court in denying his petition for certiorari was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary. We hold that he has failed to do so.

Accordingly, we hold that the trial court did not err in denying defendant's petition for certiorari.

IV. Motion to Reinstate Charges

[3] Defendant also contends on appeal that the District Court erred in denying his motion to reinstate charges. However, as we have held, the Superior Court did not err in denying his petition for certiorari. Additionally, we note that this Court granted certiorari solely for the purpose of reviewing the Superior Court's denial of certiorari, not for the purpose of reviewing the District Court's denial of the motion to reinstate charges. Indeed, on review of an appeal from the superior court's denial of certiorari, "[w]e do not address the merits of the petition[,]" which in the instant case would be whether the District Court erred in denying the motion to reinstate the charges. *N.C. Cent. Univ.*, 122 N.C. App. at 612, 471 S.E.2d at 117. As such, this argument is not properly before us, and is moot. We therefore decline to address it, and dismiss it.

AFFIRMED IN PART, DISMISSED IN PART.

Judge BERGER concurs.

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

ZACHARY, Judge, concurring in part, dissenting in part.

I concur with the conclusion reached in Section IV of the majority's opinion regarding Defendant's arguments concerning the district court's "Order Denying Defendant's Motion to Reinstate Charges." As the majority explains, that order is not before this Court. We allowed Defendant's petition for writ of certiorari for the limited purpose of reviewing the superior court's "Order Denying Petition for Writ of Certiorari." *Majority* at 7. Accordingly, we lack jurisdiction over the district court's order, and Defendant's challenge thereto is improper.

As discussed below, I also agree with the majority that mandamus is an improper remedy to redress the errors alleged in this matter, although I reach this result for different reasons than the majority. However, I respectfully dissent from the remainder of the majority's opinion.

First, I would allow Defendant's "Motion to Take Judicial Notice of Current Local Rules." While noting that the Wake County Local Judicial

Rules are indeed "of a sort of which this Court may properly take judicial notice," the majority nevertheless denies Defendant's motion on the grounds that he "offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning . . . ." *Id.* at 4. I respectfully disagree. Defendant asserts in his motion that "[t]he local rules are inconsistent with the District Court's actions in this instant case." Furthermore, it is manifest that in order to conduct a full and thorough appellate review of the superior court's order—as is our mandate in this appeal, pursuant to our Court's 15 August 2019 order allowing Defendant's petition for writ of certiorari—we must necessarily review the allegations of Defendant's underlying petition.

Moreover, as explained below, I cannot agree with the majority's analysis regarding the superior court's denial of Defendant's petition for writ of certiorari. For these reasons, I respectfully concur in part, and dissent in part, from the majority's opinion.

Facts and Procedural History

On 4 April 2015, Defendant was charged by criminal citation with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2019), and driving without an operator's license, in violation of N.C. Gen. Stat. § 20-7(a). After Defendant failed to appear in Wake County District Court on 24 February 2016, the district court issued an order for his arrest. On 11 July 2016, the Wake County District Attorney's Office dismissed Defendant's charges with leave, due to his "fail[ure] to appear for a criminal proceeding at which [his] attendance was required and" upon the prosecutor's belief that he could not "readily be found." Defendant's driving privilege was also revoked as a result of his failure to appear.

In July 2018, Defendant was arrested on the February 2016 order for his arrest; but after he again failed to appear for his 9 November 2018 court date, the district court issued another order for his arrest. Defendant was arrested on 12 December 2018, and he was ordered to appear in Wake County District Court at 2:00 p.m. on 18 January 2019. However, Defendant's case was subsequently scheduled as an "add-on case" during the 14 December 2018 Criminal Administrative Driving While Impaired Session of Wake County District Court. Upon Defendant's appearance on 14 December 2018, the assistant district attorney declined to reinstate Defendant's charges.

According to Defendant, his scheduled "18 January 2019 Criminal District Court date never took place." Accordingly, on 28 January 2019, Defendant filed a "Motion to Reinstate Charges" in Wake County

District Court, alleging, *inter alia*, that "[t]he State will not reinstate . . . Defendant's criminal charges unless [he] enters a guilty plea to the DWI charge and waives his right to appeal[.]" On 15 July 2019, the district court entered its Order Denying Defendant's Motion to Reinstate Charges.

On 22 July 2019, Defendant petitioned the Wake County Superior Court to issue its writ of certiorari, seeking reversal of the district court's order and reinstatement of Defendant's criminal charges. The superior court "denied and dismissed" Defendant's petition for writ of certiorari by order entered 24 July 2019. The superior court determined that Defendant "failed to provide 'sufficient cause' to support the granting of his Petition" and "is not entitled to the relief requested[.]"

Defendant subsequently filed a petition for writ of certiorari with this Court. By order entered 15 August 2019, we allowed Defendant's petition "for purposes of reviewing the order entered by [the superior court] on 24 July 2019."

Discussion

As explained below, I concur in the denial of Defendant's (1) "Alternative Petition for Writ of Mandamus," and (2) "Second Alternative Petition for Writ of Mandamus," directed to the Wake County District Attorney and the Wake County District Court, respectively. However, I respectfully dissent from the majority's decision regarding the superior court's denial of Defendant's petition for writ of certiorari.

A. Mandamus

"Mandamus translates literally as 'We command.' " *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation omitted). A writ of mandamus is, thus, an "extraordinary" court order issued "to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Id.* (citation and quotation marks omitted). Courts of the appellate division—that is, this Court and our Supreme Court—"may issue writs of mandamus 'to supervise and control the proceedings' of the" trial courts, but may only do so "to enforce established rights, not to create new rights." *Id.* (quoting N.C. Gen. Stat. § 7A-32(b), (c) (2007)) (additional citation omitted). A number of requirements must be satisfied before a writ of mandamus may issue, *see id.*, but for our purposes, it is sufficient to note that "the party seeking relief must demonstrate a clear legal right to the act requested"; "the defendant must have a legal duty to perform the act requested"; and "the duty must be clear and not reasonably debatable." *Id.* at 453-54, 665 S.E.2d at 59 (citation omitted).

Here, Defendant filed two separate petitions for the writ of mandamus, requesting that this Court (1) "compel the Wake County District Attorney to promptly reinstate or dismiss his charges"; and (2) "compel the Wake County District Court to schedule Defendant a trial or hearing within a reasonable time." Contrary to the majority's determination, Defendant's petitions are properly addressed to this Court, not the superior court. *See In re Redwine*, 312 N.C. 482, 484, 322 S.E.2d 769, 770 (1984) ("The superior court judge misconstrued his authority to issue the writ of mandamus to a judge of the General Court of Justice. A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus . . . to a district court judge."). Consequently, if mandamus were the appropriate remedy in this case, it would be error for our Court to deny Defendant's petitions on that basis.

Nevertheless, as the majority correctly concludes, albeit for different reasons than I, mandamus is *not* the proper remedy here. Defendant fails to "demonstrate a clear legal right to the act[s] requested." *In re T.H.T.*, 362 N.C. at 453, 665 S.E.2d at 59; *see also* N.C. Gen. Stat. § 20-38.6(a) (setting forth the limited motions and procedures available for defense of implied-consent offenses in the district courts).

Nor can it be said that the Wake County District Attorney has a "clear and not reasonably debatable" legal duty to reinstate Defendant's criminal charges under these circumstances. *In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59. Indeed, the statutes governing the dismissal of criminal charges in implied-consent cases—and the rights of defendants whose failure to appear triggers dismissal—are anything but clear. *Compare* N.C. Gen. Stat. § 15A-932(a)(2) (providing that a "prosecutor may enter a dismissal with leave for nonappearance when a defendant . . . [f]ails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found"), *with id.* § 20-24.1(a), (b1) (providing that although the DMV "*must* revoke the driver's license of a person upon receipt of notice from a court that the person was charged with a motor vehicle offense and he . . . failed to appear, after being notified to do so, when the case was called for a trial or hearing[,]" the defendant nevertheless "*must* be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance" (emphases added)).

As these convoluted and often contradictory statutes illustrate, implied-consent law is rarely clear. For our purposes, however, it is sufficient to note that Defendant has failed to demonstrate a clear legal right to the acts he seeks to compel—i.e., the Wake County District Attorney's reinstatement of his criminal charges, followed by a trial or

hearing in Wake County District Court—as this determination is fatal to his petitions for the writ of mandamus.

Accordingly, I concur in the majority's denial of Defendant's (1) Alternative Petition for Writ of Mandamus, and (2) Second Alternative Petition for Writ of Mandamus.

B. Certiorari

Contrary to the majority, I conclude that Defendant has met his burden of showing that the superior court abused its discretion by denying his petition for writ of certiorari. For the reasons set forth below, I would reverse the superior court's order denying Defendant's petition for writ of certiorari and remand for a hearing and decision on the merits.

The Nature of Certiorari

It is well settled that "[a]ppeals in criminal cases are controlled by the statutes on the subject." *State v. King*, 222 N.C. 137, 140, 22 S.E.2d 241, 242 (1942) (citation omitted). Our statutes, however, do not provide for appeal from the district court's denial of a defendant's motion to reinstate criminal charges. Nevertheless, in such instances, "the defendant is not without a remedy. The remedy, retained by statute, approved by the court and generally pursued, is *certiorari* to be obtained from the Superior Court upon proper showing aptly made." *Id.* at 140, 22 S.E.2d at 243 (citations omitted); *see also* N.C. Gen. Stat. § 1-269 ("Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use.").

The superior court has jurisdiction to issue a writ of certiorari to review district court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. Rule 19 provides, in pertinent part: "In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause."

A superior court's authority "to grant the writ of certiorari in appropriate cases is . . . analogous to [this Court's] power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c)[.]" *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33, *appeal dismissed and disc. review denied*, 334 N.C. 436, 433 S.E.2d 181 (1993). As our Supreme Court long ago explained:

> [T]he Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error lies not, by *certiorari*, to bring up their judicial proceedings to

> be reviewed in the matter of law; for in such case "the *certiorari* is in effect a writ of error," as all that can be discussed in the court above are the form and sufficiency of the proceedings as they appear upon the face of them. . . . It is . . . essential to the uniformity of decision, and the peaceful and regular administration of the law here, that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and, therefore, from necessity, we must retain this use of the *certiorari*.

State v. Tripp, 168 N.C. 150, 155, 83 S.E. 630, 632 (1914).

"*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), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.* (citing *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)).

"Two things . . . should be made to appear on application for *certiorari*: First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed" below. *Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 (citation and quotation marks omitted). Our Supreme Court has interpreted "merit" in this context to mean that a petitioner must show "that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." *Id.*

Analysis

On appeal, Defendant alleges that the Wake County District Attorney's Office "refus[es] to reinstate the charges unless [Defendant] enters a plea of guilty and waives his right to appeal[.]" Defendant lacks an appeal of right from the district court's order denying his motion to reinstate the charges, or from the superior court's denial of his petition for writ of certiorari. Accordingly, Defendant filed a petition for writ of certiorari seeking this Court's review of the superior court's order. In our discretion, we allowed Defendant's petition for writ of certiorari. However, the majority's opinion fails to sufficiently address that order, which is now squarely before us, pursuant to the determination of a panel of our Court that Defendant's appeal presented "appropriate

circumstances" to support issuing a writ of certiorari in order to enable our review. N.C.R. App. P. 21(a)(1).

As Defendant correctly notes, the discretionary nature of certiorari "does not mean that the Superior Court can deny the writ for any reason." While acknowledging that "the discretion of a trial court is not blanket authority, and must have some basis in reason[,]" the majority nevertheless misinterprets Defendant's argument as an assertion that "the trial court abused its discretion in denying the writ because he was *entitled* to it." *Majority* at 6. Yet, in faulting Defendant for arguing "too far afield[,]" *id.*, the majority inadvertently commits the same error.

For example, the majority asserts:

> Even assuming *arguendo* that the District Court's denial of [D]efendant's motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.
>
> . . . .
>
> It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary.

Id. at 6-7.

As the majority explains, an abuse of discretion occurs when the trial 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 7 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Here, the superior court's order fails to reveal any basis for its rationale. The order lacks any explanation for the basis of the superior court's decision, other than the conclusory statements that "Defendant has failed to provide 'sufficient cause' to support the granting of his Petition" and "is not entitled to the relief requested[.]" And because all of the "motions and proceedings in this matter were adjudicated in chambers" without the benefit of recordation or transcription, the record before this Court fails to disclose the basis for the superior court's decision, as well.

Moreover, it is not clear that Defendant could meet the standard embraced by the majority under *any circumstances*, given the majority's

refusal to "address the merits of the petition to the superior court in the instant case." *Id.* at 5 (citation and quotation marks omitted). I agree that the question of "whether the District Court erred in denying the motion to reinstate the charges" is not before us. *Id.* at 7. But this does not preclude our consideration of the allegations raised in Defendant's petition for writ of certiorari—i.e., his request that *the superior court* review the district court's denial of his motion to reinstate the charges. Indeed, how are we to fully review the superior court's order denying Defendant's petition without addressing its contents?

The superior court's unsupported conclusion that Defendant "failed to provide 'sufficient cause' to support the granting of his Petition" conflicts with our well-established standard for demonstrating merit and good cause for issuance of the writ of certiorari. A petitioner is not required to demonstrate a likelihood of success in every instance, merely (1) "diligence in prosecuting the appeal, *except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown*"; and (2) "merit, or that probable error was committed" below. *Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 (emphasis added); *cf. State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) ("As Bishop concedes, he cannot prevail on [his Fourth Amendment challenge to the trial court's order imposing lifetime satellite-based monitoring] without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, *we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal*." (emphasis added)).

Clearly, Defendant's petition contains all of the required information, and his arguments show merit, as we have interpreted that standard, to support the issuance of a writ of certiorari in order to enable review on the record. In his petition to the superior court, Defendant raised numerous, detailed arguments alleging violations of his statutory and constitutional rights arising from the State's refusal to reinstate his criminal charges, including that:

(1) The Wake County District Court failed to comply with N.C. Gen. Stat. § 20-24.1(b1)'s requirement that a defendant whose license is revoked due to his failure to appear after being charged with a motor vehicle offense "must be afforded an opportunity for a trial or a hearing within a reasonable time" of his appearance. N.C. Gen. Stat. § 20-24.1(b1). "Upon motion of a defendant, the court must order that a hearing or a trial be heard within a reasonable time." *Id.* Defendant alleges that the hearing dates provided to him "were merely illusory

as no opportunity for a trial or hearing actually existed on these dates."

(2) The Wake County District Attorney's decision declining to reinstate Defendant's criminal charges was made for an improper purpose—namely, to coerce him to plead guilty. Citing a variety of authorities for support, Defendant further alleges that the circumstances of the instant case evince a pattern of "systematic prosecutorial misconduct" on the part of the Wake County District Attorney's Office, which the District Court had the authority to address.

(3) The District Attorney's refusal to reinstate his criminal charges violates his constitutional rights to due process and a speedy trial. According to Defendant, "a due process violation exists when a prosecutor exercises his calendaring authority to gain a tactical advantage over a criminal defendant." For support, Defendant cites *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1 (1967), and *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994).

To be clear, I offer no opinion on the likelihood of Defendant's success on the merits of his petition, nor, as previously explained, is that question before us at this juncture. *See State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) ("The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause. As such, the two issues that [the] defendant raised in his petition for writ of certiorari to the Court of Appeals have not survived that court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea." (internal citation omitted)).

However, Defendant's petition for writ of certiorari contains cogent, well-supported arguments alleging statutory and constitutional violations akin to those at issue in *Klopfer* and *Simeon*, which—if true—are certainly concerning. He has no other avenue to seek redress for these alleged legal wrongs, because he has no right to appeal from the denial of his motion to reinstate charges. And if he pleads guilty, as the State intends, he waives his right to appeal altogether. This is no bargain.

> The open courts clause, Article I, Section 18 of the North Carolina Constitution, guarantees a criminal defendant a speedy trial, an impartial tribunal, and access to the court to apply for redress of injury. While this clause does not

> outlaw good-faith delays which are reasonably necessary for the state to prepare and present its case, it does prohibit purposeful or oppressive delays and those which the prosecution could have avoided with reasonable effort. Furthermore, Article I, Section 24 of the North Carolina Constitution grants every criminal defendant the absolute right to plead not guilty and to be tried by a jury. *Criminal defendants cannot be punished for exercising this right.*

Simeon, 339 N.C. at 377-78, 451 S.E.2d at 871 (emphasis added) (internal citations and quotation marks omitted).

Quite plainly, Defendant has no alternate means to seek redress of the issues raised in his petition before the superior court. The majority's opinion fails to address the issues raised in Defendant's petition—a necessary consideration upon review of the superior court's order denying his request for the writ of certiorari. For all of these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JUANITA NICOLE LEBEAU, Defendant

No. COA19-872

Filed 21 April 2020

1. Jurisdiction—to amend a criminal judgment—two requirements for divestment of jurisdiction

In a prosecution for trafficking in methadone, the trial court retained jurisdiction to amend the judgment against defendant five days after its entry where defendant had already filed notice of appeal but the fourteen-day period for doing so (under Appellate Rule 4(a)(2)) had not elapsed. Under N.C.G.S. § 15A-1448(a)(3), a trial court is only divested of jurisdiction when both a notice of appeal has been given and the period for taking appeals has elapsed.

2. Sentencing—right to be present—to hear sentence—amended judgment—no substantive change

In a prosecution for trafficking in methadone, where the trial court later amended the judgment against defendant in her absence, the court did not violate defendant's right to be present to hear her sentence because the amendment did not effect a substantive

change to that sentence. Instead, where the original judgment sentenced defendant to 70 months of imprisonment and the amended judgment sentenced her to a minimum of 70 months and a maximum of 93 months—thereby reflecting the required sentence for defendant's trafficking charge under N.C.G.S. § 90-95(h)(4)—the amendment merely corrected a clerical error and clarified that the sentence would comport with the applicable statute.

Appeal by Defendant from judgment entered 15 April 2019 by Judge Marvin Pope in Avery County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for the Defendant.

BROOK, Judge.

Juanita Nicole Lebeau ("Defendant") appeals from judgment entered upon jury verdicts on 10 April 2019 and amended 15 April 2019 for trafficking in methadone. We hold that the trial court retained jurisdiction to amend its judgment. We further hold that the 15 April 2019 amendment to the judgment did not violate Defendant's right to be present at sentencing. Accordingly, we find no error.

I. Factual and Procedural Background

Defendant was arrested on 6 October 2017 and indicted 20 August 2018 on charges related to drug offenses that took place in April and May of 2017. On 10 April 2019, an Avery County jury found her guilty of one count of trafficking between four and fourteen grams of methadone and two counts of selling methadone, a Schedule II narcotic. For sentencing purposes, the two counts of selling methadone were consolidated under the one count of trafficking. The sentence announced in open court on April 10 was "a mandatory 70 months" of active imprisonment. The written judgment reflected both a minimum and a maximum sentence of 70 months' active time.

The next day, the Avery County Clerk of Court sent Judge Pope an email asking two questions: First, whether he ought to indicate a maximum term for Defendant's sentence; and second, how to resolve a handful of inconsistencies among the verdict sheet, the indictment, the court

calendar, and the written judgment. In some places, the primary charge was listed as "PWISD Sch. II," i.e., trafficking. In others, it was listed as "Sale of Sch. II CS." Judge Pope replied the same afternoon clarifying that he had consolidated the two counts of selling methadone under the trafficking count, a Class F felony "for which [Defendant] received 70 to 93 months."

On 15 April 2019, Judge Pope entered an amended judgment sentencing Defendant to a minimum of 70 and a maximum of 93 months of confinement, reflecting the sentence prescribed for her trafficking offense by N.C. Gen. Stat. § 90-95(h)(4).

Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant argues that the amended judgment must be vacated and the case remanded for resentencing. Specifically, she argues her sentence was amended after the trial court had been divested of jurisdiction over her case. In the alternative, she argues that even if the trial court had jurisdiction on 15 April 2019 when it amended her sentence, it did so in her absence and thus denied her the right to be present to hear her sentence.

We address these arguments in turn.

A. Jurisdiction

[1] Defendant contends the trial court lost jurisdiction over her case when she entered notice of appeal, and that the amendment corrected an error in judicial reasoning and thus depended on the trial court's continuing jurisdiction for its validity. The State argues that the trial court had jurisdiction when it amended Defendant's sentence. It contends a trial court is only divested of jurisdiction when both (1) a notice of appeal has been given and (2) the period for taking appeals has elapsed.

As explained below, we agree with the State that the trial court retained jurisdiction.

1. Standard of Review

Whether the trial court had jurisdiction is a question of law that we review de novo. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012).

2. Merits

"The jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given *and* the period described in

(1) and (2) has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2019) (emphasis added). Subsection (1) refers to "the period provided in the rules of appellate procedure for giving notice of appeal." *Id.* § 15A-1448(a)(1).[1] The North Carolina Rules of Appellate Procedure allow a written notice of appeal in a criminal case to be filed 14 days after the entry of a judgment. N.C. R. App. P. 4(a)(2) (2019). Therefore, under the plain language of § 15A-1448(a)(3), the trial court has jurisdiction until notice of appeal has been given and 14 days have passed.

Defendant cites *State v. Davis*, 123 N.C. App. 240, 427 S.E.2d 392 (1996), for the proposition that a notice of appeal alone terminates a trial court's jurisdiction. In that case, we stated that "[t]he general rule is that the jurisdiction of the trial court is divested when notice of appeal is given[.]" *State v. Davis*, 123 N.C. App. 240, 242, 427 S.E.2d 392, 393 (1996). But we do not read *Davis*'s description of a "general rule" to nullify *in toto* one of the statute's conjunctive requirements for the divestment of jurisdiction. A "general rule" by its terms does not preclude the operation of more specific statutory provisions, as the plain text of § 15A-1448(a)(3) requires. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *State v. Wagoner*, 199 N.C. App. 321, 324, 683 S.E.2d 391, 395 (2009). Moreover, *Davis* concerned a sentence amended months after it was first entered, well after the expiration of the 14-day window for filing a notice of appeal, and is therefore distinguishable. 123 N.C. App. at 241, 427 S.E.2d at 393 (holding trial court was without jurisdiction to amend the defendant's sentence when it did so in the course of amending the record on appeal).

Only five days passed between the entry of the original judgment in this case and its subsequent amendment. The trial court thus retained jurisdiction over the matter.

B. The Right to be Present

[2] Defendant next argues that because the amended April 15 judgment was entered in her absence, she was deprived of her right to be present to hear her sentence. Defendant contends this right is violated when "the written judgment contains any substantive change from the sentence pronounced in defendant's presence." The State argues that because the sentence imposed is statutorily required by N.C. Gen. Stat. § 90-95(h)(4) for the offense under which Defendant's guilty verdicts

1. Subsection (2) involves instances when a motion for appropriate relief has been made and, as such, is inapplicable here. N.C. Gen. Stat. § 15A-1448(a)(2) (2019).

were consolidated, the sentence inhered in the verdict and thus was not actually changed by the entry of the amended judgment. The judgment's amendment, in other words, was the "non-discretionary byproduct" of the verdict, notwithstanding the trial court's failure to properly record the upper end of that mandatory sentence. *State v. Arrington*, 215 N.C. App. 161, 167, 714 S.E.2d 777, 782 (2011). We agree with the State and conclude that the amended judgment did not effect a substantive change to Defendant's sentence.

1. Standard of Review

We review the propriety of an amended judgment entered outside the defendant's presence de novo. *Id.* at 166, 714 S.E.2d at 781.

2. Merits

Criminal defendants have a right to be present to hear the entry of their sentences. *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006). Defendant was present to hear her sentence as it was imposed and announced on 10 April 2019. The question is whether the April 15 amended judgment "represent[ed] a substantive change from the sentence pronounced by the trial court[.]" *Id.*

We have found a change to be substantive where a trial court has materially altered the length or the terms of a defendant's sentence in the defendant's absence. *See*, *e.g.*, *State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) (finding a substantive change where multiple sentences were amended to run consecutively rather than concurrently); *Mims*, 180 N.C. App. at 414, 637 S.E.2d at 250-51 (vacating nine months' intensive probation imposed in written judgment but not orally in open court); *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (vacating amendment to defendant's sentences causing them to run consecutively rather than concurrently). In each of these cases, the trial court modified the defendant's sentence as an otherwise permissible exercise of judicial discretion. *See*, *e.g.*, *State v. Harris*, 111 N.C. App. 58, 71, 431 S.E.2d 792, 800 (1993) ("The sentencing judge [] retains the discretion to impose multiple sentences to run consecutively or concurrently.").

On the other hand, changes that merely correct clerical errors are not substantive. A clerical error is one that results "from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarma*n, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting Black's Law Dictionary, 7th ed. 1999). Similarly, our Court in *Arrington*

concluded that an amendment to include statutorily required fines accompanying the punishment imposed was not a substantive change but a statutorily "necessary byproduct" of the sentence. *Arrington*, 215 N.C. App. at 168, 714 S.E.2d at 782. A change is therefore not substantive when it corrects a clerical error or clarifies that a sentence will comport with applicable statutory limits on the trial court's sentencing discretion.

North Carolina law requires that the sentence imposed for Defendant's conviction be a minimum of 70 months and a maximum of 93 months. N.C. Gen Stat. § 90-95(h)(4)(a) (2019). It also requires that "[t]he maximum term shall be specified in the judgment of the court." N.C. Gen Stat. § 15A-1340.13(c) (2019). The judge is to enter the sentence required by the conviction, and subsequent discretion to adjust the time served within that mandatory range is left to state correctional officers. *Id.* § 15A-1340.13(d).

Here, the trial court's discretion was bound in both procedural and substantive terms such that the amended sentence did not represent a novel exercise of judicial discretion in Defendant's absence, as it did in *Crumbley*, *Mims*, and *Hanner*. Rather, the amendment reflects the only sentence the court could legally impose given the verdict rendered—"a non-discretionary byproduct of the sentence that was imposed in open court." *Arrington*, 215 N.C. App. at 167, 714 S.E.2d at 782.

Further, "a court of record has the inherent power and duty to make its records speak the truth." *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). The trial court is entitled to a presumption of regularity; that is, the presumption that "public officials [] discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *State v. Ferrer*, 170 N.C. App. 131, 136, 611 S.E.2d 881, 884 (2005) (internal marks and citations omitted).

> It is presumed, in the absence of evidence to the contrary, that acts of a public officer within the sphere of his official duties, and purporting to be exercised in an official capacity and by public authority, are within the scope of his authority and *in compliance with controlling statutory provisions*.

Civil Service Bd. of City of Charlotte v. Page, 2 N.C. App. 34, 40, 162 S.E.2d 644, 647 (1968) (emphasis added).

Although on its face the initial April 10 judgment purported to sentence Defendant to a minimum and maximum term of 70 months, that sentence would violate state law by both failing to impose the *correct* sentence pursuant to § 90-95(h)(4) and by failing to

specify *the* maximum term—not just *any* maximum term—required by § 15A-1340.13(c). Adhering to the presumption of regularity, we presume—absent any evidence to the contrary—that Judge Pope meant on both April 10 and April 15 to assign Defendant the sentence made mandatory by the "controlling statutory provisions." *Id.*

This presumption is supported by Judge Pope's response to the Clerk of Court's April 11 email inquiry, in which he explained that he had "consolidated everything into Count I . . . for which [Defendant] *received*"—in the past tense—"70 to 93 months." (Emphasis added.) During the 10 April 2019 sentencing hearing, Judge Pope also announced "[t]he defendant is sentenced to a *mandatory* 70 months," (emphasis added), suggesting he understood his discretion was bound by statute.

Unlike *Mims*, where remanding for resentencing was required in part because "the transcript [was] void of any reference to [the revised] sentence[,]" the transcript in this case made reference to the "mandatory" nature of the sentence prescribed by statute. *Mims*, 180 N.C. App. at 413, 637 S.E.2d at 250.

We therefore conclude that the amended judgment does not reflect a substantive change to Defendant's sentence such that Defendant had a right to be present for the rendering of the amended judgment because the trial court retained "the inherent power and duty to make its records speak the truth[,]" *Cannon*, 244 N.C. at 403, 94 S.E.2d at 342, and thus the amended judgment comports both with the sentence announced and with the statutorily required sentence.

III. Conclusion

We conclude that the trial court retained jurisdiction over Defendant's case because only five days elapsed between the entry of the first judgment and the entry of the amended judgment. Further, because the substance of Defendant's sentence was wholly preordained by statute, and because we presume that the trial court intended to follow the law, we conclude that the April 15 amendment reflects a clerical clarification rather than a substantive change. We therefore hold the trial court did not err in amending the judgment to reflect the mandatory sentence required by statute.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DERRICK LINDSEY, Defendant

No. COA19-974

Filed 21 April 2020

1. Appeal and Error—preservation of issues—right to assistance of counsel—failure to object—statutory mandate

In a prosecution for breaking and entering, larceny, and injury to real property, defendant's argument alleging a deprivation of his constitutional right to assistance of counsel was preserved for appellate review—despite defendant's failure to object at trial—in light of the statutory mandate in N.C.G.S. § 15A-1242 protecting Sixth Amendment rights.

2. Constitutional Law—assistance of counsel—failure to obtain valid waiver until trial—prejudicial error

In a prosecution for breaking and entering, larceny, and injury to real property, the trial court erred in failing to either appoint counsel for defendant or secure a valid waiver of counsel until defendant's trial—more than a year after his arrest. Instead, the court impermissibly allowed defendant to proceed pro se during the pretrial phase where defendant expressly waived his right to court-appointed counsel but did not clearly state an intention to represent himself, and where the court failed to conduct the entire three-part inquiry under N.C.G.S. § 15A-1242 to ensure that defendant knowingly, intelligently and voluntarily waived his right to all counsel. Moreover, the State failed to make any showing, as required, that this error was harmless beyond a reasonable doubt.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 13 March 2019 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 18 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Sarah Holladay for Defendant.

BROOK, Judge.

Derrick Lindsey ("Defendant") appeals from judgment entered upon jury verdicts of guilty for felony breaking and entering, felony larceny, and misdemeanor injury to real property. On appeal, Defendant argues the trial court erred in failing to either appoint counsel or secure a valid waiver of counsel until his trial—more than a year after his arrest. Defendant further argues that the trial court committed plain error in allowing secondary evidence of the contents of a videotape where the State failed to establish that the videotape itself was unavailable. Finally, Defendant argues that the trial court erred in entering a civil judgment for attorney's fees of standby counsel against Defendant without giving him notice and opportunity to be heard.

We agree with Defendant that he is entitled to a new trial because the trial court did not ensure Defendant validly waived the assistance of counsel prior to trial, and the State has failed to show that the error was harmless beyond a reasonable doubt. We therefore need not reach Defendant's remaining issues on appeal.

I. Factual and Procedural Background

Because the issue dispositive to this appeal does not relate to the facts surrounding the alleged crimes or the trial, a detailed recitation of both is unnecessary. Briefly, the State's evidence tended to show that Defendant broke into a gas station, stole two packs of Newport 100 cigarettes, and broke a window lock in the process. Defendant was arrested on 7 March 2018 and remained in custody through his trial on 12 March 2019.

On 23 April 2018, Defendant filed pro se motions requesting discovery and a subpoena so he could subpoena evidence. On 22 May 2018, Defendant mailed a letter to the clerk of court asking for a status update. On 7 June 2018, Defendant filed a pro se motion to dismiss for lack of an enacting clause and lack of subject matter jurisdiction. The Assistant Clerk of Stanly County Superior Court responded by letter indicating that Defendant's motion had been sent to the district attorney's office for review and stating as follows: "[Y]our case has been continued to the August 20, 2018 term of Superior Court. There will be a Writ issued to bring you in front of the judge at that time. You may address your concerns and motions with the Presiding Judge when deemed appropriate by the Presiding Judge." On 27 July 2018, Defendant filed a pro se motion for an audit trail on the bond that was set.

On 20 August 2018, Judge Jeffery K. Carpenter first addressed Defendant's right to counsel in the following exchange:

> [THE COURT]: [Defendant], you're here on a felony breaking or entering. It's a Class H felony which carries a maximum sentence of 39 months; a larceny after breaking or entering, a Class H felony which carries a maximum sentence of 39 months; and an injury to real property, a Class one misdemeanor which carries a maximum punishment sentence of 120 days.
>
> You have three options in regards to counsel or representation. You can hire your own lawyer, represent yourself or ask me to consider you for court appointed counsel.
>
> [DEFENDANT]: I can speak for myself.
>
> [THE COURT]: Do you want a lawyer to represent you?
>
> [DEFENDANT]: No.
>
> [THE COURT]: [Defendant], I need you to sign a waiver to counsel. [Defendant], you're wanting to waive all rights to counsel? Did I understand you correctly on that? You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?
>
> [DEFENDANT]: I'm not waiving any rights. I'm simply waiving court appointed counsel.
>
> [THE COURT]: So you want to waive court appointed counsel?
>
> [DEFENDANT]: Yes.
>
> [THE COURT]: He's waiving court appointed counsel. [Defendant], I am told that the assistant district attorney that has been assigned to handle your case is in district court. They are going to see if they can come over here and give you an opportunity to talk to them and see if you all can come to a resolution.

When the assistant district attorney came back to the courtroom during that same court session, she addressed the court and said, "[O]ur office received a pro se discovery request from [Defendant], and upon checking out his file, he hasn't addressed counsel. It's my understanding that has been done in my absence, that he has requested to hire his own counsel." Judge Carpenter responded, "He did not do that. He just waived court appointed counsel." Judge Carpenter then continued

Defendant's case to 22 October 2018. Defendant signed a waiver of counsel form, acknowledging his right to counsel and checking box one, which read, "I waive my right to assigned counsel and that I, hereby, expressly waive that right." Judge Carpenter, in the same form, certified that Defendant voluntarily, knowingly, and intelligently elected to be tried "without the assignment of counsel." Judge Carpenter subsequently appointed Andrew Scales as standby counsel for Defendant.

During the October 2018 session,[1] Judge Carpenter permitted Defendant to argue his pro se motion to dismiss for lack of an enacting clause and for lack of subject matter jurisdiction. Mr. Scales served only as standby counsel at this hearing; to wit, he did not assist Defendant with his argument or otherwise substantively participate in the hearing. Judge Carpenter denied Defendant's motion and set Defendant's case for trial on 14 January 2019. Judge Carpenter also clarified that he had appointed Mr. Scales as Defendant's standby counsel and that Mr. Scales would continue in that role.

The record is silent as to what happened on 14 January 2019. However, on 20 January 2019, Defendant filed a pro se motion with the court which read:

> My court date was set on 1-14-19 but I was never called to court. I signed a wa[i]ver of attorn[e]y so there is no court appointed attorney on this case. Can you please tell me why this case was continued without my consent and without me being present in court. This is a violation of my constitutional right to due process of law.

The Assistant Clerk of Stanly County Superior Court responded by letter that "I can only advise that the case was continued from 1/14/2019 to 2/18/2019, we are only the record keepers and I cannot say as to a reason for the continuance. I have forwarded a copy of your letter to the District Attorney's office." The record is also silent as to the 18 February 2019 session.

On 12 March 2019, Defendant's case proceeded to trial. Before trial, Judge Kevin Bridges spoke with Defendant, saying, "I noticed that you

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1. The record is unclear as to whether the next court date was 22 October 2018 or 24 October 2018. The Stanly County Clerk of Superior Court sent a letter to Defendant that his next court date was 22 October 2018, but the transcript of the proceedings is dated both 22 October 2018 and 24 October 2018. The appointment of counsel form is dated 24 October 2018, but during the court session Defendant's standby counsel indicated that he had already been "appointed in some way[.]" We will refer to this as the October 2018 session.

did sign a waiver before the Honorable Judge Carpenter on 20 August 2018, but that was only a waiver of your right to court-appointed counsel. [] [I]f you intend to proceed *pro se*, ideally I need a waiver of all counsel." Defendant elected to proceed pro se, and Judge Bridges secured a full waiver as follows:

> [THE COURT]: Sir, I just want to confirm with you, first of all, you are Derrick Lindsey.
>
> [DEFENDANT]: I'm here concerning that matter.
>
> . . .
>
> [THE COURT]: All right. You understand you have the right to remain silent. Anything you say may be used against you. Do you understand that?
>
> [DEFENDANT]: I comprehend this.
>
> . . .
>
> [THE COURT]: All right. Thank you. Sir, I just want to be clear that you understand that you are charged with breaking and/or entering, which is a Class H felony, which carries a maximum punishment of up to 39 months in prison. Also, you are charged with larceny after breaking and entering, punishable by a maximum of up to 39 months in prison. And also you're charged with injury to real property, a Class 1 misdemeanor, punishable by a maximum of up to 120 days.
>
> Do you understand that sir?
>
> [DEFENDANT]: Yes, sir.
>
> [THE COURT]: Am I correct that you still want to proceed pro se? Meaning you want to represent yourself in this trial.
>
> [DEFENDANT]: I am speaking for myself. Yes, I am.
>
> [THE COURT]: All right. Then I need to ask you some additional questions, sir. Are you able to hear and understand me clearly?
>
> [DEFENDANT]: Yes, I am.
>
> [THE COURT]: Are you now under the influence of any alcoholic beverages, drugs, narcotics, or pills?

[DEFENDANT]: No, I'm not.

[THE COURT]: How old are you, sir?

[DEFENDANT]: 35.

[THE COURT]: Have you completed high school?

[DEFENDANT]: Yes, I have.

[THE COURT]: So you can read and write?

[DEFENDANT]: Yes, I can.

[THE COURT]: Do you suffer from any mental or physical handicaps?

[DEFENDANT]: No, sir.

[THE COURT]: Do you understand that you do have the right to be represented by a lawyer, and if you cannot afford one the court will look into appointing one for you?

[DEFENDANT]: Yes.

[THE COURT]: Do you understand that if you do decide to represent yourself you must follow the same rules of evidence and procedure that a lawyer would follow in court?

[DEFENDANT]: Yes, I do.

[THE COURT]: Do you understand that if you do decide to represent yourself the Court will not give you any legal advice concerning any issues that may arise in your case?

[DEFENDANT]: I do.

[THE COURT]: Do you understand the Court's role is to be fair and impartial to both sides?

[DEFENDANT]: Yes, I do.

[THE COURT]: All right. Based on what I just said to you, do you have any questions at all before me about your right to a lawyer?

[DEFENDANT]: No.

[THE COURT]: At this time then do you now waive your right to assistance of a lawyer and voluntarily and intelligently decide to represent yourself in these cases?

[DEFENDANT]: Yes, sir.

Defendant then signed another waiver of counsel form, this time acknowledging his right to assistance of counsel and checking box 2, which read, "I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear on my own behalf, which I understand I have the right to do." Judge Bridges signed the same waiver, certifying that Defendant voluntarily, knowingly, and intelligently elected to be tried "without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel."

Mr. Scales continued as standby counsel for the duration of Defendant's trial and sentencing. Defendant was sentenced to two terms of 11 to 23 months' active imprisonment to run consecutively.

II. Standard of Review

As noted by this Court in *State v. Watlington*, 216 N.C. App. 388, 716 S.E.2d 671 (2011), "[p]rior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." *Id.* at 393-94, 716 S.E.2d at 675. We will, as we did in *Watlington*, review this issue de novo. *Id.* at 394, 716 S.E.2d at 675. "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and marks omitted).

III. Analysis

On appeal, Defendant contends that the trial court erred in failing to appoint counsel or secure a valid waiver of counsel until more than a year after Defendant's arrest. Defendant argues that the State has not proved beyond a reasonable doubt that the deprivation of the right to counsel from arrest to trial was not harmless beyond a reasonable doubt. In the alternative, Defendant argues that this error occurred at a critical stage of the proceedings and is thus per se prejudicial error requiring a new trial.

For the reasons stated below, we agree with Defendant that the trial court erred in failing to appoint counsel or secure a valid waiver and, further, that the State has not proved that the deprivation of counsel during this pre-trial period was harmless beyond a reasonable doubt. Therefore, we do not reach his argument in the alternative.

A. Preservation

[1] As an initial matter, we briefly address the dissent's argument that these matters are not preserved for appellate review.

"[T]he right to have the assistance of counsel is" one of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 66-67, 53 S. Ct. 55, 63, 77 L. Ed. 158, 169 (1932) (internal marks and citations omitted). "When an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). "For this reason[,] . . . the accused must knowingly and intelligently forgo those relinquished benefits." *Id.* (internal marks and citations omitted).

In North Carolina, the Sixth Amendment rights at issue are safeguarded by and inextricably intertwined with an effectuating statute—N.C. Gen. Stat. § 15A-1242. The waiver inquiry mandated by N.C. Gen. Stat. § 15A-1242 serves to ensure any waiver of counsel is knowing, voluntary, and intelligent. *See State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002). "It is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010); *see also State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996) ("The trial court's failure to comply with this mandatory statute relieved [the] [d]efendant of his obligation to object in order to preserve the error for review."). Furthermore, our Supreme Court in *State v. Colbert*, 311 N.C. 283, 285, 316 S.E.2d 79, 80 (1984), and, more recently, this Court in *State v. Veney*, 259 N.C. App. 915, 918, 817 S.E.2d 114, 117 (2018) (citing *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80), have reviewed unobjected-to Sixth Amendment denial of counsel claims in which the defendant was unrepresented at a court proceeding. The dissent does not mention either *Colbert* or *Veney*, let alone explain why this governing precedent does not control the outcome, nor does it identify any case law involving the circumstances at issue in support of its contention that Defendant's constitutional arguments have been waived.

Finally, the State has not questioned whether appellate review is appropriate in such instances; in *Veney* it conceded that "it does not contest whether Defendant preserved his [constitutional] argument[,]" 259 N.C. App. at 918, 817 S.E.2d at 117, and the State takes a similar tack here.

Defendant's overlapping constitutional and statutory arguments are properly before our Court.

B. Merits

[2] "The Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense." *State v. White*, 78 N.C. App. 741, 744, 338 S.E.2d 614, 616 (1986) (citing *Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802 (1963)). A criminal defendant also "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). Before allowing a defendant to proceed pro se, the trial court must establish both that the defendant clearly and unequivocally expressed a desire to proceed without counsel, and that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. *White*, 78 N.C. App. at 746, 338 S.E.2d at 617; *see also State v. Graham*, 76 N.C. App. 470, 474, 333 S.E.2d 547, 549 (1985) ("Absent such evidence, the court should not [] permit[] [a defendant] to proceed *pro se*.").

"Without a clear and unequivocal request to waive representation and proceed *pro se*, the trial court should not [] proceed[] with such assumption." *State v. Pena*, 257 N.C. App. 195, 203, 809 S.E.2d 1, 6 (2017). Exchanges that have amounted to a "clear indication" of the desire to proceed pro se have included: "The State has afforded me excellent legal counsel, but I still choose to represent myself[,]" *State v. Moore*, 362 N.C. 319, 323, 661 S.E.2d 722, 725 (2008); when the trial court asked, "But you want to proceed without an attorney?" The defendant answered, "Yes, sir[,]" *State v. Jackson*, 190 N.C. App. 437, 441, 660 S.E.2d 165, 167 (2008); the trial court asked, "Of those three choices, which choice do you make?" The defendant answered, "Represent myself[,]" *State v. Whitfield*, 170 N.C. App. 618, 621, 613 S.E.2d 289, 291 (2005). On the other hand, "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 777 (1984).

Before a defendant waives the right to counsel, "the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. LeGrande*, 346 N.C. 718, 722, 487 S.E.2d 727, 729 (1997). "This Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements

by adequately setting forth the parameters of such inquiries." *Fulp*, 355 N.C. at 175, 558 S.E.2d at 159. Under N.C. Gen. Stat. § 15A-1242,

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

N.C. Gen. Stat. § 15A-1242 (2019).

"The record must reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute." *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230 (2000). The trial court must specifically advise a defendant of the possible maximum punishment, *State v. Frederick*, 222 N.C. App. 576, 583, 730 S.E.2d 275, 280 (2012) (telling the defendant he could "go to prison for a long, long time" not specific), of the range of permissible punishments, *State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (informing the defendant of the maximum imprisonment but failing to inform him of the maximum fine he could receive was inadequate), and of the consequences of representing himself, *State v. Schumann*, 257 N.C. App. 866, 877, 810 S.E.2d 379, 387 (2018) (proper inquiry where the trial court "advised Defendant representing himself would involve jury selection, motions, presenting the evidence, knowing what evidence is admissible and [said] 'there's a reason we have folks go to law school for years and take exams to be licensed to do this.' "). Failing to advise a defendant of any of these requirements renders the subsequent waiver invalid. *See, e.g.*, *State v. Sorrow*, 213 N.C. App. 571, 577, 713 S.E.2d 180, 184 (2011).

As with the expression of a desire to proceed pro se, "[g]iven the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *McCrowre*, 312 N.C. at 480, 322 S.E.2d at 777 (citation omitted). "The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer.

Anything less is not waiver."[2] *State v. Bines*, 263 N.C. 48, 51, 138 S.E.2d 797, 800 (1964) (citation omitted). It necessarily follows that "[t]he fact that an accused waives his right to assigned counsel does not mean that he waives all right to counsel."[3] *State v. Gordon*, 79 N.C. App. 623, 625, 339 S.E.2d 836, 837 (1986). And "neither the statutory responsibilities of standby counsel [] nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986).

"It is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceedings without making the inquiry required by N.C. Gen. Stat. § 15A-1242[.]" *Frederick*, 222 N.C. App. at 584, 730 S.E.2d at 281. Critical stages are those proceedings where the presence of counsel is "necessary to assure a meaningful defen[s]e." *United States v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 1931, 18 L. Ed. 2d 1149, 1156 (1967) (internal marks omitted).[4]

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2. There are situations in which a defendant may lose the right to counsel through conduct. *State v. Blakeney*, 245 N.C. App. 452, 460-61, 782 S.E.2d 88, 93-94 (2016). "Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture." *State v. Montgomery*, 138 N.C. App. 521, 524-25, 530 S.E.2d 66, 69 (2000). Forfeiture of counsel plays no role in our deliberations here as it is "restricted to situations involving egregious conduct by a defendant[,]" *State v. Simpkins*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2020 N.C. LEXIS 98 *9 (2020) (quoting *Blakeney*, 245 N.C. App. at 461, 782 S.E.2d at 94), which the State does not and could not allege.

3. In a 2015 opinion by the North Carolina Judicial Standards Commission examining whether a judge may require a defendant to proceed without the assistance of all counsel based upon only a waiver of appointed counsel, the Commission concluded,

> Except in situations where the defendant's actions amount to a forfeiture of the right to counsel, a judge may not require a criminal defendant entitled to counsel to proceed without the assistance of counsel based on a waiver of appointed counsel only. *It is the judge's responsibility to clarify the scope of any waiver.*

Formal Advisory Op. 2015-02 (N.C. Judicial Standards Commission) (emphasis added).

4. Amplifying further on the contours of this concept, our Supreme Court has held that "[a] critical stage has been reached when constitutional rights can be waived, defenses lost, a plea taken[,] or other events occur that can affect the entire trial." *State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979). A probable cause hearing, *State v. Cobb*, 295 N.C. 1, 6, 243 S.E.2d 759, 762 (1978), pre-trial motion to suppress hearing, *Frederick*, 222 N.C. App. at 581, 730 S.E.2d at 279, sentencing proceeding, *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521 (1985), and probation revocation hearing, *State v. Ramirez*, 220 N.C. App. 150, 154, 724 S.E.2d 172, 174 (2012), are examples of critical stages requiring "the guiding hand of counsel[,]" *Detter*, 298 N.C. at 625, 260 S.E.2d at 583, unless waived, *see*, *e.g.*, *Gordon*, 79 N.C. App. at 626, 339 S.E.2d at 838.

Even if a critical stage has not been reached, the State must demonstrate, beyond a reasonable doubt, that the failure to obtain a knowing, voluntary, and intelligent waiver was harmless. N.C. Gen. Stat. § 15A-1443 (2019) ("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."). This is a weighty burden for the State, as we have found harmless error only where the mistake could not "*in any way* contaminate[] the proceedings at the trial[.]" *State v. Cradle*, 281 N.C. 198, 205, 188 S.E.2d 296, 301 (1972) (emphasis added). When the State fails to carry its burden in this context, a new trial is the appropriate remedy. *See Colbert*, 311 N.C. at 286, 316 S.E.2d at 81; *see also State v. Williams*, 201 N.C. App. 728, 689 S.E.2d 601, 2010 N.C. App. LEXIS 22, at *10 (2010) (unpublished) ("As the State has failed to show that the trial court's error was harmless beyond a reasonable doubt, we must deem the error prejudicial and remand for a new trial."); *State v. Hopkins*, 250 N.C. App. 184, 791 S.E.2d 903, 2016 N.C. App. LEXIS 1042, at *9 (2016) (unpublished) (same).

Here, there are two instances in the record when the trial court advised Defendant of his right to counsel: 20 August 2018 and 12 March 2019. The parties agree, as do we, that Judge Bridges conducted a thorough inquiry of Defendant regarding his right to counsel before trial on 12 March 2019, and that Defendant knowingly, voluntarily, and intelligently waived all counsel on that date. Where the parties disagree is whether the trial court permitted Defendant to proceed pro se in the absence of a clear indication that he intended to do so and the inquiry required by N.C. Gen. Stat. § 15A-1242 prior to that date. The record reflects that Defendant did not clearly waive the right to all counsel before March 2019. We hold that the trial court impermissibly allowed Defendant to proceed pro se without such a clear expression of intent and without conducting the proper inquiry prior to trial.

After Defendant was indicted on 9 April 2018, he began filing motions on his own behalf with the trial court from jail. These included two discovery requests, a subpoena request, the aforementioned motion to dismiss for lack of enacting clause and subject matter jurisdiction, and a motion for an audit trail—all filed from April to July 2018.

On 20 August 2018, Defendant's right to counsel was first addressed. Judge Carpenter informed Defendant of the nature of the charges against him and the range of permissible punishments. Then this exchange occurred:

> [THE COURT]: You have three options in regards to counsel or representation. You can hire your own lawyer, represent yourself or ask me to consider you for court appointed counsel.
>
> [DEFENDANT]: I can speak for myself.
>
> [THE COURT]: Do you want a lawyer to represent you?
>
> [DEFENDANT]: No.
>
> [THE COURT]: [Defendant], I need you to sign a waiver to counsel. [Defendant], you're wanting to waive all rights to counsel? Did I understand you correctly on that? You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?
>
> [DEFENDANT]: I'm not waiving any rights. I'm simply waiving court appointed counsel.
>
> [THE COURT]: So you want to waive court appointed counsel?
>
> [DEFENDANT]: Yes.
>
> [THE COURT]: He's waiving court appointed counsel[.]

While Defendant first seems to categorically disavow legal representation, upon further questioning, Defendant narrows that disavowal to pertain only to court-appointed counsel. Consistent with this, Defendant also executed a written waiver of court-appointed counsel. In an exchange between the prosecutor and Judge Carpenter shortly after this colloquy, the prosecutor stated, "It's my understanding that . . . [Defendant] has requested to hire his own counsel." Judge Carpenter corrected her, stating, "He did not do that. He just waived court appointed counsel." Accordingly, two of the options that the trial court laid out for Defendant remained: "hiring your own lawyer [or] represent[ing] yourself[.]"

Yet, subsequent to this colloquy the trial court operated as though Defendant had fully waived his right to counsel. Judge Carpenter appointed standby counsel for Defendant, which is permissible "[w]hen a defendant has elected to proceed without the assistance of counsel[.]" N.C. Gen. Stat. § 15A-1243 (2019). Then, during the October 2018 session, the trial court allowed Defendant to argue his motion to dismiss for lack of an enacting clause and subject matter jurisdiction without counsel and without any input from standby counsel.

For the following reasons, Defendant's proceeding pro se here was at odds with the requisite constitutional safeguards.

First, Defendant had to that point never expressed a clear and unequivocal desire to proceed without counsel. Waiving "court-appointed counsel do[es] not amount to [an] expression[] of an intention to represent oneself." *McCrowre*, 312 N.C. at 480, 322 S.E.2d at 777 (citation omitted). In stark contrast to instances where we have found a defendant clearly wished to represent himself, *see*, *e.g.*, *Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291 (The trial court: "Of those three choices, which choice do you make?"; The defendant: "Represent myself."), the 20 August 2018 colloquy left open the possibility of Defendant's retaining counsel. And, while seemingly signaling its understanding that Defendant was proceeding pro se, the trial court's appointment of standby counsel does not mean *Defendant* had clearly and unequivocally expressed such a desire. *See Dunlap*, 318 N.C. at 389, 348 S.E.2d at 805.

Relatedly, these facts do not speak to a knowing, voluntary, and intelligent waiver. While properly advising Defendant of the charges against him, the range of permissible punishments, and his right to counsel, the trial court did not ensure that Defendant understood and appreciated the consequences of proceeding pro se. *See* N.C. Gen. Stat. § 15A-1242(3) (2019). The most concrete means of understanding the deficiencies in Judge Carpenter's colloquy is to compare it with that of Judge Bridges many months later. Not only did Judge Bridges elicit a clear statement from Defendant that he wished to proceed pro se but also he reviewed and ensured that Defendant appreciated the consequences of doing so. *See Bines*, 263 N.C. at 51, 138 S.E.2d at 800 ("Anything less is not waiver.").

We do not gainsay the challenges trial courts face in ensuring compliance with constitutional and statutory rights as they pertain to the right to counsel. But these rights are fundamental, and "[t]his case is a good example of the confusion that can occur when the record lacks a clear indication that a defendant wishes to proceed without representation." *Pena*, 257 N.C. App. at 204, 809 S.E.2d at 6.

As the trial court impermissibly allowed Defendant to proceed pro se without such a clear expression of intent and without conducting the proper inquiry prior to trial, the question then becomes whether the State has proven that the resulting deprivation of Defendant's Sixth Amendment right to counsel was harmless beyond a reasonable doubt. We hold that the State has not met this heavy burden.

Assuming without deciding that there was no "critical stage" in the litigation prior to the appropriate waiver being obtained in March 2019, the State has not even attempted to argue that the deprivation of counsel was harmless here. "Because the State does not make the required [harmless beyond a reasonable doubt] argument, it has failed in its burden." *State v. Taylor*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 N.C. App. LEXIS 213, at *137 (2019); *see also Williams*, 2010 N.C. App. LEXIS 22, at *10 ("[T]he burden is on the State to demonstrate that any error was harmless beyond a reasonable doubt, [] and it is not proper for this Court to carry that burden for the State.").

And it is hard to see how they could make a plausible argument in these circumstances. Defendant was not without counsel for some mere "housekeeping" matter, *see Veney*, 259 N.C. App. at 924, 823 S.E.2d at 120 (Dietz, J., concurring); during the time period at issue, there was a hearing on the court's jurisdiction, the possibility of plea negotiations, discovery concerns, and evidentiary issues relating to the preservation of video surveillance, not to mention issues regarding whether Defendant fully understood how the case was progressing as he was proceeding pro se while incarcerated. While Judge Bridges appropriately recognized that Defendant intended to represent himself at trial and accordingly obtained a full waiver of counsel, Defendant had, by that point, been deprived of his right to counsel for the year-long pre-trial period. "We have no way of knowing what counsel for defendant may have found through discovery or if his counsel could have raised valid objections to any of the" State's evidence. *Hopkins*, 2016 N.C. App. LEXIS 1042, at *9. After all, "there's a reason we have folks go to law school for years and take exams to be licensed to do this." *Schumann*, 257 N.C. App. at 877, 810 S.E.2d at 387. Even assuming we were to believe that the State's evidence was "quite convincing, we cannot find that the denial of defendant's right to counsel was harmless beyond a reasonable doubt." *Hopkins*, 2016 N.C. App. LEXIS 1042, at *9.[5]

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5. Our Court arrived at the same result using the same reasoning in a circumstance bearing many similarities to the current controversy in the aforementioned *State v. Williams*. In that case, the trial court conducted an imperfect waiver inquiry on 17 August 2006. *Williams*, 2010 N.C. App. LEXIS 22, at *2. The defendant subsequently argued pre-trial motions pro se on 20 September 2006. *Id.* This was "the only substantive hearing" where the defendant argued pro se before a proper waiver was obtained. *Id.* at *4. On 3 April 2007, the trial court conducted a thorough colloquy, and the defendant knowingly, voluntarily, and intelligently waived the right to counsel. *Id.* at *2. The trial began 4 June 2007. *Id.* Despite granting it was "likely that nothing harmful to Defendant's case transpired during that [20 September 2006] hearing," our Court held that the State had not proven the error harmless beyond a reasonable doubt and ordered a new trial. *Id.* at *4. The distinctions between *Williams* and the current controversy, namely the larger amount of time Defendant was denied counsel and the commensurate greater potential consequences thereof, only make it more difficult to prove harmless error.

IV. Conclusion

At some point between April and October 2018, Defendant began functioning as his own counsel. The trial court was aware of and, in fact, sanctioned Defendant's actions by assigning Mr. Scales as standby counsel and allowing Defendant to argue a motion without the assistance of counsel. However, Defendant never clearly expressed his desire to proceed pro se, and the trial court failed to obtain a proper waiver of all counsel before allowing him to do so. This resulted in a violation of Defendant's Sixth Amendment right to counsel until trial on 12 March 2019, and the violation was not harmless beyond a reasonable doubt.

Defendant is therefore entitled to a new trial.

NEW TRIAL.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I. Summary

Defendant was convicted by a jury of crimes for breaking into and stealing cigarettes from a retail kiosk. Judgment was entered accordingly. The trial court also entered a civil judgment against Defendant for the cost of appointed stand-by counsel, as Defendant proceeded *pro se*.

Defendant makes three arguments on appeal.

He argues that the trial court erred by imposing the civil judgment against him without giving him an opportunity to be here. (The majority does not reach this issue.) I agree and would remand for a new hearing on the civil judgment.

He makes a single argument that the criminal trial *itself* was tainted, contending that the trial court committed plain error by allowing certain evidence in, namely video of him committing the crimes. (The majority does not reach this issue.) I disagree that the trial court committed plain error in this regard. He makes no other argument concerning the trial itself.

Rather, he argues that he is entitled to a new trial, even if no reversible error occurred at the trial itself, because he was allowed to proceed *pro se* during much of the pre-trial stages before being properly advised

of his right to counsel. Indeed, Defendant represented himself during *all* stages of this proceeding, both pre-trial and trial, and Defendant was not properly advised of his right to counsel until just before the trial was scheduled to begin. There is no dispute, however, that Defendant's constitutional right to counsel was not violated at any point *during the trial itself*, as he knowingly waived his right to counsel before any critical stage of the trial occurred.

I agree that the delay in obtaining a valid waiver of counsel during critical, pre-trial stages was both a constitutional (Sixth Amendment) violation and a violation of a statutory mandate (pursuant to N.C. Gen. Stat. § 15A-1242 (2018)). However, generally such pre-trial violations do not warrant a new trial where the defendant is otherwise afforded a fair trial such that the pre-trial violations do not taint the trial itself.

Regarding the constitutional violation, the majority holds that Defendant is entitled to a new trial because the State failed to meet its burden of showing how any pre-trial, constitutional error was harmless beyond a reasonable doubt. I disagree. I conclude that Defendant failed to meet his initial burden of preserving any constitutional errors for our review. Indeed, the initial burden is on the defendant to preserve constitutional errors for our appellate review. Only regarding those properly preserved constitutional errors does the burden shift to the State to show that the errors were harmless beyond a reasonable doubt.

To the extent that the delay in obtaining a proper waiver was a violation of a *statutory mandate*, I recognize that said violation is automatically preserved. For such errors, the burden is not on the State to show that they were harmless, but is on Defendant to show how he was prejudiced thereby. And, here, Defendant has failed to show how he was prejudiced at trial by any pre-trial violation of a statutory mandate. The evidence at trial was overwhelming against him, none of which was tainted by the pre-trial violation.

To illustrate my point, consider the situation of a defendant involved in a post-indictment line-up in the presence of an identifying witness. Such line-up is, indeed, a "critical stage," where a defendant has the right to have counsel present. *Gilbert v. California*, 388 U.S. 263, 272, 18 L.Ed.2d 1178, 1185 (1967). Our Supreme Court, though, has instructed that the remedy for a Sixth Amendment violation occurring at this stage is not a new trial, but rather the suppression of the testimony of the identifying witness. *State v. Hunt*, 339 N.C. 622, 646-47, 457 S.E.2d 276, 290 (1994). But our Supreme Court has held that if the "defendant's constitutional right of assistance of counsel at the lineup was violated, [the]

defendant *waive[s] that error* by failing to object when the witness later identifie[s] him before the jury as the man he had picked out of the lineup." *State v. Hunt*, 324 N.C. 343, 355, 378 S.E.2d 754, 761 (1989) (emphasis added). In other words, our Supreme Court held that a defendant does not even have the right to appellate review of a constitutional error where the error is not preserved, without any consideration as to whether or not the error may have been harmless.

Accordingly, my vote is that Defendant received a fair trial, free from reversible error, but that the civil judgment should be vacated and the matter be remanded for a new hearing on the civil judgment.

II. Background

In March 2018, Defendant was charged with various crimes associated with a break-in of a retail kiosk.

Five months later, on 20 August 2018, well before trial, Defendant appeared in court where he waived his right to *appointed counsel*, though he did not expressly waive his right to counsel generally. The court engaged in a colloquy in which Defendant was informed of his right to counsel, the charges against him, and the possible punishments; however, Defendant was not advised of the consequences of continuing *pro se* at that hearing or in the future. At some point, though, the trial court did appoint stand-by counsel for Defendant.

In March 2019, the matter was called for trial. The presiding judge engaged in the required colloquy with Defendant concerning Defendant's desire to waive his right to counsel generally, including the consequences of proceeding *pro se*, because he was concerned about the sufficiency of Defendant's waiver seven months earlier. Defendant formally waived counsel and elected to proceed *pro se*. He did not seek any continuance, indicating that he was ready to proceed with the trial.

During the trial, the State presented overwhelming evidence of Defendant's guilt. On appeal, Defendant does not point to any objection he made concerning any of the State's trial evidence. He made no argument during the trial, nor does his appellate counsel make any argument on appeal, that any of the State's evidence was tainted by any pre-trial, Sixth Amendment error. The State's evidence offered at trial included a copy of the surveillance video and of photos depicting Defendant committing the break-in. This evidence also consisted of Defendant's unsolicited admission to the break-in, a statement he made as he was being served the arrest warrant, in which he stated, "Well, the good news is this is the last thing you can pin on me because this is the only other

thing I did last night." Defendant makes no argument on appeal concerning the admission of this statement.

Defendant was convicted by the jury for the break-in. The trial court entered judgment accordingly. The trial court also entered a civil judgment against Defendant for the cost associated with his appointed stand-by counsel.

There is nothing in the record, nor does Defendant's appellate counsel point to anything specifically, where Defendant's trial itself was affected by him appearing *pro se* during the pre-trial critical stages. Specifically, there is nothing in the record indicating, nor does Defendant's appellate counsel make any argument, that the State obtained any evidence that might not have been obtained had Defendant been represented during all critical stages. There is nothing in the record indicating, nor does Defendant's appellate counsel make any argument, that Defendant irretrievably lost, during a pre-trial phase, the right to assert any particular defense at trial.

III. Analysis

A defendant has a constitutional right to counsel under the Sixth Amendment at every "critical stage" of the proceedings, *which includes many pre-trial proceedings*, as recognized by the United States Supreme Court:

> This Court has held that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him," . . . and that the constitutional principle is not limited to the presence of counsel at trial.
>
> "It is central to that principle that in addition to the counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

Coleman v. Alabama, 399 U.S. 1, 7, 26 L.Ed.2d 387, 395 (1970) (citations omitted). *See State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979) (recognizing this right). Accordingly, it is considered a constitutional error for a trial court to allow a defendant to proceed *pro se* at any critical stage, whether trial or pre-trial, unless the defendant has knowingly waived his right to be represented by counsel.

However, our Supreme Court has repeatedly held that a defendant may not raise a constitutional error for the first time on appeal, where

"the trial court was denied the opportunity to consider and, if necessary, to correct the error [as it is] well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (internal quotation marks omitted) (citation omitted). This rule applies to constitutional issues arising under the Sixth Amendment. *See State v. Valentine*, 357 N.C. 512, 525, 857, 591 S.E.2d 846, 857 (2003) (holding that defendant waived Sixth Amendment issue by failing to raise the issue at trial); *see also State v. Hunt*, 324 N.C. at 355, 378 S.E.2d at 761 (1989) (holding that "[a]ssuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup").

And this rule applies to Sixth Amendment issues occurring during critical, pre-trial proceedings. *See id.* at 355, 378 S.E.2d at 761 (1989) (defendant waived Sixth Amendment "right to counsel" argument for error occurring during a post-indictment lineup); *see also State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (waived Sixth Amendment "right to counsel" argument for error occurring during interrogation by law enforcement).

Here, Defendant's appellate counsel does not point to anything that occurred at trial that was tainted by a pre-trial, constitutional error, whether preserved or unpreserved. Rather, his counsel only speculates that the pre-trial error of allowing Defendant to proceed *pro se* before being properly advised cost Defendant opportunities to "develop[] evidence, negotiate[] a plea, or fil[e] significant pretrial motions." However, this argument ignores the fact that *after* Defendant was properly advised of his rights before the trial started, he had the opportunity to bring to the trial court's attention that he needed a continuance to allow time to develop evidence, to negotiate a plea deal, or to file pretrial motions and that his trial would otherwise not be fair if he was not granted this opportunity. In other words, Defendant, after being properly advised, did not bring to the trial court's attention how any pre-trial error might infect the trial itself and, otherwise, did not give the trial court the opportunity to correct such error. For example, once properly advised, he had the opportunity to ask the trial court for a continuance, to allow him more time, if he thought there was a real problem. He did not do so; therefore, he cannot now complain and get a new trial.

And as Defendant refused counsel and decided to proceed *pro se* even after being properly advised of the risks of doing so, he assumed

the risk. Thus, we must analyze this appeal in the same way we would had he invoked his right to counsel and been fully represented once being properly advised. A trial attorney has the obligation to point out constitutional errors to the trial court to preserve the issue for appellate review. In the same way, a defendant proceeding *pro se*, after being properly advised, has the same obligation.

In conclusion, Defendant has failed to preserve any constitutional errors associated with Sixth Amendment violations which occurred pretrial for appellate review.[1]

I agree, though, that a violation of a statutory mandate, is generally preserved, even without an objection being lodged at trial. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (stating that "[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved notwithstanding defendant's failure to object at trial"). However, where there is a violation of a statutory mandate, the burden is on the defendant to show prejudice. And to the extent that the delay in properly advising Defendant of his right to counsel in this proceeding constitutes a violation of a statutory mandate, Defendant has failed to show how he was prejudiced at trial by this violation. It is important to note that the statutory mandate was not violated during the trial itself, as Defendant was properly advised under N.C. Gen Stat. § 15A-1242 before the trial began. Further, the evidence against Defendant at trial was overwhelming, evidence which included a video of him committing the break-in and his admission to the break-in. Defendant makes no argument on appeal that any evidence was tainted by the delay in properly advising

1. Had Defendant preserved an argument for review, I am convinced from the record that any error was harmless beyond a reasonable doubt, based on the overwhelming evidence against Defendant and the lack of anything in the record tending to show that the trial was tainted by the pre-trial error. But I am cognizant of case law from our Court which holds that the State's failure to make any "harmless error" argument waives our consideration of harmless error, notwithstanding that the record itself may demonstrate that any error was, indeed, harmless. *See State v. Taylor*, 2020 N.C. App. LEXIS 213, 137 (2020). *See also In re L.I.*, 205 N.C. App. 155, 162, 695 S.E.2d 793, 799 (2010) (holding the same as *Taylor*). An argument could be made, though, that waiver does not apply: the State is the appellee and has no duty to file a brief, and the State's burden is met simply if the record shows that the error was harmless, notwithstanding that the State failed to make any argument in a brief that the error was harmless. Our Supreme Court had the opportunity to take up the issue as to whether the State, as appellee, can waive "harmless error" review by failing to make an argument, but declined to do so. *See State v. Miller*, 371 N.C. 273, 280, 814 S.E.2d 93, 98 (2018) (recognizing the issue, but, as stated in footnote 5, declining to decide the issue).

Defendant of his right to counsel. Finally, any conclusion that the violation of the statutory mandate is prejudicial *per se* would lead to absurd results. That is, if it was considered prejudicial *per se* in every case that a defendant is allowed to proceed unrepresented during some initial, pre-trial stage, then it would be impossible to successful prosecute such defendant – no matter how fair the trial was and no matter that all tainted evidence may have been suppressed – as any conviction would have to be reversed.

Turning to Defendant's other arguments not reached by the majority, Defendant contends that certain photos and a copy of the surveillance video showing him breaking into the kiosk should not have been admitted at trial. He did not object to the admission of this evidence at trial, after he had been properly advised of the consequences of not being represented by counsel. I believe the evidence was admissible for the reasons stated in the State's brief, But even assuming that the evidence was inadmissible, I do not believe that the trial court committed error by not intervening *ex mero motu* when the evidence was introduced or that the admission of said evidence constituted plain error.

Regarding the civil judgment, Defendant contends that he was deprived of his right to be heard before the trial court entered the civil judgment against him for the fees of the appointed stand-by counsel. The State essentially concedes this error, and I agree. I would vacate that civil judgment and remand the matter for the limited purpose of holding a hearing on this civil issue.

STATE v. MONEY

[271 N.C. App. 140 (2020)]

STATE OF NORTH CAROLINA
v.
JAMES LLOYD MONEY, Defendant

No. COA19-1043

Filed 21 April 2020

1. Motor Vehicles—operating a motor vehicle while displaying an expired registration plate—sufficiency of evidence

The trial court improperly denied defendant's motion to dismiss a charge of operating a motor vehicle while displaying an expired registration plate (N.C.G.S. § 20-111(2)) because the State's evidence showed that an officer stopped defendant's car for not displaying a registration plate at all.

2. Appeal and Error—preservation of issues—argument challenging sufficiency of evidence—truly an objection to jury instruction

In a prosecution for operating a vehicle without a current inspection certificate (N.C.G.S. § 20-183.8(a)(1)), the Court of Appeals declined to review defendant's argument that the trial court improperly denied his motion to dismiss the charge for insufficiency of the evidence where the court's jury instructions required proof that he willfully displayed an expired certificate but where the evidence showed he did not display any certificate. Because the trial court's instructions required proof of an unnecessary element, the Court of Appeals classified defendant's argument as challenging an erroneous jury instruction; thus, defendant's motion to dismiss did not preserve his argument for appellate review, and defendant otherwise failed to preserve it by neither objecting to the instructions at trial nor asserting plain error on appeal.

3. Sentencing—prison sentence—based on two misdemeanors and an infraction—unauthorized by law

In a prosecution for various driving-related offenses, where defendant was sentenced to ten days' imprisonment suspended upon twelve months of supervised probation, the sentence was reversed and remanded on appeal because defendant had no prior convictions, was convicted of two Class 3 misdemeanors and one infraction, and therefore should have received a sentence imposing only court costs and a fine (pursuant to N.C.G.S. § 15A-1340.23(d)).

Appeal by Defendant from judgment entered 24 April 2019 by Judge Carl R. Fox in Forsyth County Superior Court. Heard in the Court of Appeals 1 April 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

BROOK, Judge.

James Lloyd Money ("Defendant") appeals from judgment entered upon jury verdicts for driving while license revoked, operating a vehicle while displaying an expired registration plate, and operating a vehicle without an approved inspection certificate. Defendant argues that the trial court erred in denying his motion to dismiss because the evidence presented at trial did not support the charges of operating a motor vehicle while displaying an expired registration plate and operating a motor vehicle without an approved inspection certificate. Defendant further argues that his sentence was not authorized by law.

For the following reasons, we agree with Defendant that the trial court erred in denying his motion to dismiss the charge of operating a motor vehicle while displaying an expired registration plate but hold the trial court properly denied Defendant's motion to dismiss the charge of operating a vehicle without an approved inspection certificate. We further hold that the trial court erred in its sentencing of Defendant.

I. Factual and Procedural Background

On 27 April 2018, Kernersville Police Officer Sawyer Highfill stopped Defendant because he was driving his pickup truck without a license plate. Defendant provided Officer Highfill with an insurance card and the truck's Vehicular Identification Number ("VIN") number and told Officer Highfill that he "was not required to" produce a driver's license. Officer Highfill entered the truck's VIN number into the police database and determined that the truck was registered to Defendant, but the registration and inspection were expired. Officer Highfill also determined that Defendant's license was revoked.

Officer Highfill issued two citations. The first, bearing file number 2018CR 712745, alleged that Defendant did unlawfully and willfully:

> (1) operate a motor vehicle on a street or highway while the Defendant's driver's license was revoked. (G.S. 20-28(A)).
>
> (2) operate a motor vehicle on a street or highway without displaying thereon a current approved inspection certificate, such vehicle requiring inspection in North Carolina. Month Expired 03/2015. (G.S. 20-183.8(A)(1)).

The second, with file number 2018CR 712746, alleged that Defendant did unlawfully and willfully

> operate a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired. (G.S. 20-111(2)).

Defendant was tried in district court on 17 October 2018 and found guilty of the offenses. Defendant appealed to superior court.

On 23 April 2019, Defendant represented himself in a jury trial before Judge Fox in Forsyth County Superior Court. At trial, Defendant testified in his defense that he did not have a driver's license because, based on his legal research, he concluded that driver's licenses were only required for commercial vehicles, and he drove his vehicle for personal use. He testified that he "probably" made a conscious decision to remove the registration plate from his truck several years prior to 27 April 2018 after conducting legal research that led him to believe that registration plates were only required for commercial vehicles. At the close of the State's evidence and at the close of all evidence, Defendant made a motion to dismiss for "lack of evidence," which the trial court denied.

During closing arguments, Defendant argued that for the charge of driving while license revoked, he did not "have a driver's license to actually be suspended in the first place[,]" and "[i]t's kind of hard to suspend something you don't have." As to the charge of operating a motor vehicle without an approved inspection certificate, Defendant argued that he maintained his vehicle himself and ensured that it was safe. Finally, as to the charge of operating a motor vehicle while displaying an expired registration plate, Defendant argued, "[T]here's no plate on there to actually be expired in the first place. It's not there."

The jury found Defendant guilty of driving while license revoked, a Class 3 misdemeanor, and operating a motor vehicle while displaying an expired registration plate, a Class 3 misdemeanor. The jury found Defendant responsible for operating a motor vehicle without an approved inspection certificate. Judge Fox indicated on the judgment

form that Defendant was a prior record level I with zero prior convictions and sentenced Defendant to 10 days' imprisonment, suspended upon 12 months of unsupervised probation. Judge Fox imposed court costs and a fine in the amount of $662.50.

Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the charges of operating a vehicle while displaying an expired registration plate and operating a vehicle without an approved inspection certificate because there was no evidence that he "displayed" a plate, tag, or certificate. Defendant further argues that the trial court entered a sentence that was not authorized by law since he was only convicted of two Class 3 misdemeanors and an infraction and had no prior convictions.

The State concedes that the trial court erred in denying Defendant's motion to dismiss the charge of operating a vehicle while displaying an expired registration plate and in imposing a sentence of 10 days' imprisonment suspended upon 12 months of unsupervised probation, and we agree. As to Defendant's remaining argument on appeal, that the trial court erred in denying his motion to dismiss the charge of operating a motor vehicle without displaying an approved inspection certificate, we hold that the trial court properly denied Defendant's motion.

A. Standard of Review

"This Court reviews a trial court's denial of a motion to dismiss *de novo*." *State v. Stroud*, 252 N.C. App. 200, 208, 797 S.E.2d 34, 41 (2017). The question of whether the sentence imposed was authorized by the jury's verdict is also reviewed de novo. *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

B. Motion to Dismiss

A defendant properly preserves an insufficiency of the evidence argument for review if he makes a motion to dismiss based on insufficient evidence at the close of the State's evidence and renews that motion at the close of all evidence. N.C. R. App. P. 10(a)(1), (3); *see also State v. Golder*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2020 N.C. LEXIS 271 *13 (2020) ("[A] defendant's motion to dismiss preserves all issues related to the sufficiency of the State's evidence for appellate review.").

A general motion to dismiss for insufficient evidence preserves a defendant's arguments on all elements of all charged offenses, even if the defendant proceeds to specifically argue about fewer than all of the elements or charges to the trial court. *State v. Pender*, 243 N.C. App. 142, 152-53, 776 S.E.2d 352, 360 (2015).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "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, 265 S.E.2d 164, 169 (1980). "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).

We note that Defendant has properly preserved his arguments for our review since he renewed his general motion to dismiss "based on lack of evidence" at the close of all evidence. *See State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that the defendant's general motion to dismiss based on insufficient evidence, which was renewed after the defendant presented evidence, was sufficient to preserve insufficient evidence arguments as to all of his charges even though he only made arguments as to some of his charges at trial). We therefore proceed to the merits of Defendant's claims.

i. Operating a Motor Vehicle While Displaying an Expired Registration Plate

[1] Defendant was cited for "operat[ing] a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired. (G.S. § 20-111(2))." Under N.C. Gen. Stat. § 20-111(2), it is a Class 3 misdemeanor

> [t]o display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to willfully display an expired license or registration plate on a vehicle knowing the same to be expired.

N.C. Gen. Stat. § 20-111(2) (2019).

Even viewed in the light most favorable to the State, no substantial evidence shows Defendant "display[ed] an expired registration plate on a vehicle." *Id.* In fact, Officer Highfill testified that he stopped Defendant's car because there was "no license plate on it." Defendant also testified that he removed the plate "years ago."

Though the State's evidence would have supported a conviction under N.C. Gen. Stat. § 20-111(1), which makes it a Class 3 misdemeanor to drive a vehicle without a current registration plate or a vehicle that is not registered, the evidence presented at trial did not support the charged offense. Therefore, Defendant's motion to dismiss should have been granted.

ii. Operating a Motor Vehicle Without an Approved Inspection Certificate

[2] Defendant was also cited for "operat[ing] a motor vehicle on a street or highway without displaying thereon a current approved inspection certificate, such vehicle requiring inspection in North Carolina. Month expired 03/2015. (G.S. 20-183.8(A)(1))." Under N.C. Gen. Stat. § 20-183.8(a)(1), it is an infraction for a person to

> [o]perate[] a motor vehicle that is subject to inspection under this Part on a highway or public vehicular area in the State when the vehicle has not been inspected in accordance with this Part, as evidenced by the vehicle's lack of a current electronic inspection authorization or otherwise.

N.C. Gen. Stat. § 20-183.8(a)(1) (2019).

The trial court instructed the jury on this infraction as follows:

> The defendant has been charged with willfully *displaying* an expired inspection certificate on a vehicle knowing the same to be expired.
>
> For you to find [Defendant] responsible of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant willfully *displayed* an expired inspection certificate on a vehicle.
>
> And second, that the defendant knew that the inspection certificate was expired.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant

> willfully *displayed* an expired inspection certificate on a vehicle and that the defendant knew that the inspection certificate was expired, it would be your duty to return a verdict of responsible. If you do not so find or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not responsible.

(Emphasis added.)

Defendant argues that the evidence was insufficient to support his conviction. Specifically, he contends that the jury was instructed on a theory of guilt that required the "display" of an expired inspection certificate and that "a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117 (1984). For the reasons stated below, Defendant's argument is properly classified as a challenge to an erroneous jury instruction, and that argument is not properly preserved for our review.

"The Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236-37, 58 L. Ed. 2d 207, 211 (1978)), *abrogated on other grounds by State v. Millsaps*, 356 N.C. 556, 568, 572 S.E.2d 767, 775 (2002). This well founded principle arises out of cases where "there could be evidence in the record indicating culpability for more than one theory" of the crime. *State v. Vines*, ___ N.C. App. ___, 829 S.E.2d 701, 2019 WL 3202226, at *4 (2019) (unpublished). In such instances, "the evidence supporting the conviction can only be reviewed according to the theory or theories on which the jury was instructed at trial." *Id.* "For example, a conviction for felony larceny may not be based on the value of the thing taken when the trial court has instructed the jury only on larceny pursuant to burglarious entry." *Smith*, 65 N.C. App. at 773, 310 S.E.2d at 117. Or if a defendant is charged with first-degree murder under the principle of acting in concert, "the conviction cannot be upheld absent a jury charge to that effect." *Wilson*, 345 N.C. at 123-24, 478 S.E.2d at 511 ("[A]bsent an acting in concert instruction, it was necessary for the State to prove each element of first-degree murder on the theory of premeditation and deliberation[.]").

This case, unlike those cited above, is not one where there were alternate theories of guilt that could have been submitted to the jury to find Defendant responsible for driving without an approved inspection certificate. There was one route to the State's end: it had to prove

beyond a reasonable doubt that Defendant (1) was operating a motor vehicle (2) without an approved inspection certificate. *See* N.C. Gen. Stat. § 20-183.8(a)(1) (2019). Though displaying an expired inspection certificate is one potential form of *evidence* the State could use in an effort to establish the offense at issue, it is not a necessary *element*. *Id.* Rather than allowing a conviction via a different theory of the offense, the instructions in this case "required the State to prove an element that was not required by the charging statute[.]" *State v. Dale*, 245 N.C. App. 497, 506, 783 S.E.2d 222, 228 (2016). *Presnell* and its progeny do not stand for the proposition that an erroneous jury instruction can increase "the State's evidentiary burden to prove the commission of a crime *beyond* its necessary elements." *Vines*, 2019 WL 3202226, at *5 (emphasis in original).

Accordingly, Defendant's argument is best characterized as a challenge to an erroneous jury instruction. But Defendant did not object to the jury instruction, N.C. R. App. P. 10(a)(2), nor does he allege plain error review is warranted in his brief, N.C. R. App. P. 10(a)(4).[1] Therefore, we cannot properly review an error in the trial court's instruction to the jury.

C. Defendant's Sentence

[3] Defendant next argues that the trial court erred in entering a sentence of 10 days' imprisonment suspended upon 12 months of unsupervised probation because such a sentence was not authorized by law.[2]

"[A]n argument that the sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law may be reviewed on appeal even without a specific objection before the trial court." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (internal marks omitted).

Under N.C. Gen. Stat. § 15A-1340.23(d), a court is authorized to enter judgment imposing only court costs and a fine against a defendant

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1. Plain error exists when "the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and marks omitted). An erroneous jury instruction suggesting the State had a *higher* burden of proof is, at the very least, difficult to square with any notion of prejudice to Defendant. *See Dale*, 245 N.C. App. at 507, 783 S.E.2d at 229 (same).

2. Although we have determined that the trial court erred in denying Defendant's motion to dismiss one of his charges, we elect to review his remaining argument because the same issue may arise on remand.

who is convicted of a Class 3 misdemeanor unless the specific offense provides otherwise or the defendant has more than three prior convictions. N.C. Gen. Stat. § 15A-1340.23(d) (2019).

Here, the judgment sheet notes that Defendant did not have any prior convictions. Though Defendant was convicted of two Class 3 misdemeanors and one infraction and should have received a sentence of court costs and a fine only, *see id.*, the trial court imposed a sentence of 10 days' imprisonment, suspended upon 12 months of unsupervised probation. Such a sentence was not authorized by law.

III. Conclusion

For the above stated reasons, we hold that the trial court erred in denying Defendant's motion to dismiss for operating a motor vehicle while displaying an expired registration plate but hold that it properly denied Defendant's motion to dismiss for operating a motor vehicle without an approved inspection certificate.

On remand, Defendant is entitled to be re-sentenced consistent with this opinion.

NO ERROR IN PART; REVERSED IN PART AND REMANDED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KENNETH CHRISTOPHER STALLINGS, Defendant

No. COA19-636

Filed 21 April 2020

1. Jurisdiction—bill of information—timing of filing—waiver of indictment—lack of arraignment

In a drug trafficking case, the trial court had subject matter jurisdiction to proceed on a superseding bill of information filed after the judge's address to the jury venire but before jury selection, because the plain language of N.C.G.S. § 15A-646 did not require the State to file a superseding bill of information before trial. Further, defendant waived indictment and the information was proper in form. The lack of formal arraignment on the new charge (which

corrected the type of drug at issue) was not reversible error where defendant did not object and had notice of the charge.

2. Drugs—jury instructions—guilty knowledge—plain error analysis

The trial court did not commit plain error by failing to sua sponte give a jury instruction on guilty knowledge (regarding knowledge of the specific illegal substance at issue). Rather than contending he did not know the nature of the methamphetamine found in his home, defendant instead contended he had no knowledge of the presence of the methamphetamine and that it belonged to someone else. Even if error, the failure to instruct on guilty knowledge did not rise to plain error where the State presented copious evidence defendant was the only occupant of the home where the drugs were found.

Appeal by Defendant from judgment entered 10 January 2019 by Judge William A. Wood, II, in Guilford County Superior Court. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin T. Spangler, for the State.

Daniel J. Dolan, for Defendant Appellant.

INMAN, Judge.

Defendant Kenneth Christopher Stallings ("Defendant") appeals from a judgment entered following a jury verdict finding him guilty of possession with intent to sell or deliver marijuana, possession of marijuana drug paraphernalia, and trafficking in methamphetamine. On appeal, Defendant contends that the trial court: (1) lacked subject matter jurisdiction to try him on the charge of trafficking in methamphetamine because the relevant charging document—an information superseding an earlier indictment—was not filed prior to trial; and (2) committed plain error in failing to give a jury instruction on guilty knowledge *sua sponte*. After careful review, we hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence at trial tends to show the following:

On the afternoon of 19 September 2017, Officer Senaria Smith of the Greensboro Police Department responded to a call from a security

company about a possible break-in at a house on Gatewood Avenue. When she arrived at the home, she heard a noise from inside and noticed that the side door had been forced open. Concerned that a person could still be in the home, Officer Smith drew her sidearm and called for backup.

Additional officers arrived a short time later and conducted a protective sweep of the house. In the course of the sweep, Officer Smith observed a scale and narcotics on the kitchen counter, a plastic bag with a crystalline substance on the floor, and a hole in the laundry room wall with plastic baggies inside.

Defendant arrived at the house as police were leaving. Officer Smith asked him if he lived there. Defendant replied that he did and stated that he had a roommate named "Michael—uh—Smith."

Police informed Defendant that officers had found evidence of narcotics in plain view during their protective sweep. Defendant responded by asking, "More than weed?" When the officers described the additional narcotics, Defendant said, "I don't know about all that." He then told police that he was trying to call Michael Smith.

Defendant cooperated with police and signed a form consenting to a search of the home. In the bedroom Defendant identified as his roommate's, Officer Smith found a stack of paperwork bearing only Defendant's name. A Greensboro drug and vice detective, Harvey Harris, arrived a short time later to assist Officer Smith. Detective Harris observed two substances—one crystalline and the other consistent with marijuana—on the scale on the kitchen counter. Next to the scale, Detective Harris saw a bag containing a crystalline substance inside a pill bottle bearing Defendant's name. He also observed plastic bags, including a bag of marijuana, nearby, as well as a marijuana cigarette in the ashtray of the living room. Searches by other officers turned up another bag of marijuana in a bedroom. Detective Harris also located the plastic bag that Officer Smith had seen on the floor of the laundry room and noticed it contained a crystalline substance.

Detective Harris asked Defendant who lived there. Defendant confirmed that his name was on the lease and utility bills. Detective Harris further questioned Defendant about the crystalline substances which appeared to be methamphetamine, and Defendant said he and Michael Smith both stayed there. Detective Harris asked Defendant for a picture of Michael Smith, which he was unable to provide. Defendant stated that Michael Smith's phone had been cut off, and that he did not know any of his roommate's friends or relatives. He

denied dealing in methamphetamines or any illegal narcotics but admitted to smoking marijuana.

Asked to identify items in the house belonging to his roommate, Defendant was unable to specifically identify anything other than a green toothbrush with a travel cap located in the bathroom. The officers concluded their search of the house after recovering the following items: (1) the plastic bag from the laundry room floor, which contained methamphetamine; (2) the clear plastic bags in a cut out area of the laundry room wall; (3) the digital scale with marijuana and a crystalline substance; (4) the pill bottle with Defendant's name on it and a bag of methamphetamine inside; (5) the bag of marijuana and a box of plastic bags on the kitchen counter; (6) the marijuana roach in the living room; (7) a bag of marijuana from one of the bedrooms; (8) $1,247 in cash in a bedroom closet; (9) the paperwork with Defendant's name on it; (10) Defendant's phone; (11) an additional iPhone from one of the bedrooms; and (12) a tablet computer that Defendant claimed as his. Defendant was taken into custody following the search, and Officer Smith and Detective Harris both recorded the above events with body cameras.

Following Defendant's arrest, police searched Defendant's phone and discovered text messages that indicated Defendant sold marijuana. Lab reports later confirmed that the substance found in the plastic bag in the laundry room was methamphetamine. Officers continued to monitor Defendant's home for two weeks following the break-in in an attempt to locate and identify Michael Smith; those efforts ultimately proved unsuccessful, and no person named "Michael Smith" was ever located.

A Guilford County grand jury returned two indictments on 19 February 2018. The first indictment, filed in file number 17 CRS 86100, charged Defendant with one count each of trafficking in MDMA and maintaining a dwelling for keeping and selling MDMA; the second indictment, filed in file number 17 CRS 86101, charged him with one count of possession with intent to sell marijuana and one count of possession of marijuana paraphernalia. Both cases came on for trial on 7 January 2019 and were consolidated at the outset of proceedings.

The trial court called in prospective jurors and questioned them about any undue hardships warranting deferral of jury service. It next informed the venire of the charges brought against Defendant, the date of the alleged offenses, and Defendant's plea of not guilty. The trial court sat twelve potential jurors in the jury box and asked if they had any connection with the judge, the attorneys, Defendant, and any potential witnesses. It then turned the *voir dire* questioning over to the State, but the prosecutor instead requested a bench conference. The trial court

excused the venire, at which point the prosecutor pointed out that the allegations in the indictment in file number 17 CRS 86100 concerned MDMA rather than the methamphetamine ultimately shown on the lab reports:

> [THE STATE]: [T]he substance in the lab report is methamphetamine. It is not 3, 4-MDMA, which is what was identified.
>
> . . . .
>
> Now, at this point, we have two choices: I can dismiss that charge, because we have not impaneled a jury, and I can reindict and [have] Mr. Stallings go through the arrest process again, or I — or we can do it on a bill of information. However, Your Honor knows and his attorney knows, that's totally up to Mr. Stallings at this point.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: Like [the prosecutor] . . . I have been prepping this thing about a month, and I read that twice as well, several times. And it is what it is. I would like an opportunity just to step back in the conference room and talk to my client with regard to the options in the case. I think the options that [the prosecutor] stated in open court are accurate.
>
> THE COURT: [Defendant's counsel], you take all the time you need.

Over an hour later, the parties returned to the courtroom and proceedings resumed. Defendant's counsel informed the Court that, after discussing their options and "the risks and benefits of both the bill of information and a delay," Defendant agreed to proceed by information charging him with trafficking methamphetamine and had signed a waiver of indictment and statutory notice normally required for the new charge. The trial court pointed out that it had previously denied Defendant's pre-trial motion for a continuance and recusal and noted that Defendant would essentially receive that relief if he decided against waiving reindictment. Defendant's counsel confirmed on the record that his client nonetheless wished to proceed on the information. Consistent with that understanding, the prosecutor read into the record the allegations in the new bill of information—charging Defendant with only one count of trafficking methamphetamine—and informed the court that "at the same time, I'll be filing a dismissal in the MDMA [indictment]."

With the new information in hand, the trial court called the prospective jurors back into the room and informed them of the new charge. Following jury selection, the jury was empaneled, and the trial proceeded in ordinary fashion. Officer Smith and Detective Harris both testified to their experiences with Defendant on the day of the break-in, and the footage from their body cameras was submitted into evidence during the State's presentation. Defendant did not testify in his defense, but he did call a man named Tyrone Brown as a witness. Mr. Brown testified that he: (1) was the roommate that lived in the house with Defendant; (2) had brought the methamphetamine into the house without Defendant's knowledge; and (3) hid the methamphetamine in the laundry room and pill bottle. When asked what room he stayed in, Mr. Brown testified "all of them[,]" and testified that he kept clothes in closets in both rooms.

After the close of evidence and during the jury charge, the trial court gave the standard instruction on narcotics trafficking, which did not include any specific instruction on guilty knowledge. The jury ultimately convicted Defendant on all counts. Defendant now appeals.

II. ANALYSIS

A. Standards of Review

Defendant presents two arguments on appeal, contending that the trial court: (1) lacked subject matter jurisdiction to convict him of the trafficking charge given the procedural timing of the filed information; and (2) committed plain error in failing to give the jury additional instruction on the guilty knowledge element of that same crime. Each is subject to a different standard of review on appeal.

We review subject matter jurisdiction *de novo*. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). To the extent our jurisdictional analysis requires statutory interpretation, that too is a question of law subject to *de novo* review. *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, ___, 778 S.E.2d 68, 73 (2015).

Plain error review of the trial court's jury instruction requires Defendant to show error that "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Such error must be "a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996).

B. Subject Matter Jurisdiction and the Information

[1] Defendant argues that a superseding information must be filed prior to trial, and the State's failure to do so in this case deprived Defendant of his constitutional right to prosecution by indictment—his written waiver of that right notwithstanding.[1] Based on the plain language of the statute Defendant relies on for this argument, we disagree.

Defendant points to N.C. Gen. Stat. § 15A-646 (2019), which provides in pertinent part:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

Defendant construes the statute to mean that the State can file a superseding information only "before entry of a plea of guilty to an indictment or information[,]" *id.*, and the State's failure to do so nullifies the information, as well as Defendant's waiver of the constitutional right to prosecution by indictment, while depriving the trial court of subject matter jurisdiction over the charge.[2]

Defendant's interpretation is unsupported by the plain language of the statute. Absent any ambiguity, an absurd result, or an outcome that contravenes a statute's expressed purpose,[3] we are duty-bound to give effect to that plain language. *State v. Curtis*, 371 N.C. 355, 358, 817 S.E.2d 187, 189 (2018).

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1. Defendant does not argue that the initial indictment or superseding information is facially invalid in any other respect.

2. We note that a plea of guilty may be entered before or after trial has begun. *See, e.g.*, *State v. Paige*, 180 N.C. App. 693, 639 S.E.2d 143, 2006 WL 3717551 (2006) (unpublished) (affirming a trial court's order denying a defendant's motion to withdraw a guilty plea that was entered during the State's presentation of evidence); *State v. Moody*, 345 N.C. 563, 481 S.E.2d 629 (1997) (holding no error on appeal from a trial in which the defendant pled guilty to first-degree murder during trial and after the State had presented testimony from multiple witnesses).

3. Defendant does not argue any of these positions on appeal.

Our Supreme Court has previously held that N.C. Gen. Stat. § 15A-646 merely requires the trial court to perform the "ministerial act" of dismissing an initial charging document when a superseding indictment or information is filed before trial or the entry of a guilty plea. *State v. Carson*, 320 N.C. 328, 333, 357 S.E.2d 662, 666 (1987). The statute imposes a positive duty *on the trial court*, not the State. This is in contrast to other statutes in which the General Assembly has expressly required the State to file charging documents by a particular stage of proceedings. *See* N.C. Gen. Stat. § 15A-922(d) (2019) (requiring the State to file a statement of charges upon determination of a prosecutor "*prior to* arraignment in the district court" (emphasis added)); *State v. Wall*, 235 N.C. App. 196, 200, 760 S.E.2d 386, 388 (2014) (holding the State's failure to file its statement of charges consistent with the timing requirement in N.C. Gen. Stat. § 15A-922(d) deprived the trial court of jurisdiction); *State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977) (holding that an habitual felon indictment must be brought prior to full prosecution of the underlying substantive felony consistent with the statutory procedures established by the Habitual Felons Act).

Previous decisions by this Court suggest that such a timing requirement does not exist when there is a proper waiver of prosecution by indictment. *See*, *e.g.*, *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (1998) (holding a defendant could appeal question of subject matter jurisdiction over an unindicted charge presented to the jury—even though defendant himself requested instruction on the crime at the charge conference—because defendant had *not* waived indictment under N.C. Gen. Stat. § 15A-642(c)).

We also disagree with Defendant's argument that his constitutional right to prosecution by indictment has been violated. Article I, Section 22 of the Constitution of North Carolina provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." That section also states, however, that "any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." *Id*. Under our statutes, such a waiver is accomplished if it is "in writing and signed by the defendant and his attorney" and "attached to or executed upon the bill of information." N.C. Gen. Stat. § 15A-642(c) (2019). Here, Defendant's waiver complies with the constitutional and statutory requirements for waiving prosecution by indictment, as he was represented by counsel and executed a written waiver on the superseding bill of information. While Defendant now protests that he was never made aware that he was waiving "his right to have a superseding information

timely filed" and thus did not knowingly, voluntarily, and intelligently waive prosecution by indictment, he identifies no constitutional provision requiring the pre-trial filing of a superseding information.

Because we hold that N.C. Gen. Stat. § 15A-646 does not require the State to file a superseding information before trial in order to retain the trial court's subject matter jurisdiction, we do not reach Defendant's argument that a trial begins for purposes of the statute at or around the time the trial judge first addresses the venire.[4]

Defendant also suggests that the trial court had no subject matter jurisdiction because he was not formally arraigned on the new charge.[5] But, as pointed out by the State, the lack of formal arraignment does not constitute reversible error when the defendant does not object and assert inadequate notice of the charge. *See, e.g.*, *State v. Brown*, 306 N.C. 151, 174, 293 S.E.2d 569, 584 (1982) ("The failure to conduct a formal arraignment itself is not reversible error. . . . [F]ailure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges." (citations omitted)).[6]

C. Guilty Knowledge Instruction and Plain Error

[2] Defendant argues that the trial court committed plain error in failing to give the jury a discrete instruction on the requirement that he had guilty knowledge of the methamphetamine. Defendant relies primarily on *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346 (2013), in which this Court awarded a new trial to a defendant who asserted this same

4. Regardless of whether this is the case procedurally, it is not true of trials for double jeopardy purposes. *See, e.g.*, *State v. Courtney*, 372 N.C. 458, 463, 831 S.E.2d 260, 265 (2019) ("[J]eopardy attaches when a jury is sworn[.]" (citing *Richardson v. United States*, 468 U.S. 317, 326, 82 L. Ed. 2d 242, 251 (1984))).

5. Although a reversal for lack of subject matter jurisdiction would not turn on issues of prejudice, we note that Defendant certainly did not suffer any here. Defendant, not the State, determined how to proceed after an hour-long discussion with his attorney. He elected to go forward on the information after the trial court pointed out that re-indictment would have given him the relief he sought in his pretrial motion for a continuance and recusal. Further, it is clear from the record and pretrial motions that Defendant and his counsel understood that methamphetamine—not MDMA—served as the basis for the trafficking charge, and the substitution of methamphetamine in the information appears to have had no impact on Defendant's defense or trial strategy.

6. Nor are we troubled by the question, raised at oral argument, as to whether the superseding information was filed before or after the State's dismissal of the initial indictment; though the information was file-stamped nine minutes after the dismissal, Defendant signed the waiver and the State read the information into the record prior to the State dismissing the initial indictment. Further, the State made clear on the record its intention that the information and dismissal be filed "at the same time[.]"

plain error argument in his trial and conviction for trafficking heroin. 227 N.C. App. at 355, 742 S.E.2d at 347. The defendant argued that the evidence showed that while he knew he possessed drugs, he did not know the drugs were heroin and the trial court should have instructed the jury it could convict only if it found that "the defendant knew that what he possessed was [heroin]." *Id.* at 356, 742 S.E.2d at 348 (citation and quotation marks omitted; alteration in original). This Court agreed, noting that the State introduced witness testimony and videotaped evidence of "consistent assertions by defendant, admitted as substantive evidence, that he thought he was carrying marijuana and cocaine" rather than heroin. *Id.* at 360, 742 S.E.2d at 350. We then held that the error was so prejudicial as to amount to plain error because: (1) guilty knowledge was "the defendant's sole defense to the charges," and "his entire defense was predicated upon a lack of knowledge that the substance he possessed was heroin[,]" *id.* at 361-62, 742 S.E.2d at 350-51; (2) "the closing arguments by both the prosecution and defense were in apparent agreement that this was the most contested issue[,]" *id.* at 361, 742 S.E.2d at 350; (3) "[n]one of the other facts were controverted," *id.* at 363, 742 S.E.2d at 352; and (4) the prosecutor misstated the law concerning guilty knowledge in his closing arguments to the jury. *Id.*

The instant case shares some superficial similarities to *Coleman* in that Defendant argues evidence showed he did not know that methamphetamine, rather than simply marijuana, was present in his home. But unlike the defendant in *Coleman*, who did not deny knowledge of possessing a substance and instead denied knowing what it was, Defendant denied any knowledge of the existence of methamphetamine and instead argued to the jury that it belonged to Mr. Brown. Defendant's only witness did not testify that Defendant was ignorant of the nature of the methamphetamine; he instead testified that Defendant was not aware of its existence in the home at all. Defendant brought motions to dismiss the charges for insufficiency of the evidence at the close of each party's case, arguing in both instances that the State had failed to prove Defendant possessed the drugs. In closing argument, Defendant's counsel emphatically argued to the jury that "the [S]tate must show that Mr. Stallings is the man that should be convicted. And Mr. Stallings is not that man. . . . Mr. Stallings is not that man because Mr. Brown has taken responsibility for the methamphetamine." *Coleman* is inapposite to this case.

In any event, even assuming *arguendo* that the trial court erred in not giving a specific instruction on guilty knowledge in light of this evidence, it does not rise to the level of plain error that "had a probable

impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

The State offered copious evidence that Defendant was the only occupant of the home where the drugs were found when it impeached Mr. Brown's testimony and Defendant's version of events. For example, the State showed that: (1) Defendant repeatedly told police that his roommate was "Michael Smith," but no Michael Smith was ever found; (2) police found no items in the home bearing Mr. Brown's name; (3) Defendant's name was the only name on the lease, the mail, and all paperwork found in the home; (4) Defendant acknowledged smoking marijuana, his phone contained dozens of text messages about marijuana sales, and police found both marijuana and a white crystalline substance on a scale in the home; (5) Mr. Brown denied knowing about any scales in the home when questioned on cross-examination; and (6) police found a white crystalline substance inside a pill bottle with Defendant's name on it. In short, Defendant's defense and the State's evidence at trial distinguish this case from *Coleman* and place it outside " 'the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

III. CONCLUSION

Defendant's argument that his right to prosecution by indictment was violated by the filing of superseding information after the judge's address to the venire but before jury selection is misplaced. N.C. Gen. Stat. § 15A-646, unlike some procedural statutes governing other charging documents, does not impose a filing deadline on the State, and Defendant waived in writing his constitutional right to prosecution by indictment. We therefore hold the trial court did not lack subject matter jurisdiction to try and convict Defendant of trafficking methamphetamine. We further hold that Defendant has failed to demonstrate plain error warranting a new trial based on the absence of a jury instruction on guilty knowledge.

NO ERROR; NO PLAIN ERROR.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
GARRY ARITIS YARBOROUGH, Defendant

No. COA19-752

Filed 21 April 2020

1. Criminal Law—joinder—objection—no motion to sever—waiver—ineffective assistance of counsel claim

Where the trial court—over defendant's objection—granted the State's motion for joinder of defendant's charges (arising from a series of events in which defendant killed one person and shot at another in her home), defendant waived his right to severance by failing to file a motion to sever, and the Court of Appeals declined to review the issue under Appellate Rule 2. Because the record was silent regarding defendant's counsel's reasons for not filing a motion to sever, defendant's alternative claim for ineffective assistance of counsel for failure to file the motion was dismissed without prejudice to file a motion for appropriate relief in the trial court.

2. Evidence—lay witness testimony—defendant's mental capacity—intent—sufficient additional evidence

Where defendant was convicted of murder, attempted murder, and related charges stemming from a series of events in which defendant killed one person and shot at another person in her home, there was no reasonable probability that the jury would have reached a different result if the trial court had excluded allegedly improper lay witness medical testimony regarding defendant's mental capacity because the State presented abundant evidence that defendant intended to commit the crimes charged—including that defendant chased the first victim before killing her, drove to the second victim's home who he knew was a nurse so she could treat his gunshot wound, and stated on the phone that he had shot the first victim and had a hostage—and the lay witness also testified in non-medical terms that defendant seemed to know what he was doing.

3. Homicide—attempted first-degree murder—malice—premeditation and deliberation—sufficiency of evidence

The State presented sufficient evidence for the jury to reasonably conclude that defendant attempted to kill the victim with malice and premeditation and deliberation where defendant told the victim he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, he stated over the

phone that he had a hostage, and when the victim tried to escape by shutting the front door, defendant shot near the door handle four to six times before kicking the door and yelling.

4. Homicide—attempted first-degree murder—jury instructions —malice—use of deadly weapon

In a prosecution for attempted first-degree murder where the evidence showed defendant injured the victim by pistol-whipping her but she was not injured when he later shot into a door after she closed it between them, any error in the trial court's jury instruction regarding the malice element (informing the jury they could infer malice from defendant inflicting a wound on the victim with a deadly weapon) was not prejudicial error because defendant's intentional use of his gun against the victim gave rise to a presumption that defendant acted with malice, and malice could also be inferred by the lack of provocation by the victim and verbal threats made against her.

5. Homicide—first-degree murder—jury instructions—self-defense

In a first-degree murder trial where the evidence showed defendant chased the victim down and shot her after she had thrown her gun at him and ran away, defendant was not entitled to a self-defense instruction because there could no longer be any reasonable belief it was necessary for him to defend himself at the time he shot the victim. Further, defendant's testimony that he could not remember shooting the victim, along with his expert's testimony that defendant acted involuntarily due to preexisting psychological conditions, defeated his self-defense argument.

Appeal by Defendant from judgments entered 2 August 2018 by Judge David T. Lambeth, Jr., in Franklin County Superior Court. Heard in the Court of Appeals 18 March 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant-Appellant.

INMAN, Judge.

Defendant Garry Aritis Yarborough ("Defendant") appeals from his convictions following jury verdicts finding him guilty of first-degree murder, attempted first-degree murder, first-degree kidnapping, assault with

a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, two counts of discharging a firearm into occupied property, felony breaking or entering, and possession of a firearm by a felon. Defendant argues that the trial court erred by: (1) joining his charges for a single trial, or, in the alternative, that his counsel was ineffective; (2) allowing a lay witness to testify about his medical condition; (3) denying Defendant's motion to dismiss the attempted first-degree murder charge for lack of sufficient evidence of malice, premeditation, and deliberation; (4) instructing the jury on attempted first-degree murder in a misleading manner that lowered the State's burden of proof; and (5) denying defense counsel's request for a self-defense instruction. After careful review, we hold Defendant has failed to demonstrate prejudicial error and dismiss his claim of ineffective assistance of counsel without prejudice to allow him to file a motion for appropriate relief in the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence introduced at trial tends to show the following facts:

Defendant and his girlfriend, Tracy Williams ("Williams"), met around 2009 or 2010 while Defendant was in prison for manslaughter. The two continued their relationship after Defendant was released in 2010. By March 2014, their relationship became volatile and they would cycle between living together and apart. Beginning in April 2015, Defendant was charged with misdemeanor assault and kidnapping Williams when he allegedly prevented her from leaving his residence in Zebulon. In early July 2015, Williams obtained an *ex parte* domestic violence protective order against Defendant.[1]

On 17 July 2015, Defendant and Williams, driving separate vehicles, stopped next to each other at an intersection in Franklinton. Williams suspected that Defendant had been following her. Defendant told Williams that "he could put his hands on her at any time he wanted to." Williams then fired two shots from her handgun into the back window of Defendant's vehicle—Defendant was not injured.

On 26 July 2015, Williams stopped her vehicle at an ATM in a Food Lion parking lot in Franklinton Square. Moments later, Defendant arrived in a black SUV and parked behind Williams' vehicle. Defendant had a handgun tucked in his waist. The two started arguing while Williams was

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1. At trial, Defendant presented evidence that Williams was exaggerating these experiences to extort him for money. Defendant testified that at one point he withdrew $20,000 from his business account to pay Williams to drop the charges.

sitting in her vehicle and Defendant was beside her kneeling down. The two got into a physical altercation, and Williams then drew her handgun and shot Defendant in the leg. She attempted to fire the gun a second time, but the gun jammed. Williams threw the gun at Defendant and ran away, screaming for help. Defendant chased after Williams while he loaded the magazine in his handgun. Williams attempted to get into the driver's seat of the black SUV, but Defendant caught up to her, pushed her head down, and fatally shot her in the back of her head. Defendant then threw Williams out of the vehicle, drove out of the parking lot, and ran over her body in the process.[2]

Defendant fled and made his way to the residence of Kim Elmore ("Elmore"), a registered nurse, parking the SUV in her backyard rather than in the driveway. Defendant repeatedly rang the doorbell and knocked on the door to get Elmore's attention. Elmore opened the front door a few inches and recognized Defendant as the repairman who had worked on her air conditioning unit a few months earlier. Elmore tried to shut the door, but Defendant pushed his way in and asked if anyone else was home. When Elmore told Defendant to leave, he pointed a handgun to her forehead and said that he would kill her. Defendant then struck Elmore twice over the head with the butt of his gun, causing her to bleed profusely.

Defendant asked Elmore for band-aids and towels. Although Defendant's leg wound was not bleeding, he wanted Elmore to provide a tourniquet for his leg and bandage the wound. While Elmore was working on Defendant's leg, Defendant called and talked to an acquaintance on the phone. Elmore overheard Defendant "saying something about a van, that he had killed [Williams], and he had a hostage." Elmore begged Defendant not to kill her, and he told her that "if [she] did what he said, he would just leave [her] there tied up," despite saying on the phone that he had a hostage.

After Elmore finished, Defendant got up and told her that they were leaving. While the two were heading to the front door, Elmore said she was going to turn the lights off. As Defendant crossed the door and stepped outside, Elmore quickly shut the door and locked it. Defendant then turned around and fired four to six shots near the doorknob and kicked and yelled at the door. Elmore ran to the bathroom and called 911 and Defendant drove from the scene. Defendant was later found and arrested in a hotel in Raleigh.

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2. Though the medical examiner testified that there was no evidence Williams was run over, all three witnesses who observed the incident testified that Defendant drove over Williams' body.

Defendant was indicted for first-degree murder, attempted first-degree murder, first-degree kidnapping, felony breaking or entering, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, burning personal property, possession of a firearm by a felon, and two counts of discharging a weapon into occupied property. In October 2017, the State filed a motion to join all of Defendant's charges for a single trial.

Defendant's charges came on for trial on 9 July 2018. Both the State and defense counsel presented expert witness testimony regarding Defendant's mental state at and around the time of the alleged crimes. Following the State's evidence, defense counsel motioned to dismiss all of Defendant's charges for lack of evidence. The trial court dismissed the burning personal property charge and denied the remainder of defense counsel's motion. At the close of all the evidence, the trial court denied defense counsel's renewed motion to dismiss all remaining charges. The jury found Defendant guilty on all counts.

The trial court sentenced Defendant to life imprisonment without parole for first-degree murder and entered consolidated judgments imposing consecutive prison terms: 238-298 months for attempted first-degree murder; 110-144 months for first-degree kidnapping, felony breaking or entering, and assault with a deadly weapon inflicting serious injury; 97-129 months for two counts of discharging a weapon into occupied property; 38-58 months for assault with a deadly weapon with intent to kill; and 19-32 months for possession of a firearm by a felon.

Defendant gave oral notice of appeal.[3]

II. ANALYSIS

A. Joinder of Charges

[1] On the first day of trial, before jury selection, defense counsel objected to the State's motion for joinder, contending that his charges should be severed. Following arguments, the trial court orally granted the State's motion (and later via written order). Defendant contends the trial court erred in granting the State's motion. We disagree.

Multiple offenses may be joined for one trial so long as they "are based on the same act or transaction or on a series of acts or transactions

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3. As an initial matter, we hold that all of Defendant's constitutional claims embedded in his arguments on the same issues are unpreserved and we will not address them on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2017). In concluding whether consolidation was appropriate, we review whether: (1) there is a transactional connection among the offenses; and (2) "the accused can receive a fair hearing on more than one charge at the same trial." *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). While a transactional connection between the offenses is a question of law reviewable on appeal, the decision to join the offenses for one trial, *i.e.*, determining "whether consolidation hinders or deprives the accused of his ability to present his defense," is within "the sound discretion of the trial judge." *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000) (quotation marks and citations omitted).

Section 15A-927 of our General Statutes requires a criminal defendant to file a motion to sever charges prior to trial or, if the grounds for severance are not known before trial, file a motion to sever no later than the close of the State's evidence. N.C. Gen. Stat. §§ 15A-927(a)(1)-(2) (2017). A defendant waives his right to severance "if the motion is not made at the appropriate time." *Id.* § 15A-927(a)(1); *see also State v. Walters*, 357 N.C. 68, 79-80, 588 S.E.2d 344, 351 (2003) (dismissing the defendant's severance issue due to his trial counsel's failure to file any motion for severance). Here, Defendant made no motion to sever, either before or during trial, but merely objected to the State's motion for joinder. Defendant now asks this Court to exercise its discretion under Rule 2 of our Rules of Appellate Procedure to review this issue. N.C. R. App. P. 2 (2020). We decline to do so.

Defendant requests, in the event we hold he has waived this issue for appellate review, that we consider whether he received ineffective assistance of counsel ("IAC").

We decline to address this issue on direct appeal, as it is more appropriate for Defendant to file a motion for appropriate relief ("MAR"). Though this court can review IAC claims on direct appeal, we can do so only if we can decide the issue from the record on appeal without further investigation. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004). Because the record is silent as to Defendant's counsel's reasoning in declining to file a motion to sever, we dismiss his IAC claim without prejudice so he can file a MAR in the trial court.

B. Lay Witness Testimony

[2] Defendant next argues that the trial court erred in allowing Elmore, a lay witness, to offer expert medical testimony regarding his mental capacity. We review the trial court's admission of lay witness opinion

testimony for abuse of discretion. *State v. Sharpless*, 221 N.C. App. 132, 137, 725 S.E.2d 894, 898 (2012).

During direct examination, Elmore, a registered nurse, testified as follows:

> [STATE:] In the five to ten minutes, give or take a few minutes on either side of that, did you believe that in your time—let me—did you believe that [Defendant] was not in touch with reality?
>
> [ELMORE:] No, he knew what he was doing.
>
> [STATE:] And why do you say that?
>
> [ELMORE:] Because of the steps. Cognitively—
>
> [Objection overruled]
>
> [ELMORE:] In my experience as a nurse, I have seen a lot.
>
> [Objection]

After defense counsel's last objection, a *voir dire* hearing was held outside the presence of the jury to determine whether Elmore's testimony went beyond that of a lay witness. Defense counsel did not object to Elmore's statement that Defendant "knew what he was doing," but to Elmore's conclusions from her observations "based upon her experience and training" as a nurse. The trial court sustained defense counsel's objection and instructed the prosecutor to continue questioning without asking Elmore for a medical opinion. The trial court then instructed the jury to disregard Elmore's statement "dealing with cognitive steps" that Defendant may have taken.

On redirect examination, the prosecutor elicited the following testimony from Elmore:

> [STATE:] Have you dealt with psych patients?
>
> [ELMORE:] Oh, yes.
>
> [STATE:] And how would you compare [Defendant's] behavior on that day to psych patients that you've dealt with?
>
> [Objection overruled]
>
> [STATE:] You can answer that, ma'am, yes.

> [ELMORE:] Psych patients, they're just a different breed. They're just not in touch with reality. They have trouble processing their thoughts.
>
> [Objection overruled]
>
> [ELMORE:] They have trouble going through steps, processing their thoughts. They just have trouble functioning cognitively and physically and . . . .
>
> [STATE:] So was that what you saw in [Defendant] or did you see something different in him?
>
> [ELMORE:] I saw evil, mean.
>
> [Objection overruled]
>
> [STATE:] Was he able to process his thoughts?
>
> [ELMORE:] Yes.
>
> [STATE:] Was he in touch with reality?
>
> [ELMORE:] Yes.
>
> [Objection sustained]
>
> [STATE:] Was there ever a time in your observations that you believed he did not know what was going on?
>
> [ELMORE:] No.

Rule 701 of the North Carolina Rules of Evidence provides that non-expert testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). While lay witnesses with personal knowledge of a person's mental state can "give an opinion as to an emotional state of another," they "may not offer a specific psychiatric diagnosis of a person's mental condition." *State v. Storm*, 228 N.C. App. 272, 277-78, 743 S.E.2d 713, 717 (2013) (citations omitted); *see also State v. Davis*, 349 N.C. 1, 30, 506 S.E.2d 455, 471 (1998) (affirming the trial court's decision prohibiting lay witness testimony regarding whether the defendant "appeared to be psychotic").

Defendant contends that the trial court erroneously allowed Elmore to testify that he was "able to process his thoughts," was "in touch with reality," and could "function[] cognitively and physically." Defendant further asserts that, because the key issue at trial was his ability to

formulate the specific intent element of the charges, he was prejudiced by Elmore's impermissible lay testimony, because the State's and Defendant's respective expert witnesses "largely canceled out the testimony of the other."

The State argues that any error resulting from Elmore's challenged testimony was invited by defense counsel, who cross-examined Elmore about her prior statements to police comparing Defendant to a "psych patient."

Assuming *arguendo* that the alleged error was not invited, Defendant cannot demonstrate that, but for the impermissible testimony, "there is a reasonable possibility that . . . a different result would have been reached at trial." *Storm*, 228 N.C. App. at 278, 743 S.E.2d at 718 (quoting N.C. Gen. Stat. § 15A-1443(a) (2011)).

The State introduced an abundance of evidence showing that Defendant intended to commit the crimes in question. Following a brief physical altercation with Williams in the parking lot, Defendant chased after a defenseless Williams while reloading his handgun, grabbed and held her down, and shot her in the back of the head. Defendant then drove directly to Elmore's residence. Defendant was not a friend of Elmore's but knew she was a nurse. Instead of parking in Elmore's driveway, Defendant parked the black SUV in the backyard. Defendant first asked her if anyone was home. He then pointed the gun at her head and demanded that she attend to his gunshot wound or else he would kill her. Defendant reported to someone on the phone that he had shot Williams and had a hostage. Elmore also testified, in non-medical terms, that Defendant seemed as if he understood what he was doing. Considering this evidence, we are unable to conclude that, had the trial court excluded Elmore's alleged improper medical opinion testimony, there is a reasonable possibility the result of any of Defendant's charges would have been different.

C. Sufficiency of the Evidence

[3] Defendant contends that the trial court erred in denying his motion to dismiss the attempted first-degree murder charge because the State did not establish that he acted with malice and premeditation and deliberation. We disagree.

When reviewing a trial court's denial of a motion to dismiss for sufficiency of the evidence, our standard of review is well-known:

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the

> perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (quotation marks and citations omitted). We review a denial of a motion to dismiss *de novo*. *State v. Cox*, ___ N.C. App. ___, ___, 825 S.E.2d 266, 268 (2019).

To prove attempted first-degree murder, the State must demonstrate that the defendant (1) had the specific intent to kill another; (2) performed an overt act calculated to carry out that intent, going beyond mere preparation; and (3) acted with malice and premeditation and deliberation. *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citing N.C. Gen. Stat. § 14-17 (2003)). Premeditation is an act "thought out beforehand for some length of time, however short, but no particular amount of time is necessary." *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998). Deliberation "means an intent to kill, carried out in a cool state of blood, in furtherance of . . . an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* Malice is "not only hatred, ill-will, or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Tilley*, 18 N.C. App. 300, 302, 196 S.E.2d 816, 818 (1973). Malice and premeditation and deliberation, in the context of attempted first-degree murder, "may be inferred from the conduct and statements of the defendant before and after the incident, ill-will or previous difficulty between the parties, and evidence regarding the manner of the attempted killing." *State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000).

Construing all evidence and inferences in favor of the State, we hold the State presented sufficient evidence for the jury to reasonably conclude that Defendant attempted to kill Elmore with malice and premeditation and deliberation. Defendant told Elmore he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, and he stated on the phone that he had a hostage. When Elmore tried to escape by shutting the front door, Defendant shot the door near the doorknob four to six times before kicking the door and

yelling. Although Defendant argues he fired because he was startled and did not know Elmore was behind the door, we have consistently held that contradictions and alternative hypotheses are for the jury to weigh and resolve. *See*, *e.g.*, *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

D. Malice Instruction

[4] Defendant argues the trial court committed prejudicial error by instructing the jury regarding the malice element of attempted first-degree murder as follows:

> If the State proves beyond a reasonable doubt that the defendant *intentionally inflicted a wound upon the victim with a deadly weapon*, *you may infer first*, *that the defendant acted unlawfully and second*, *that it was done with malice*, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and with malice.

(emphasis added). Defendant contends the italicized portion of the instruction could have misled the jury by effectively lowering the State's burden of proof. Defendant contends that there was no evidence that his shots hit Elmore when he fired into her front door and that the jury could not infer malice from his twice pistol-whipping her.

Defendant cannot demonstrate prejudicial error. We have held that, "in the context of attempted first degree murder, the intentional use of a deadly weapon itself gives rise to a presumption that the act was undertaken with malice." *Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28-29 (citation omitted). Malice may also be inferred by other circumstances including "(1) lack of provocation by the intended victims; (2) conduct and statements of the defendant both before and after the attempted killing; [and] (3) threats made against the intended victims by the defendant." *State v. Teague*, 216 N.C. App. 100, 106-07, 715 S.E.2d 919, 924 (2011). Given Defendant's use of a deadly weapon and these three additional circumstances, we are unpersuaded that, absent the argued instructional component, there is a reasonable possibility that the jury would have reached a different verdict on the charge of attempted first-degree murder.

E. Self-Defense Instruction

[5] Defendant finally argues that the trial court committed prejudicial error in its instruction to the jury regarding the first-degree murder charge by failing to include an instruction on self-defense. We disagree.

> Our Court reviews a trial court's decisions regarding jury instructions *de novo*. The trial court must instruct the jury on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm. Moreover, the trial court must provide a self-defense instruction if the above criteria is met even though there is contradictory evidence by the State or discrepancies in the defendant's evidence. With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant.

State v. Cruz, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50-51 (2010) (quotation marks, citations, and alterations omitted).

Here, the trial court declined Defendant's request for a jury instruction on both perfect and imperfect self-defense. A perfect self-defense instruction is warranted if the following elements are established:

> (1) [I]t appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i. e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i. e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citations omitted). But if the defendant, "although without murderous intent, was the aggressor in bringing on the difficulty, or [he] used excessive force," then he is only eligible for an imperfect self-defense instruction and "is guilty at least of voluntary manslaughter." *Id.* at 530, 279 S.E.2d at 573 (citations omitted).

Consequently, "for defendant to be entitled to an instruction on self-defense, the following questions must be answered affirmatively: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?" *State v. Meadows*, 158 N.C. App. 390, 401, 581 S.E.2d 472, 478 (2003) (quotation marks and citation omitted).

Here, three witnesses to the confrontation between Williams and Defendant in the parking lot testified that immediately after Williams shot Defendant in the leg, her handgun jammed, she threw it at Defendant, and she attempted to flee from him while screaming for help. Defendant then ran after her, reloaded his own handgun, and proceeded to grab Williams and fire a bullet into the back of her head. Assuming Defendant reasonably believed it was necessary to defend himself with deadly force when Williams shot him, that belief could not have remained reasonable after Williams' handgun jammed and she threw it at Defendant and ran away.

Defendant testified that he "was in fear for [his] life" when Williams shot him in the leg, but that he did not remember chasing or shooting Williams after that. Defendant's expert witness testified that Defendant was acting instinctively and involuntarily due to his preexisting psychological conditions, including intermittent bouts of amnesia.

Defendant's testimony that he does not recall shooting Williams, combined with his expert's testimony that Defendant acted involuntarily, defeat his self-defense argument. *See State v. Cook*, 254 N.C. App. 150, 153, 802 S.E.2d 575, 577 (2017) ("[O]ur Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction if he testifies that he did not intend to shoot the attacker when he fired the gun." (citation and emphasis omitted)); *State v. Hinnant*, 238 N.C. App. 493, 496, 768 S.E.2d 317, 320 (2014) ("[T]he testimony of a witness stating that it was reasonable for the defendant to believe deadly force was necessary was irrelevant where the defendant himself testified that he did not intend to shoot anyone when he fired his weapon." (citation omitted)). Consistent with the defense evidence, the trial court instructed the jury that it could not find Defendant guilty if it found he was not able to exercise voluntary control of his actions. *See State v. Boggess*, 195 N.C. App. 770, 772, 673 S.E.2d 791, 793 (2009) ("[T]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." (quotation marks and citation omitted)).

Based on all of the evidence, considered in the light most favorable to Defendant, we conclude that the trial court did not err in its instruction. Also, the undisputed evidence that Defendant chased Williams when she was unarmed, grabbed her, and shot her in the back of the head precludes Defendant's argument that, had the instruction been given, there is a reasonable possibility the jury would not have found him guilty of first-degree murder.

III. CONCLUSION

For the foregoing reasons, Defendant has failed to demonstrate prejudicial error as to any of his issues on appeal. We dismiss his IAC claim without prejudice to allow him to file a MAR in the trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ZACHARY and YOUNG concur.

KARA ANN SULLIVAN (FORMERLY WOODY), PLAINTIFF
v.
SCOTT NELSON WOODY, DEFENDANT, AND E. LYNN WOODY AND JAMES NELSON WOODY, INTERVENORS

No. COA19-514

Filed 21 April 2020

1. Attorney Fees—custody action—visitation rights—award against intervenor grandparents

The trial court had the authority under N.C.G.S. § 50-13.6 to award attorney fees against intervenor grandparents seeking visitation rights in a custody action because the grandparents' action constituted an action for "custody or support" under section 50-13.1(a).

2. Attorney Fees—custody action—visitation rights—award against intervenor grandparents—reasonableness of fees

The trial court failed to make sufficient findings regarding the reasonableness of the amount of attorney fees awarded against the intervenor grandparents as required by N.C.G.S. § 50-13.6. Although the court made findings regarding the reasonableness of the plaintiff's total attorney fees, including claims to which the intervenors were not parties, the court did not make necessary findings regarding the scope of the legal services rendered and time spent

by plaintiff's attorneys specifically incurred as a result of defending against the intervenors' visitation action, necessitating remand.

Appeal by intervenors from judgment entered 12 September 2018 by Judge Rebecca Eggers-Gryder in Mitchell County District Court. Heard in the Court of Appeals 31 March 2020.

Jackson Family Law, by Jill S. Jackson, for plaintiff-appellee.

Scott Nelson Woody, pro se, defendant-appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for intervenors-appellants.

BERGER, Judge.

E. Lynn Woody and James Nelson Woody (collectively, "Intervenors") appeal from an order entered September 12, 2018, which found Intervenors jointly liable with Scott Nelson Woody ("Defendant") for the attorneys' fees of Kara Ann Sullivan ("Plaintiff"). On appeal, Intervenors argue, among other things, that the trial court erred (1) when it made an award of attorneys' fees against Intervenors; and (2) when it found Intervenors liable for attorneys' fees unrelated to their involvement in the custody action. Although the trial court was statutorily authorized to make an award of attorneys' fees against Intervenors, we conclude that the trial court failed to make requisite findings. Therefore, we reverse and remand for the trial court to make additional findings of fact. Because we conclude the trial court failed to make those findings necessary for the fees awarded, we need not address Intervenors' additional assignments of error, all of which relate to the award.

Factual and Procedural Background

This appeal arises from a heavily litigated child custody dispute that has now stretched on for more than three and a half years. Plaintiff and Defendant were married on May 12, 2006. Plaintiff filed a complaint seeking temporary and permanent custody of a minor child, child support, and attorneys' fees on June 17, 2016. Plaintiff and Defendant were not separated when the complaint was originally filed. The parties subsequently divorced.

On August 21, 2016, Intervenors, who are the parents of Defendant and grandparents of the minor child, filed a motion to intervene. The trial court granted Intervenors' motion on October 31, 2016. On December

5, 2016, Intervenors filed a complaint seeking temporary and permanent visitation rights and attorneys' fees. Plaintiff filed an answer to Intervenors' complaint on February 8, 2017.

Before the matter was called for trial, Plaintiff and Defendant stipulated that Plaintiff was a fit and proper parent and that it would be in the best interest of the minor child to reside with Plaintiff, who would have legal and physical custody of the minor child. A trial was held on the remaining issues in the case—including Defendant's visitation rights, Intervenors' visitation rights, and Plaintiff's claim for attorney's fees—over six days between March 28, 2018 and August 31, 2018.

On September 12, 2018, the trial court entered a final order in the case. Pursuant to the final order, the trial court granted Intervenors visitation rights with the minor child. The trial court also ordered that Defendant and Intervenors were to be jointly liable for Plaintiff's attorneys' fees in the amounts of $12,720.00 and $74,491.50.

Intervenors filed a Notice of Appeal on October 4, 2018. On appeal, Intervenors contend, among other things, that the trial court erred (1) when it made an award of attorneys' fees against Intervenors; and (2) when it found Intervenors liable for attorneys' fees unrelated to their involvement in the custody action.

Analysis

I. Statutory Authorization for Attorney Fees

[1] Intervenors first argue that the trial court erred as a matter of law in making an award of Plaintiff's attorneys' fees against Intervenors. Specifically, Intervenors argue that the trial court erred by interpreting Section 50-13.6 of the North Carolina General Statutes to allow an award of attorney fees against intervening grandparents. We disagree.

We review a trial court's statutory interpretation *de novo*. *Dion v. Batten*, 248 N.C. App. 476, 485, 790 S.E.2d 844, 851 (2016). "Statutory interpretation begins with the plain meaning of the words of the statute." *Id.* at 485, 790 S.E.2d at 851 (citation omitted).

As a general matter, North Carolina law does not permit a trial court to award attorney fees unless such fees are specifically authorized by statute. *Wiggins v. Bright*, 198 N.C. App. 692, 695, 679 S.E.2d 874, 876 (2009). Under Section 50-13.6, in any "action or proceeding for the custody or support" of a minor child, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the

suit." N.C. Gen. Stat. § 50-13.6 (2019). "Custody" is defined by Section 50-13.1(a) to include "custody or visitation or both" unless the General Assembly's contrary intent is clear from the statutory scheme. N.C. Gen. Stat. § 50-13.1(a) (2019).

Under Section 50-13.2(b1), "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 50-13.2(b1) (2019). To qualify for visitation rights under this section, the grandparent must have a substantial relationship with the minor child. N.C. Gen. Stat. § 50-13.2(b1).

Accordingly, under the plain language of this statutory scheme, an action by intervening grandparents for visitation rights under Section 50-13.2(b1) qualifies as an action for "custody" by operation of Section 50-13.1(a).

In *McIntyre v. McIntyre*, our Supreme Court analyzed Section 50-13.2(b1), and its sister sections, to conclude that grandparents have no "right to visitation when the natural parents have legal custody of their children and are living with them as an intact family." *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995) (citation omitted). Within this context, our Supreme Court determined that "[r]eading [Section] 50-13.1(a) in conjunction with [Section] 50-13.2(b1) . . . strongly suggests that the legislature did not intend 'custody' and 'visitation' to be interpreted as synonymous in the context of grandparents' rights." *Id.* at 634-35, 461 S.E.2d at 749. As a result, our Supreme Court held that the trial court had no jurisdiction to hear a complaint for visitation by grandparents when the parents themselves were not disputing custody. *Id.* at 635, 461 S.E.2d at 750.

However, our Supreme Court's analysis in *McIntyre* did not address Section 50-13.6 and is not controlling in this case. Since *McIntyre*, our Court has had the opportunity to examine whether "custody" and "visitation" are synonymous within the context of awarding attorney fees to an intervening grandparent under Section 50-13.6. *Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009).

In *Barbour*, a minor child's grandparents intervened during a custody dispute between parents to secure visitation rights with the minor child. *Id.* at 248, 671 S.E.2d at 581. The trial court ultimately concluded that it was in the best interests of the child for the parents to have joint legal and physical custody and the grandparents to have specified visitation privileges. *Id.* at 248, 671 S.E.2d at 582. The trial court also ordered

the minor child's father to pay $40,000.00 of the attorney fees expended by the grandparents in securing visitation. *Id.* at 254, 671 S.E.2d 585.

On appeal, our Court upheld the award to the intervening grandparents under Section 50-13.6. *Id.* at 255, 671 S.E.2d at 586. Accordingly, this Court has determined that an action by intervening grandparents to secure visitation rights qualifies as an "action or proceeding for the custody or support" of a minor child for purposes of Section 50-13.6.

Here, the trial court's order cited our Court's holding in *Barbour* and concluded that "[i]f intervenors can ask for and receive attorney's fees, then they can also pay attorney's fees." We agree. If an action by intervening grandparents to secure visitation rights falls within the scope of Section 50-13.6 as an "action or proceeding for the custody or support, or both, of a minor child" for the purposes of awarding attorney fees to the grandparents, then such an action must also fall within the scope of the statute for the purposes of ordering the grandparents to pay fees. *See id.* at 255, 671 S.E.2d at 586.

Therefore, we conclude that an award of attorney fees could be made against Intervenors under Section 50-13.6 because an action by intervening grandparents for visitation is one for "custody or support" by operation of Section 50-13.1(a). *See* N.C. Gen. Stat. § 50-13.1(a) (defining "custody" to include "custody or visitation or both" unless the General Assembly's contrary intent is clear). As such, the trial court properly concluded that an award of attorneys' fees against grandparents seeking visitation rights was authorized by Section 50-13.6.

II. Amount of Attorneys' Fees Awarded to Plaintiff

[2] Intervenors next contend that the trial court erred as a matter of law when it made Intervenors jointly liable for attorneys' fees that did not arise from Intervenors' claim. We agree that the trial court failed to make some of the reasonableness findings necessary to calculate the award of attorneys' fees against Intervenors. Therefore, we reverse and remand for the trial court to make appropriate factual findings regarding the costs incurred by Plaintiff in defending against Intervenors' visitation claim.

Attorney fees can only be awarded in a custody proceeding where the trial court has made adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit. N.C. Gen. Stat. § 50-13.6; *Cox v. Cox*, 133 N.C. App. 221, 227-28, 515 S.E.2d 61, 66 (1999). Additionally, "[b]ecause [Section] 50-13.6 allows for an award of *reasonable* attorney's fees, cases construing

the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (emphasis in original) (citation omitted). The record must also contain "additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers." *Id.* at 595-96, 339 S.E.2d at 828 (citations omitted). "Whether these statutory requirements are met is a question of law, reviewable on appeal." *Cox*, 133 N.C. App. at 228, 515 S.E.2d at 66 (citations omitted). This Court reviews questions of law *de novo*. *Green v. Green*, 255 N.C. App. 719, 724, 806 S.E.2d 45, 49 (2017).

In the instant case, the trial court's findings support Plaintiff's good faith and that Plaintiff had insufficient means to defray the expense of this heavily litigated child custody dispute. The trial court also made extensive findings concerning the nature of the legal services rendered, the hourly rates of Plaintiff's attorneys, and the reasonableness of those rates. However, the trial court failed to make the findings of fact necessary for a determination regarding what amount of Plaintiff's attorneys' fees were reasonably incurred as the result of litigation by Intervenors, as opposed to litigation by Defendant.

Despite Intervenors arguing in opposition to the award that they should not be held responsible for those fees unrelated to their claim for visitation, the trial court failed to make those findings required by our precedent concerning (1) the scope of legal services rendered by Plaintiff's attorneys in defending against Intervenors' visitation claim, or (2) the time required of Plaintiff's attorneys in defending against that claim. Rather, the trial court's findings broadly relate to Plaintiff's attorneys' fees associated with the entire action—including those claims brought by Defendant, to which Intervenors were not parties.

Plaintiff has cited no authority, and we are aware of none, holding that intervenors may be held liable for attorneys' fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party's attorney fees.

Because the trial court failed to make the requisite reasonableness findings to make an award of attorneys' fees against Intervenors under Section 50-13.6, we must reverse and remand for additional findings of fact. *See Cobb*, 79 N.C. App. at 595-96, 339 S.E.2d at 828.

Conclusion

For the reasons stated herein, the trial court was statutorily authorized to make an award of attorneys' fees against Intervenors. However, we reverse and remand for additional findings concerning the reasonableness of a fee award against Intervenors.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 21 April 2020)

Case	County	Disposition
BARRINGTON v. DYER No. 19-640	Carteret (18CVS767)	Dismissed
IN RE O.L. No. 19-626	Granville (18SPC50667)	Affirmed
MARTIN v. LANDFALL COUNCIL OF ASS'NS, INC. No. 19-883	New Hanover (16CVS2284)	Affirmed in part, reversed in part, and remanded
STATE v. CHAMBERS No. 19-984	Guilford (17CRS80917)	No Error
STATE v. CUEVAS No. 19-766	Harnett (99CRS667)	Affirmed
STATE v. CUMMINGS No. 19-864	Craven (17CRS53862)	Vacated and Remanded
STATE v. FORE No. 19-765	Harnett (06CRS51459)	Affirmed
STATE v. GAITHER No. 19-922	Cleveland (17CRS56416-18) (17CRS56420-21)	No Error
STATE v. HARGETT No. 19-718	Craven (15CRS50867)	No Error
STATE v. HAYNER No. 19-397	Randolph (15CRS54067) (15CRS54486)	Affirmed
STATE v. HICKS No. 19-645	Randolph (15CRS55688) (16CRS51293)	Judgment in 15 CRS 055688 Reversed. Judgment in 16 CRS 051293 Vacated and Remanded.
STATE v. JOHNSON No. 19-767	Harnett (05CRS56253) (05CRS56915-18)	Affirmed

STATE v. JOHNSON No. 19-757	Wake (16CRS220559) (16CRS220721) (16CRS222322) (17CRS3788-93) (17CRS65-66)	Affirmed
STATE v. JOHNSON No. 19-529	Wake (17CRS222594)	No Prejudicial Error
STATE v. JONES No. 19-759	Wake (17CRS220317-19)	Dismissed
STATE v. McCOY No. 19-99	Alamance (13CRS53245)	Vacated and Remanded
STATE v. RICE No. 19-788	Mecklenburg (07CRS249456)	Vacated and Remanded.
STATE v. STOKES No. 19-684	Cleveland (17CRS55084) (17CRS55237-38)	No Error
WOODARD v. N.C. DEP'T OF TRANSP. No. 19-816	N.C. Industrial Commission (TA-26729)	Affirmed

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